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Court of Appeals
Division II
State of Washington
3/12/2018 10:55 AM

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SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

THE STATE OF WASHINGTON, vs. MIGUEL ALBARRAN,	Plaintiff, Defendant.	No. 13-1-01301-1 ORDER RE CrR 7.8 MOTION CLERK'S ACTION REQUIRED *Copies to Defendant and Prosecuting Attorney
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THIS MATTER having come before the Court for initial consideration on the motion and affidavit(s) of Defendant herein, pursuant to Criminal Rule 7.8, and the Court being fully advised in the premises, the Court:

Having determined that the motion is barred by RCW 10.73.090 as the Defendant filed the motion more than one year after the judgment and sentence was final, hereby transfers this matter to the Court of Appeals for its consideration as a personal restraint petition.

The judgment and sentence was final on _____ (date judgment and sentence was filed, or date mandate disposing of the appeal was issued, or date petition for certiorari to the U.S. Supreme Court was denied, whichever is latest), and the motion was filed on _____.

Having determined that the motion is not barred by RCW 10.73.090 (motion was filed within one year of date judgment and sentence became final or judgment and sentence is invalid on its face), but having determined that the Defendant has not made a substantial showing that s/he is entitled to relief or that an evidentiary hearing will be necessary to resolve the motion on the merits, hereby transfers this matter to the Court of Appeals for its consideration as a personal restraint petition.

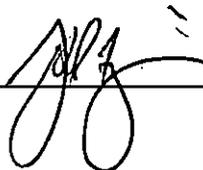
Having determined that the motion is not barred by RCW 10.73.090, and, either:

- having determined that the Defendant has made a substantial showing that s/he is entitled to relief; or
- determination of this matter will require an evidentiary hearing to resolve the motion on the merits;

hereby directs the Clark County Prosecuting Attorney to appear on _____ at _____ and show cause as to why the relief requested should not be granted.

DATED this 5th day of March, 2018.

JUDGE



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JAB

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SCOTT G. WEBER, CLERK
CLARK COUNTY

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SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendant.

No. 13-1-01301-1

CrR 7.8 MOTION TO VACATE
JUDGMENT AND BRIEF IN SUPPORT
THEREOF

RELIEF REQUESTED

The defense seeks an order vacating Mr. Albarran's conviction following a jury trial pursuant to CrR 7.8. Because defendant received ineffective assistance of counsel at both the trial and pre-trial stages, the defense seeks an order directing the State to make available for acceptance the plea offer previously extended to Mr. Albarran's former trial attorney. In the alternative, based on ineffective assistance of counsel and prosecutorial misconduct, the defense seeks a new trial. Finally, consistent with Supreme Court discussion in this case, the defense

Motion to Vacate Judgment

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3 seeks a new sentencing hearing in which the court determines the proper felony to be dismissed
4 based on double jeopardy.

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ISSUES PRESENTED

1. Miguel Albarran's reading level is below sixth-grade, and he has difficulty understanding and processing oral information. Although he was charged with serious felony offenses, his attorney only met with him for a few 20-minute meetings. These meetings took place at Starbucks. As a result, defense counsel failed to spend the necessary time with his client going over the evidence, explaining the options, and assisting his client in making an informed decision as to whether to plead guilty. Where defense counsel failed to adequately describe the plea offer and the consequences of proceeding to trial in an understandable way, and where there is a reasonable probability Miguel would have entered a plea had he been properly advised and counseled, was Miguel deprived of effective assistance of counsel at the plea stage?

2. Both federal and state courts recognize that the remedy for ineffective assistance of counsel is to put the defendant back in the same position as if the deficient performance had never occurred. Where ineffective assistance of counsel occurs at the pre-trial negotiation stage, the appropriate remedy is to direct the State to extend the same pre-trial plea offer and allow the defendant to be advised by competent counsel. Where Miguel has already spent three times as long in custody as he would have under the plea offer, should this Court direct the State to extend the same offer previously offered to Miguel?

3. After successfully moving to exclude evidence of Miguel's prior arrests, defense counsel inexplicably began questioning the detective about whether he had run a criminal

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3 history background check on Miguel. In doing so, counsel opened the door for the State to
4 question Miguel about serious unproven criminal acts. Defense counsel compounded the error
5 by not preparing his client for testimony. Given the unfairly prejudicial impact of prior crimes
6 evidence, was defense counsel ineffective in opening the door to this evidence and failing to
7 prepare his client to testify in court?

8 4. Although the State did not necessarily intend to introduce the tape-recorded jail
9 calls, defense counsel asked the detective if he had heard anything that sounded like an indirect
10 confession. The detective obliged by offering his opinion that Miguel sounded worried when
11 mentioning possible DNA evidence. Given the highly prejudicial nature of this evidence, did
12 defense counsel deprive Miguel of a fair trial when he asked these questions?

