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STATE OF WASHINGTON

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**Court of Appeals No. 40344-7-II**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**MICHAEL ANTHONY MEE,**

**Defendant/Appellant.**

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**OPENING BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 08-1-03121-9  
The Honorable Susan Serko, Presiding Judge**

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## **I. ASSIGNMENTS OF ERROR**

1. Mr. Mee's right to a fair trial was violated by the admission of irrelevant yet highly prejudicial gang-related evidence.
2. The trial court failed to require the State to establish the gang-related evidence was true by a preponderance of the evidence before permitting the evidence to be admitted.

## **II. ISSUES PRESENTED**

1. Does a defendant receive a fair trial where the trial court allows highly prejudicial yet irrelevant evidence to be admitted? (Assignment of Error No. 1)
2. Was the gang-related evidence relevant where it had no probative value to any issue before the jury? (Assignment of Error No. 1)
3. Was the gang-related evidence more prejudicial than probative where such evidence had no probative value to any issue before the jury? (Assignment of Error No. 1)
4. Did the trial court err in admitting the gang-related evidence where the State had not established the truth of the evidence by a preponderance of the evidence? (Assignment of error No. 2)

## **III. STATEMENT OF THE CASE**

### *A. Factual Background*

At 2:15 a.m. on May 10, 2008, Tacoma Police Officers were dispatched to a report of a drive-by shooting in the area of South 41<sup>st</sup> and J Street in Tacoma. CP 3-4. Upon arriving at the scene, officers observed a group of individuals kneeling around a man who was laying on the ground. CP 3-4. The man, later identified as Tracy Steele, had

a gunshot wound to his torso. CP 3-4. Mr. Steele was transported to St. Joseph's Hospital but died from his wounds later that morning. CP 3-4.

Witnesses at the scene told police that there had been a barbecue at the location and that many people had been there. CP 3-4. Witnesses told police that an altercation had occurred between several party-goers and a man later identified through a photomontage as Mr. Michael Anthony Mee. CP 3-4.

Police investigation revealed that Mr. Mee left the barbecue in a vehicle occupied by three females and had gone to a nearby residence on South 48<sup>th</sup> Street where Mr. Hokeshina Tolbert and several other people were located. CP 3-4. Mr. Mee entered the residence for a short period of time then exited the residence with several other people, including Mr. Tolbert. CP 3-4. Mr. Tolbert was carrying a rifle that he gave to Mr. Mee. CP 3-4. Mr. Mee got into a vehicle that was parked at the residence and Mr. Tolbert got into the vehicle in which Mr. Mee had arrived at the residence. CP 3-4. Both vehicles then began driving back towards the barbecue Mr. Mee had left earlier. CP 3-4.

Multiple people were in the yard of the residence where the barbecue had occurred. CP 3-4, RP 738. Mr. Steele was one of those people. CP 3-4. The vehicle in which Mr. Mee was a passenger approached the residence with its lights off. CP 3-4. The vehicle

slowed briefly and Mr. Mee fired two rounds from the rifle towards the house, one of which hit a crossbar on a fence, broke apart, and the fragments struck Mr. Steele. CP 3-4, RP 237-239, 332-333, 337, 360, 737, 740, 1004, 1011, 1013, 1461-1469.

After the shooting, both vehicles returned to the residence on South 48<sup>th</sup> St. where Mr. Mee gave the rifle back to Mr. Tolbert. CP 3-4. Mr. Mee then left the South 48<sup>th</sup> St. residence. CP 3-4.

*B. Procedural Background*

On July 2, 2008, Mr. Mee was charged with one count of murder in the first-degree in violation of RCW 9A.32.030, while armed with a firearm, and one count of unlawful possession of a firearm. CP 1-2.

On January 9, 2009, the State filed a memorandum in support of the admission of gang-related evidence under ER 404(b). CP 5-17. Specifically, the State sought to introduce evidence relating to the fact that Mr. Mee and many other individuals involved in the shooting were members of various Lakewood gangs, the gang names of the various individuals involved with the case, gang-related slang terminology, typical gang member behaviors and expectations, and the culture of not cooperating with police. CP 5-17. The State argued that this evidence was relevant to prove motive and was relevant and necessary evidence of the res gestae of the crimes charged. CP 5-17.

On November 30, 2009, the parties stipulated that Mr. Mee had

previously been convicted of a felony crime defined as a “serious offense” and, accordingly, on May 10, 2008, and at all times relevant to the crimes charged, was prohibited by law from possessing a firearm. CP 40.