13 5. T.P. was 13 years old at the time of this incident. The State relied upon the
14 defendant's DNA that was found around T.P.'s vaginal area and panties. In order to explain the
15 presence of the DNA, and establish an alternative source, the defense sought to introduce
16 evidence that defendant and T.P.'s mom regularly used a vibrator together in intimate moments,
17 and that T.P. had access to the drawer where the vibrator was stored. The trial court excluded the
18 evidence. On appeal, the appellate court agreed that the evidence may very well have been
19 admissible, but that defense counsel failed to lay the proper foundation. Did defense counsel's
20 failure to lay the necessary foundation for this crucial evidence deprive Miguel of a fair trial?

21 6. The prosecutor violated trial court rulings without first conferring with the trial
22 court. Defense counsel remained silent. The prosecutor also engaged in misconduct in closing,
23 misrepresenting key pieces of evidence and suggesting that reasonable doubt is something that
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3 defense attorneys rely upon when they have nothing else. There was no objection. Was this
4 egregious misconduct requiring reversal? Alternatively, does the failure to object to clearly
5 improper arguments constitute ineffective assistance of counsel?

6 EVIDENCE UPON WHICH THE MOTION IS BASED

7 The factual basis for this motion is contained in the court file, transcripts from the first
8 trial (supplied on CD for the court's convenience), and declarations from Miguel Albarran, Olga
9 Flores, Tresha King, and John Jakoski (currently unsigned), and James Dixon.

10 SUMMARY OF FACTS

11 What follows is a short summary of the procedural history and basic allegations
12 presented in the case. In order to avoid needless duplication, the facts relating to the specific
13 issues raised in this motion will be set forth within their respective arguments.

14 Procedural Facts

15 The Clark County Prosecutor initially charged Miguel Albarran with one count of child
16 molestation in the second degree, alleged to have occurred on April 1, 2013.¹ The alleged victim
17 was listed as T.P., who was 13 old at the time.² Mr. Albarran entered a plea of not guilty, and the
18 office of public defense assigned David Kurtz to represent him.

19 Mr. Kurtz never met Mr. Albarran in his office, choosing instead to conduct all meetings
20 at a local Starbucks.³ Mr. Albarran said he did not commit the offense, so the case was set for
21 trial. The State responded by adding three additional charges: 1) rape of a child in the second

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23 ¹ CP 1

² *Id.*

³ Albarran Declaration at 1-3

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3 degree, 2) attempted rape of a child in the second degree, and 3) rape in the second degree
4 (incapable of consent prong).⁴ The State alleged three sentence aggravators: violation of a
5 position of trust, invasion of the victim's privacy, and victim less than 15 years old.⁵

6 A jury trial began on January 13, 2014. Including pretrial motions and voir dire, the trial
7 lasted two days, with closing arguments spilling over onto the third. The found Mr. Albarran
8 guilty of all four counts and the aggravating factors.⁶ Based on double jeopardy, the court
9 dismissed all counts except for rape in the second degree under the unable to consent prong.
10 Because T.P. was under the age of 15, the court imposed the mandatory 25-year sentence as the
11 minimum sentence.⁷ Mr. Albarran filed a timely appeal.⁸

12 Trial Testimony

13 Miguel Albarran and Denise Domke began dating in 2010. She was his boss, but
14 transferred him to another department so she would no longer be supervising him.⁹ Throughout
15 the three-year relationship, Miguel was not faithful. He had multiple affairs with other women,
16 even after he had moved in with Denise.¹⁰ This created a great deal of stress. Denise would
17 become angry; they would fight, split up, he would apologize, and then they would get back
18 together.¹¹

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21 ⁴ CP 21-24

⁵ *Id.*

⁶ CP 31-34, 52-55

⁷ RCW 9.94A.507; RCW 9.94A.837; RP 494; CP 39-47

⁸ CP 63

⁹ RP 260

¹⁰ RP 243, 343, 361

¹¹ RP 265

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3 Denise had a 13 year old daughter, T.P. Up until the date of this purported incident, there
4 had never been any suggestion that Miguel had acted inappropriately around T.P.¹²

5 On April 1, 2013, T.P. was on spring break from school.¹³ She had stayed up late
6 watching a movie, first on the couch in the living room, and then later on the TV located in her
7 room.¹⁴ Denise and Miguel had to work that day¹⁵. Denise got up and took a shower, and Miguel
8 went to the kitchen to get coffee. As is often the case, he walked through the house turning off
9 lights that had been left on over night. The TV in the living room had been left on, so he turned
10 that off as well. Walking back towards their bedroom he passed by T.P.'s room. The lights and
11 the TV were still on, so he stopped in her room to turn them off. He went into her room while
12 she was sleeping to turn off the lights and TV, something he does almost every day. As he was
13 covering her with a blanket, Denise came into the room and began accusing him of touching her
14 daughter.¹⁶

15 At first, Miguel thought this was some type of April Fools' joke. But when he saw that
16 Denise was serious, he tried explaining that he was just covering T.P. up.¹⁷ As they stepped out
17 of the room, Denise began yelling louder and socked Miguel in the eye. She called him a dog,
18 because of all of the times he cheated on her.¹⁸

19 Denise told the story differently. According to her, after getting out of the shower, she
20 walked past her daughter's bedroom. The door was open and she saw her daughter lying on the

21 ¹² RP 54, 261

¹³ RP 55.