Also on November 30, 2009, a 404(b) hearing was held regarding the admissibility of the gang evidence the State wished to introduce. RP 72-96. The State argued that the gang-related evidence was admissible to prove motive, res gestae, and knowledge. RP 73. Specifically, the State sought to introduce gang evidence for the following reasons: (1) some witnesses only knew the defendant and other individuals related to the shooting by their “gang names” or nicknames; (2) Mr. Mee may have been intending to shoot at Mr. Steele or at another person present at the party, Mr. Pitts, who was allegedly a member of Mr. Mee’s gang but who didn’t assist Mr. Mee when Mr. Mee was beaten up; (3) some of the people in the vehicle with Mr. Mee were wearing bandanas when the shooting occurred; (4) that some witnesses were reluctant to cooperate with police because they did not want to be a “snitch” and Mr. Pitts had made apparent threats towards one witness insinuating that the witness should not testify; (5) to explain how Mr. Mee knew where he could obtain a gun; (6) that the shooting was a group effort as opposed to Mr. Mee alone; (7) gang-related evidence was necessary to “present the accurate truthful story

to the jury”; (8) gang-related evidence was necessary to “dispel some sort of misunderstanding that the Crips are all on the same side”; and (8) to “accurately portray it to the jury” that Mr. Mee’s “motive of going after Mr. Pitts in addition to the motive of going after Mr. Steele because he was beat down”. RP 82-85, 89-93.

Trial counsel for Mr. Mee objected to the introduction of any gang evidence on grounds that the evidence was irrelevant and more prejudicial to Mr. Mee than it was probative of any issue before the jury. RP 85-89.

The trial court ruled that the gang evidence was relevant to Mr. Mee’s motive and was admissible to establish Mr. Mee’s motive. RP 94. The trial court did not rule that the evidence was admissible for any other reason. However, in ruling that the gang evidence was admissible, the trial court held, “I haven’t heard evidence...I would expect that I might hear a 3.5, a 3.6, I might actually hear evidence myself which would then convince me that by a preponderance of the evidence, this is established.” RP 95. No further evidentiary hearings were held prior to trial and the introduction of gang-related evidence.

Jury trial began on November 30, 2009. RP 101.

Mr. Mee’s defense at trial was that the shooting was done by Dan Bluehorse. RP 1562. In support of this defense, Mr. Mee sought to call Mr. Larry Kleven, an inmate who claimed that Mr. Bluehorse

had confessed to shooting Mr. Steele while housed near Mr. Kleven. CP 69-76, RP 59-60. Mr. Mee sought to call Mr. Bluehorse for purposes of Mr. Bluehorse denying that he shot Mr. Steele and then to call Mr. Kleven to impeach Mr. Bluehorse with Mr. Bluehorse's confession to Mr. Kleven. RP 1392-1394.

Initially, the State objected to Mr. Mee calling either Mr. Bluehorse or Mr. Kleven. RP 60, 1392-1394, 1557-1573. The trial court granted the State's motion to preclude Mr. Mee from asking Mr. Bluehorse whether or not he had told Mr. Kleven that he had shot Mr. Steele. RP 1572-1573.

Mr. Mee called Mr. Bluehorse who, despite acknowledging that he pled guilty to second-degree murder based on the shooting death of Mr. Steele, denied having been in the car from which the shots that struck Mr. Steele were fired. RP 1616-1619. On cross-examination, Mr. Bluehorse denied shooting Mr. Steele. RP 1628.

However, during the middle of cross-examining Mr. Bluehorse, the State withdrew its objection to Mr. Mee asking Mr. Bluehorse whether or not he had told Mr. Kleven that he had shot Mr. Steele. RP 1678. The trial court informed the State that, if the State withdrew its objection, the court would permit Mr. Mee to ask Mr. Bluehorse if Mr. Bluehorse had told Mr. Kleven he shot Mr. Steele and that the court would then permit Mr. Mee to call Mr. Kleven to impeach Mr.

Bluehorse. RP 1678-1679.

The State withdrew its objection but did request the court give a limiting instruction to the jury before allowing Mr. Kleven to testify, informing the jury that Mr. Kleven's testimony was to be considered only as impeachment evidence and for no other purpose. RP 1679, 1684, 1686-1687.

Following the State's reversal of its position and the court reversal of its ruling prohibiting Mr. Bluehorse from being questioned about his statement to Mr. Kleven, trial counsel for Mr. Mee moved for a mistrial on the basis that Mr. Mee was prejudiced because counsel for Mr. Mee was unable to conduct his direct examination of Mr. Bluehorse in the manner in which he would have conducted it had he been able to question Mr. Bluehorse about his statement to Mr. Kleven. RP 1687-1692, 1695-1696. The trial court agreed that Mr. Mee was prejudiced (RP 1692), but the court never ruled on the motion for mistrial and the trial continued.

On redirect, Mr. Bluehorse testified that he never told another inmate that he shot Mr. Steele and that he did not know and had never met Mr. Kleven. RP 1712, 1719-1720.

Mr. Mee objected to the jury being given any instructions including language relating to accomplice liability since Mr. Mee had not been charged as an accomplice. RP 1576-1578, 1584, 1586, 1587.

The State agreed to remove all accomplice-related language from the jury instructions except for the instructions dealing with the testimony of Mr. Mee's former codefendants who had plead guilty. RP 1595-1601. The trial court ruled that the 'to-convict' instruction could not contain any accomplice language and initially, did not allow any accomplice liability instructions, but later reversed itself and did allow instructions regarding accomplice liability over Mr. Mee's objections. RP 1602, 1607, 1729, 1732, 1734-1735, 1736-1737.

Mr. Mee also objected to the State's proposed instruction defining extreme indifference, but the trial court gave it anyway. RP 1588-1590, 1608, 1733.

After the jury retired and informed the court it had reached a verdict, but before that verdict was entered, it was learned that the wife of one of the jurors had seen a television show regarding gang-related crime in which the prosecutor of Mr. Mee's case was interviewed and that juror thought that the prosecutor "had his stuff together." RP 1886-1887. The juror was questioned by the court and it was discovered that the juror had also watched the show featuring the prosecutor. RP 1899-1901. The juror admitted that he had told another juror that he had seen the prosecutor on television prior to the jury rendering its verdict. RP 1902-1903. The trial court excused the juror and seated one of the alternates. RP 1911. Counsel for Mr. Mee

moved for a mistrial but the trial court denied the motion. RP 1909, 1920.

The jury found Mr. Mee guilty of first-degree murder and first-degree unlawful possession of a firearm and found that Mr. Mee was armed with a firearm at the time he committed the murder. CP 296-298, RP 1934.

Notice of Appeal was timely filed on February 12, 2010. CP 308-318.

#### **IV. ARGUMENT**

##### **1. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING GANG-RELATED EVIDENCE TO BE ADMITTED.**

Pre-trial, the State moved to introduce under 404(b) gang-related evidence, specifically, that Mr. Mee and many other individuals involved in the shooting were members of various Lakewood gangs, the gang names of the various individuals involved with the case, gang-related slang terminology, typical gang member behaviors and expectations, and the culture of not cooperating with police. CP 5-17. Trial counsel for Mr. Mee objected to the introduction of any gang evidence on grounds that the evidence was irrelevant and more prejudicial to Mr. Mee than it was probative of any issue before the jury. RP 85-89. The trial court ruled that the gang evidence was relevant to Mr. Mee's motive and was admissible to establish Mr.

Mee's motive. RP 94.

Evidence of prior bad acts, including acts that are merely unpopular or disgraceful, is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Whether evidence of a defendant's other bad acts should be admitted at trial is governed by ER 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*State v. Stanton*, 68 Wn.App. 855, 860, 845 P.2d 1365 (1993).

[B]efore admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

*State v. Baker*, 89 Wn.App. 726, 731-732, 950 P.2d 486 (1997), *review denied* 135 Wn.2d 1011, 960 P.2d 939 (1998).

"In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to

establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.” *State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied* 108 Wn.2d 1024 (1987).

Substantial prejudicial effect is inherent in ER 404(b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

Evidence of gang membership is inadmissible when it proves no more than a defendant’s abstract beliefs. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (ruling that gang membership is inadmissible to prove abstract belief because ideology is protected by the constitutional rights of freedom of association and freedom of speech).

A trial court’s ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007), *certiorari denied* 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). A trial court’s balancing of whether or not a piece of evidence is more prejudicial than probative under ER 403 is reviewed for abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 802, 132 P.3d 714 (2006).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

- a. *Because the State was not required to prove motive as an element of any crime charged, the probative value of the gang-related evidence on the issue of motive did not outweigh the prejudicial effect of the evidence on Mr. Mee.*

“Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect.” *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003) (emphasis added), *citing Lough*, 125 Wn.2d at 853, 889 P.2d 487.

Mr. Mee was charged with first-degree murder, and first-degree unlawful possession of a firearm. The trial court ruled that the gang-related evidence was admissible for purposes of establishing Mr. Mee’s motive. RP 94. However, neither of the crimes Mr. Mee was charged

with having committed included motive as an element. *See* RCW 9A.32.030(1)(b) and RCW 9.41.040(1)(a). Under RCW 9A.32.030(1)(b), “A person is guilty of murder in the first-degree when... [u]nder circumstances manifesting an extreme indifference to human life, he...engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.’ Under RCW 9.41.040(1)(a), ‘A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first-degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.’

In *State v. Devries*, DeVries was charged and convicted of knowingly delivering amphetamines. The State offered testimony that DeVries had given two ‘energy’ pills to another classmate three days before the incident for which DeVries was charged. The classmate testified that the pills she received from DeVries looked different from the pill allegedly delivered by Devries in the case being prosecuted. The trial court admitted the classmate’s testimony regarding the prior act, even though the descriptions of the pills in the two incidents were strikingly different and there was no evidence that the pills in the prior incident contained a controlled substance.

On appeal, Devries challenged the admission of evidence relating to the delivery of the two ‘energy’ pills under ER 404(b). The Washington Supreme Court ruled that the trial court erred in admitting the evidence, because since “[t]here was no evidence the prior pills were a controlled substance or that the pills were the same[, *t]he prior incident had little or no probative value on the elements of the crime charged and it should have been excluded.*” *Devries*, 149 Wn.2d at 849, 72 P.3d 748 (emphasis added). Thus, where proffered 404(b) evidence has no probative value on the elements of the crimes charged, such evidence should be excluded.