22 ¹⁴ RP 57, 67

¹⁵ RP 246

23 ¹⁶ RP 341

¹⁷ RP 341-42

24 ¹⁸ RP 342

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3 bed with her knees up and Miguel's face in her crotch area. Denise could see that T.P.'s panties
4 were still on. Denise yelled, which caused T.P. to wake up. As Miguel stood up, he put a blanket
5 on T.P. Denise did not see the blanket until she screamed at him. When they stepped out of the
6 room, Miguel told her that he was just covering T.P. up.¹⁹ Miguel was wearing boxer shorts and
7 Denise did not notice anything unusual about his appearance.²⁰

8 T.P. testified that she was asleep and has no recollection of anything that Miguel was
9 doing or not doing before she woke up to the screaming. She didn't feel that she was being
10 touched in any way.²¹ She does remember hearing Miguel and her mom arguing. She specifically
11 recalled Miguel saying that he did not do anything, that he was just covering her up.²²

12 The police were called and took statements from everyone. Miguel told the police the
13 same thing he told Denise, that he was just putting a blanket on T.P.²³ As part of the initial
14 investigation, the police had T.P. go into the bathroom and take off the panties she was wearing.
15 The underwear she brought back out was somewhat wet in the crotch area.²⁴

16 Charges were not filed until many months later. The defense theory was that Denise was
17 angry with Miguel as a result of his continued infidelity, and that she made up this story as a
18 means of taking revenge.²⁵ Given that most people who are angry or jealous do not take such
19 extreme actions, it was incumbent upon the defense to show that Denise's rage and jealousy was
20 much greater than in the typical case. To that end, the defense sought to cross examine Denise

21 ¹⁹ RP 250-251

22 ²⁰ RP 268

23 ²¹ RP 68-69.

24 ²² RP 74-75.

25 ²³ RP 129-130

²⁴ RP 50-51

²⁵ RP 31, 234.

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3 about how two weeks prior to this incident, Denise used a GPS tracker to locate Miguel at the
4 house of another woman, where she then confronted Miguel and punched him.²⁶ The defense
5 also wanted to cross-examine Denise on other instances of her rage and assaults on Miguel
6 sparked by his constant cheating.²⁷ The court excluded all of this evidence, finding the GPS
7 tracker and the multiple assaults were unnecessary to show the depth of Denise's jealousy and
8 rage.²⁸

9 In addition to Denise's testimony, the State relied upon DNA evidence. Lab results
10 showed small amounts of Miguel's DNA on T.P.'s inner thigh, panties, and vagina area.²⁹ The
11 question for the jury was if Miguel did not have sexual contact with T.P., then how did the DNA
12 end up there? In order to answer that question, the defense sought to introduce evidence of a
13 vibrator that Miguel and Denise used almost every time they had sex.³⁰ This vibrator was located
14 in the top drawer next to their bed. The defense theory is that T.P. used her mom's vibrator.
15 Miguel recalled Denise talking about how the vibrator and lubricant were missing one day.³¹ The
16 defense also believed it was quite possible the police or the mom could have used the vibrator to
17 obtained a sample of his DNA.³² Consistent with those theories, the State's expert agreed that
18 DNA could be transferred from one object to another thing or person. Further, there would be no
19 means of determining how the transfer occurred, but only that it had occurred.³³

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21 ²⁶ RP 30-32, 235

²⁷ RP 30-32, 234-240

²⁸ RP 240.

²⁹ RP 218.

³⁰ RP 352

³¹ RP 352

³² RP 8, 353-354

³³ RP 227-229

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3 The judge excluded this evidence. According to the judge, the foundation for the
4 evidence was Denise's statement that the vibrator was missing one day, and that because this
5 statement was hearsay, the defense could not lay the necessary foundation.³⁴ Thus, the defense
6 was not allowed to present facts establishing an alternative explanation for the presence of the
7 DNA. The prosecutor relied upon the DNA evidence in closing.³⁵

8 When Miguel was on the stand, he testified that Denise frequently became angry over his
9 affairs and assaulted him.³⁶ The prosecutor objected and the court sustained the objection. A
10 moment later, Miguel tried describing Denise's violent responses when he either told her or she
11 found out about his cheating.³⁷ This time the court asked the jury to step out and addressed the
12 issue again with the parties. The court stated, "But anything having to do with somebody hitting
13 or striking or taking specific actions, it was the Court's intent by our previous conversation by
14 this to exclude this as not relevant and prejudicial."³⁸ Accordingly, defense counsel instructed his
15 client: "So Mr. Albarran, remember the Judge said, don't use – don't bring up any incidents of
16 the violence in terms of being hit."³⁹ Miguel said he understood.