The language of RCW 9.41.040(1)(a) makes clear that motive is not an element of unlawful possession of a firearm. Thus, 404(b) evidence establishing Mr. Mee’s motive to unlawfully possess a firearm was irrelevant, and therefore inadmissible, at trial. Similarly, as will be discussed further below, 404(b) evidence relating to Mr. Mee’s motive to shoot Mr. Steele was irrelevant and therefore inadmissible at trial.

*b. Where the State has more than circumstantial evidence that the accused committed a murder, evidence of motive is not necessary and, therefore, is irrelevant.*

“Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.” *State v. Athan*, 160 Wn.2d. 354, 382, 158 P.3d 27 (2007) *citing State v. Powell*,

126 Wn.2d 244, 260, 893 P.2d 615 (1995). It should be noted that *Athan* and *Powell* stand for the proposition that, where only *circumstantial* evidence is available in a murder case, evidence of motive *might* be necessary, not that evidence of motive automatically becomes admissible in all such cases.

Unlike the present case, both *Athan* and *Powell* were prosecutions for murder where there were no witnesses to the physical acts that caused the death of the victim. *Athan*, 160 Wn.2d at 361-364, 158 P.3d 27; *Powell*, 126 Wn.2d at 247-256, 893 P.2d 615.

Here, the State had far more than only circumstantial evidence establishing that Mr. Mee was the individual who fired the shots. The State had the testimony of Ms. Marjorie Morales (RP 712-782) and the testimony of Mr. Jose Cota-Ancheta. RP 955-1046. Both Ms. Morales and Mr. Cota-Ancheta were present in the car when the shots were fired which killed Mr. Steele and both Ms. Morales and Mr. Cota-Ancheta identified Mr. Mee as the person who fired the shots. RP 730-743, 1001-1013. Thus, the State had the direct evidence of the eye-witness testimony of two witnesses who were in the same car as the defendant at the time the shots were fired. Under these circumstances, evidence of motive was not necessary.

Here, motive was not an element of any crime charged. Accordingly, the gang-related evidence was inadmissible under ER

404(b) because it was not relevant to any element of the crimes charged. The trial court abused its discretion in admitting the gang-related evidence to prove motive because the facts of the case did not meet the standard governing admissibility of evidence under ER 404(b).

*Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

*c. The trial court abused its discretion in finding that admission of the gang-related evidence did not violate ER 403.*

Evidence is relevant if it has “any tendency to make the existence of any fact that is **of consequence** to the determination of the action more probable or less probable than it would be without the evidence.” ER 401 (emphasis added). Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. The ER 403 balancing test is incorporated into the test for admissibility under ER 404(b):

Before admitting ER 404(b) evidence, a trial court “must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) **weigh the probative value against the prejudicial effect.**”

*State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added).

Probative evidence is “evidence that tends to prove or disprove

a point in issue.” Black’s Law Dictionary (7<sup>th</sup> ed., 1999) p. 579. The probative value of evidence is directly linked to the relevance of the evidence: “To be relevant, evidence must meet **two** requirements: (1) the evidence must have a tendency to prove or disprove a fact **(probative value)**, and (2) **that fact must be of consequence** in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (emphasis added). Therefore, evidence that is not probative is not relevant.

The trial court admitted the gang-related evidence in this case as relevant to establishing Mr. Mee’s motive. RP 94. As discussed above, motive was not an element of any of the crimes charged in this case, thus, the gang-related evidence in this case was neither logically relevant nor necessary to prove any essential element or fact that was of consequence to the crimes charged. Because the gang-related evidence was not relevant, it was not probative. Despite this, the trial court admitted the gang-related evidence over objection from Mr. Mee.

The gang-related evidence was not probative of any fact of consequence to the determination of Mr. Mee’s guilt, but at the same time was highly prejudicial towards Mr. Mee. Because the gang-related evidence lacked any probative value, the prejudice to Mr. Mee far outweighed the probative value of the evidence and it was an abuse of

discretion for the trial court to allow the evidence to be admitted.

d. *State v. Campbell, State v. Boot, and State v. Yarbrough* are not controlling.

It is anticipated that the State will argue that under *State v. Campbell*, 78 Wn.App. 813, 901 P.2d 1050, review denied 128 Wn.2d 1004, 907 P.2d 296 (1995), *State v. Boot*, 89 Wn.App.780, 950 P.2d 964, review denied 135 Wn.2d 1015, 960 P.2d 939 (1998), and *State v. Yarbrough*, 151 Wn.App. 66, 210 P.3d 1029 (2009) evidence of Mr. Mee's gang affiliation was admissible to prove Mr. Mee's motive. *Campbell* and *Boot* are factually distinguishable, and *Campbell*, *Boot*, and *Yarbrough* were incorrectly decided and should be overruled.

i. *State v. Campbell*.

In *Campbell*, Mr. Campbell was charged with two counts of first-degree murder committed by two means: premeditation and felony murder predicated on robbery. *Campbell*, 78 Wn.App. at 817, 901 P.2d 1050. The State also charged Mr. Campbell with one count of conspiracy to commit first-degree premeditated murder. *Campbell*, 78 Wn.App. at 817, 901 P.2d 1050.

Pretrial, the State sought to introduce evidence regarding Mr. Campbell's prior bad acts and expert testimony regarding gang behavior. *Campbell*, 78 Wn.App. at 817, 901 P.2d 1050. The State sought introduction of this evidence to prove a motive for the murders:

Mr. Campbell and an accomplice killed the victims because the victims did not give Mr. Campbell and his accomplice appropriate respect, were invading Mr. Campbell's drug territory, and Mr. Campbell believed himself to be a member of a superior gang. *Campbell*, 78 Wn.App. at 817-818, 901 P.2d 1050. The trial court determined there was a nexus between gang culture, gang activity, gang affiliation, drugs, and the homicides. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050. Based on this determination, it allowed the introduction of Mr. Campbell's gang affiliation and drug selling activity. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050. The trial court also ruled admissible expert testimony on gang culture for the purpose of showing premeditation, intent, motive, and opportunity. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050. However, the trial court also limited the testimony, excluding matters that it considered were more prejudicial than probative, such as certain aspects of Mr. Campbell's criminal history and expert opinion that certain gangs are particularly adept at selling drugs and that gang members ordinarily carry and use guns. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050.

The jury found Mr. Campbell guilty on both counts of felony murder but acquitted Mr. Campbell of premeditated first-degree murder. *Campbell*, 78 Wn.App. at 818, 901 P.2d 1050.

On appeal, *inter alia*, Mr. Campbell challenged the admission of

evidence regarding his gang activities. *Campbell*, 78 Wn.App. at 821, 901 P.2d 1050. The Court of Appeals affirmed the trial court's ruling admitting the gang-related evidence under ER 404(b) for the purpose of proving Mr. Campbell's premeditation, motive, and intent. *Campbell*, 78 Wn.App. at 822, 901 P.2d 1050.

1. *Campbell is distinguishable from this case.*

Mr. Campbell was charged with premeditated first-degree murder. This placed the burden on the State to prove premeditation to commit the murders.

“Premeditation has been defined as ‘the deliberate formation of and reflection upon the intent to take a human life,’ and involves ‘the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.’” *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992) (internal citations omitted). Four characteristics of the crime are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing. *Ortiz*, 119 Wn.2d at 312, 831 P.2d 1060.

As discussed above, “Evidence can be admitted under ER 404(b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect.”

*DeVries*, 149 Wn.2d at 848, 72 P.3d 748 (emphasis added).

Motive is not an element of the charge of murder that the State is required to prove, however, where only circumstantial evidence is available to the State, evidence of motive may become necessary. RCW 9A.32.030; *Athan*, 160 Wn.2d. 354, 382, 158 P.3d 27. “Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.”

Thus, evidence of motive is relevant and potentially admissible in a murder case in two situations: (1) when the defendant has been charged with premeditated murder, and in this situation motive is only one of four criteria which are relevant; and (2) where the State has only circumstantial evidence of the defendant’s guilt. The instant case involves neither of these scenarios.

Mr. Mee was charged with first-degree murder by causing the death of another person under circumstances manifesting an extreme indifference to human life under RCW 9A.32.030(1)(b), *not* premeditated first-degree murder under RCW 9A.32.030(1)(a). Further, also as discussed above, the State had more than mere circumstantial evidence that Mr. Mee committed the crimes. This case is factually distinguishable from *Campbell* both in the State’s burden and in the evidence available to the State. *Campbell* does not control this case.

2. Campbell was incorrectly decided.

In *Campbell*, the Court of Appeals affirmed the trial court's admission of gang-related evidence under ER 404(b) for purposes of proving premeditation, motive, and intent. *Campbell*, 78 Wn.App. at 821-822, 901 P.2d 1050.

Gang evidence, by its very nature, is highly prejudicial. *State v. Perez-Mejia*, 134 Wn.App. 907, 919, 143 P.3d 838 (2006). Substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487. Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough*, 125 Wn.2d at 863, 889 P.2d 487.

As discussed above, motive is not an element of the crime of murder. Motive may be one of four categories of evidence to be evaluated for purposes of establishing premeditation, but it *is* only *one* of *four*. Where the crime charged does not have premeditation as an element, gang-related evidence is not admissible for purposes of proving motive since such evidence introduced for that purpose would fail ER 403's balancing test: gang-related evidence of motive is irrelevant but at the same time highly prejudicial. In cases like *Campbell* where the charge involves premeditation, the inherently highly prejudicial nature of gang evidence will always outweigh any probative value the evidence may have.

The *Campbell* court erred in affirming the admission of highly prejudicial yet irrelevant gang-related evidence. This court should take this opportunity to correct the erroneous ruling in *Campbell* and overrule that case and the precedent it has set.

ii. *State v. Boot*

In *Boot*, Mr. Boot, like Mr. Campbell, was charged with first-degree premeditated murder. *Boot*, 89 Wn.App. at 789, 950 P.2d 964. The trial court ruled that evidence relating to Mr. Boot's gang affiliation on grounds that it was probative of motive and premeditation. *Boot*, 89 Wn.App. at 788-789, 950 P.2d 964. At trial, Mr. Boot confirmed he was a gang member and other evidence was introduced which established that killing someone heightened a gang member's status. *Boot*, 89 Wn.App. at 789-790, 950 P.2d 964.

1. *Boot is distinguishable from this case.*

Like Mr. Campbell, Mr. Boot was charged with premeditated murder. This alone is sufficient to distinguish Mr. Mee's case from *Boot*, since the State had the burden of proving premeditation in *Boot* but not in the instant case. As discussed above, the added element of premeditation changes the analysis of the admissibility of gang-related evidence for purposes of establishing motive, rendering the analysis in *Boot* inapplicable to Mr. Mee's case.

2. *Boot was incorrectly decided.*

Kevin Boot and his cousin, Jerry Boot, were both charged with aggravated first-degree murder or, in the alternative, first-degree felony murder, for the shooting death Ms. Felicia Reese during the carjacking of Ms. Reese by the Boots. *Boot*, 89 Wn.App. at 783, 950 P.2d 964. The cases were severed for trial. *Boot*, 89 Wn.App. at 783, 950 P.2d 964.

Pre-trial, Mr. Boot moved to suppress evidence of his gang affiliation and evidence on alleged assault where he held a gun to a woman's head but was taunted that he was too much of a baby to shoot her. *Boot*, 89 Wn.App. at 785, 787-788, 950 P.2d 964. The trial court admitted this evidence on the basis that it was probative of Mr. Boot's motive. *Boot*, 89 Wn.App. at 788, 950 P.2d 964.

At trial, Mr. Boot admitted he participated in the carjacking, but that Jerry had shot Ms. Reese and Mr. Boot had no idea that Jerry was going to shoot Ms. Reese. *Boot*, 89 Wn.App. at 793, 950 P.2d 964. The jury convicted Mr. Boot of aggravated first-degree murder. *Boot*, 89 Wn.App. at 783, 950 P.2d 964.

On appeal, Mr. Boot challenged the trial court's admission of the gang-related evidence. The Court of Appeals affirmed the trial court's admission of the gang-related evidence under ER 404(b), finding that the trial court correctly determined the evidence was admissible under

the motive, premeditation, and res gestae exceptions, and that the probative value of the evidence outweighed the prejudicial effect of the evidence. *Boot*, 89 Wn.App. at 788-791, 950 P.2d 964. Mr. Boot also challenged the admission of the gang-related evidence on grounds that admission of the evidence violated his First Amendment right to freedom of association. *Boot*, 89 Wn.App. at 791, n. 1, 950 P.2d 964.

Without analysis, the *Boot* court cited *Campbell* for the proposition that gang “association evidence is admissible when relevant to an issue in a case.” *Boot*, 89 Wn.App. at 791, n. 1, 950 P.2d 964. The *Boot* court noted that the evidence introduced at that trial was that “killing someone heightened a gang member’s status.” *Boot*, 89 Wn.App. at 789, 950 P.2d 964. On this basis, the *Boot* court held that the trial court did not err in admitting evidence of Boot’s gang membership and a previous incident where Mr. Boot was taunted as being too much of a baby to shoot a woman since such evidence was relevant to Boot’s motive to shoot Ms. Reese. *Boot*, 89 Wn.App. at 789, 950 P.2d 964.

As cited above, evidence of gang membership is inadmissible when it proves no more than a defendant’s abstract beliefs. *Dawson*, 503 U.S. at 165, 112 S.Ct. 1093, 117 L.Ed.2d 309. Further, *Campbell* requires that a sufficient nexus exist between the alleged crimes and gang activity before gang evidence is admissible. *Campbell*, 78

Wn.App. at 822, 901 P.2d 1050. The *Boot* court admitted evidence that Mr. Boot was in a gang as evidence of Mr. Boot's motive because there was evidence that killing someone heightened a gang member's status and Mr. Boot had previously been taunted as lacking the courage to kill a woman. Thus, the court's logic was that Mr. Boot was motivated to kill Ms. Reese because he and his gang-mates held the abstract belief that Mr. Boot's killing of Ms. Reese would heighten his gang status. Thus, the evidence that Mr. Boot was in a gang did nothing more than prove Mr. Boot's abstract beliefs. Beyond demonstrating Mr. Boot's abstract beliefs, the gang evidence in *Boot* had no nexus to the alleged crimes. Thus, the *Boot* court's determination that the gang evidence was admissible to demonstrate motive was erroneous and contrary to both *Campbell* and *Dawson*.

The res gestae "exception permits the admission of evidence of other crimes or misconduct where it is a link in the chain of an unbroken sequence of events surrounding the charged offense in order that a complete picture be depicted for the jury. **The res gestae exception requires that evidence be relevant to a material issue and its probative value must outweigh its prejudicial effect.**" *State v. Acosta*, 123 Wn.App. 424, 442, 98 P.3d 503 (2004) (internal citations omitted) (emphasis added). Thus, saying evidence goes to the res gestae of a criminal act is not sufficient- the evidence must still be

relevant to a material issue and the probative value of the evidence must outweigh the prejudicial effect of the evidence.

As discussed above, the gang-related evidence was not relevant to a material issue. Further, the gang-related evidence was highly prejudicial. Therefore, under *Acosta*, the evidence was not admissible under res gestae exception to ER 404(b). The *Boot* court erred in affirming the trial court's admission of the gang-related evidence under the res gestae exception to ER 404(b).

The *Boot* court erred in affirming the admission of highly prejudicial yet irrelevant gang-related evidence, and adopted the erroneous precedent set by *Campbell*. This court should take this opportunity to correct the erroneous ruling in *Campbell* and disagree with the holding in *Boot*.

iii. *State v. Yarbrough*

A jury found Yarbrough guilty of first-degree murder by extreme indifference, first-degree assault, and second-degree unlawful possession of a firearm. *Yarbrough*, 151 Wn.App. at 80, 210 P.3d 1029. The jury also returned a special verdict finding that Yarbrough committed both the first-degree murder and first-degree assault to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association, or identifiable group, and that both these offenses involved a destructive and foreseeable impact on

persons other than the victim. *Yarbrough*, 151 Wn.App. at 80, 210 P.3d 1029.

1. *Yarbrough is distinguishable from this case.*

As in *Campbell* and *Boot*, *Yarbrough* was charged with a crime, specifically the aggravating factor that he committed the murder to advance his position in a gang, which rendered evidence of motive potentially relevant. *Yarbrough*, 151 Wn.App. at 84, 210 P.3d 1029. Mr. Mee was not charged with any crime or aggravating factor which made motive relevant. Therefore, *Yarbrough* is factually distinguishable from this case and is not applicable.

2. *Yarbrough was incorrectly decided.*

On appeal, *Yarbrough* argued that the trial court erred in admitting gang-related evidence under ER 404(b) to prove *Yarbrough*'s motive and mental state where such evidence was irrelevant and more prejudicial than it was probative. *Yarbrough*, 151 Wn.App. at 81-82, 210 P.3d 1029. *Yarbrough* argued that the gang-related evidence was not relevant to prove motive because motive is not an element of first-degree murder by extreme indifference. *Yarbrough*, 151 Wn.App. at 83, 210 P.3d 1029.

The *Yarbrough* court rejected *Yarbrough*'s argument, reasoning as follows:

Yarbrough contends that the gang-related evidence is not relevant to prove motive because motive is not an element of first-degree murder by extreme indifference. **But it is well established that the State can prove motive even when it is not an element of the crime charged.** See *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007) (“Although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.”); *State v. Young*, 87 Wn.2d 129, 138, 550 P.2d 1 (1976) (although not an element of crime of arson, presence of a likely motive was a circumstance which the jury could consider along with other circumstances in the case). In *Boot*, Division Three of this court reasoned that, “[a]lthough the State is not required to prove motive as an element of the offense, evidence showing motive may be admissible” if “the evidence is relevant and necessary to prove an essential element of the crime charged.” 89 Wn.App. at 789, 950 P.2d 964.

*Yarbrough*, 151 Wn.App. at 83, 210 P.3d 1029 (emphasis added).

As stated above, *Athan* stands for the proposition that, where only *circumstantial* evidence exists indicating an accused is guilty of murder, evidence of that accused’s motive to kill the victim *may* be admissible in some cases. *Athan*, 160 Wn.2d. at 382, 158 P.3d 27, citing *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). The *Yarbrough* court interpreted *Athan*, *Young*, *Powell*, and *Boot* too broadly when it held that *Athan* stands for the proposition that “the State can prove motive even when it is not an element of the crime charged.” *Yarbrough*, 151 Wn.App. at 83, 210 P.3d 1029.

*Athan*, *Young*, *Powell*, and *Boot* were all cases in which the evidence against the defendant was purely circumstantial. See *Athan*,

160 Wn.2d at 361-364, 158 P.3d 27 (defendant seen carrying a box similar to the one in which the murder victim was found, defendant known to frequent area where murder victim was found, defendant claimed his DNA found on the victim's body in the form of semen was a result of a consensual sexual encounter); *Powell*, 126 Wn.2d at 247-256, 893 P.2d 615 (only evidence linking defendant to strangulation death of his wife was history of assaulting wife and abusive behavior toward wife); *State v. Young*, 87 Wn.2d 129, 131, 550 P.2d 1 (1976) (evidence that defendant committed arson was entirely circumstantial, save for the two ambiguous polygraph examinations of defendant's friend who claimed defendant had attempted to bribe him to provide an alibi); *Boot*, 89 Wn.App. 780, 785, 793-94, 950 P.2d 964 (defendant admitted to committing carjacking with codefendant, but evidence was ambiguous as to which of the two defendants fired the gunshots which killed the victim).

Other than *Yarbrough*, no Washington case has ever held that evidence of motive is admissible where motive is not an element of the crime and the State has more than only circumstantial evidence. Where motive is not an element of a crime, it becomes relevant only where the State has only circumstantial evidence of the defendant's guilt.

The *Yabrough* court incorrectly interpreted *Athan*, *Young*, *Powell*, and *Boot* too broadly and oversimplified the rule when it held

that “the State can prove motive even when it is not an element of the crime charged.” *Yarbrough*, 151 Wn.App. at 83, 210 P.3d 1029. The true rule in Washington is that, in a crime where motive is not an element of the crime charged, evidence of motive *may* become relevant, and therefore admissible, only in cases where the State’s evidence is limited to circumstantial evidence that the accused committed the crime. In cases such as Mr. Mee’s and *Yarbrough* where the State has eye-witness testimony that the accused committed the crime, evidence of motive is irrelevant and inadmissible unless motive is an element of the crime.

*Yarbrough* was incorrectly decided and interpreted *Athan* too broadly. This court should take this opportunity to clarify the law with regards to when evidence of motive becomes relevant where motive is not the evidence of a crime.<sup>1</sup>

*e. The trial court abused its discretion in admitting*

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<sup>1</sup> *Campbell*, *Boot*, and *Yarbrough* are the only published cases counsel was able to find which discuss the admissibility of gang evidence to prove motive. However, RCW 10.95.020(6) defines aggravated murder as a murder committed by a person “to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group” This language is identical to the aggravating factor set forth in RCW 9.94A.535(3)(s): “The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.” Counsel was able to find only one published Washington case discussing RCW 10.95.020(6), *State v. Monschke*, 133 Wn.App. 313, 135 P.3d 966 (2006), *review denied* 159 Wn.2d 1010, 154 P.3d 918, *certiorari denied* 128 S.Ct. 83, 76 USLW 3158 (2007). At trial, evidence was introduced regarding Mr. Monschke’s membership in white supremacist organizations to establish that Mr. Monschke had committed the murder to further his position in those white supremacist groups. However, like *Campbell* and *Boot*, the charge in *Monschke* included motive as an element that the State was required to establish. For this reason, *Monschke*, like *Campbell* and *Boot*, is distinguishable and not controlling on this case.

*the gang-related evidence where the State had not presented any evidence which established the truth of the gang-related evidence by a preponderance of the evidence.*

As stated above,

[B]efore admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

*Baker*, 89 Wn.App. 726, 731-732, 950 P.2d 486.

Here, when the trial court ruled that the gang evidence was admissible, the court specifically held that the State had not presented any evidence which would convince the court of the truth of the gang evidence by a preponderance of the evidence: “I haven’t heard evidence...I would expect that I might hear a 3.5, a 3.6, I might actually hear evidence myself which would then convince me that by a preponderance of the evidence, this is established.” RP 95. No further hearing was held in which the State presented evidence to establish the truth of the proffered gang-related evidence by a preponderance of the evidence.

Thus, the trial court erred in admitting the evidence without required the State to establish by a preponderance of the evidence that the gang-related evidence was true.

2. **ADMISSION OF THE GANG-RELATED EVIDENCE DEPRIVED MR. MEE OF HIS RIGHT TO A FAIR TRIAL.**

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

*a. The gang-related evidence was irrelevant.*

As discussed above, the gang-related evidence was not relevant to any issue before the jury. Therefore, the gang-related evidence was not probative and therefore not relevant.

*b. The gang-related evidence was highly prejudicial.*

As discussed above, substantial prejudicial effect is inherent in ER 404(b) evidence. *Lough*, 125 Wn.2d at 863, 889 P.2d 487 (1995).

Evidence of gang membership carries heightened prejudice due to the highly negative societal bias against gang members.

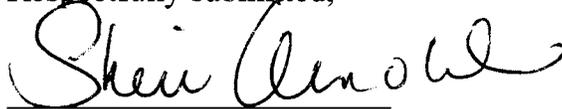
The admission of the highly prejudicial yet irrelevant gang evidence deprived Mr. Mee of a fair trial.

**VI. CONCLUSION**

The trial court erred in admitting the gang-related evidence as relevant to demonstrating Mr. Mee's motive. The admission of this irrelevant yet highly prejudicial evidence deprived Mr. Mee of a fair trial. This court should vacate Mr. Mee's conviction and remand for a new trial at which gang evidence is not admissible.

DATED this 6<sup>th</sup> day of October, 2010.

Respectfully submitted,



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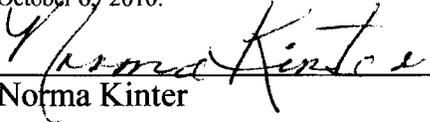
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**Certificate of Service:**

The undersigned certifies that on October 6, 2010, she delivered in person to the: Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Michael A. Mee, DOC # 303608, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, Washington 98326, copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on October 6, 2010.

  
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Norma Kinter