17 After successfully excluding Denise's specific acts of domestic violence, including a
18 witness who could have testified to that violence, the defense was left with just the general
19 statement that Denise had struck Miguel in the past. The State took advantage of that ruling by
20 calling a CPS caseworker as a rebuttal witness. That caseworker had previously spoken with

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22 ³⁴ RP 355

³⁵ See e.g., RP 416, 462

³⁶ RP 347

³⁷ RP 348.

³⁸ RP 350.

³⁹ RP 355

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3 Miguel on the telephone, during which time Miguel had denied a history of domestic violence.
4 RP 372. In closing, the prosecutor cited to the CPS testimony as proof that Miguel “lied” about
5 Denise’s rages. RP 425-26.

6 The jury convicted Miguel on all counts. All charges, other than the second degree rape
7 based on incapacity were dismissed on double jeopardy grounds and a mandatory 25 year
8 sentence was imposed. Miguel filed an appeal, challenging the exclusion of bias evidence against
9 Denise and the vibrator evidence. The appellate court found that the court did not abuse its
10 discretion in excluding the prior assaults, GPS tracker, and the Facebook entries. As to the
11 vibrator evidence, the appellate court concluded that while it may have been admissible under a
12 different theory or foundation, “the trial court ruled on the admissibility of the evidence as it was
13 presented, not on the admissibility of evidence that could have been presented in a different
14 way.”⁴⁰ As to the sentence, the Supreme Court affirmed that the sentence was properly imposed
15 on the second-degree rape conviction rather than the conviction for rape of a child. The appeal
16 did not raise any ineffective assistance of counsel or prosecutorial misconduct claims.

17 LEGAL ARGUMENT

18 1. MR. ALBARRAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL
19 IN THE PRETRIAL AND NEGOTIATION STAGES OF THE PROCEEDINGS.

20 a. The Legal Standard

21 The decision to reject a plea offer is a “vitally important decision.”⁴¹ Thus, plea
22 negotiations are a critical stage at which the accused has a Sixth Amendment right to effective

23 ⁴⁰ Slip Op. at 16.

24 ⁴¹ *U.S. v. Zelinsky*, 689 F.2d 435, 438 (3rd 1982)

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3 assistance of counsel.⁴² In the plea bargaining context, effective assistance of counsel requires
4 counsel to “actually and substantially” assist the client in deciding whether to plead guilty.⁴³

5 To prevail on a claim of ineffective assistance of counsel, a defendant must show (1)
6 counsel’s performance fell below an objective standard of reasonableness, and (2) but for
7 counsel’s deficient performance the result of the proceeding would have been different.⁴⁴

8 In order to establish prejudice, a defendant need not show that counsel's deficient conduct
9 “more likely than not altered the outcome in the case.”⁴⁵ Rather, a defendant only needs to show
10 a reasonable probability that the outcome would have been different but for defense counsel’s
11 mistakes. Washington and federal courts recognize that this is a lower standard than
12 preponderance of the evidence, a standard that requires only “a probability sufficient to
13 undermine confidence in the reliability of the outcome.”⁴⁶ This standard applies in collateral
14 attacks, such as the one presented in this case.⁴⁷

15 **b. Deficient Performance**

16 As a starting point, defense counsel must communicate all offers of a plea to his client.
17 The failure to do so constitutes a deficient performance under both the state and federal
18 constitutions.⁴⁸ Additionally, defense counsel “must include not only communicating actual
19 offers, but discussion of tentative plea negotiations and the strengths and weaknesses of
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21 ⁴² *Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)

⁴³ *State v. Osborne*, 102 Wn.2d 87, 99 (1984), quoting *State v. Cameron*, 30 Wn. App. 229, 232 (1981).

⁴⁴ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

⁴⁵ *State v. Thomas*, 109 Wn.2d 222, 226 (1987), quoting *Strickland* at 693.

⁴⁶ *In re Fleming*, 142 Wn.2d 853, 866 (2001), quoting *Strickland* at 694.

⁴⁷ *See Id.*

⁴⁸ *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994); *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006).

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3 defendants' case so that the defendants know what to expect and can make an informed judgment
4 whether or not to plead guilty.⁴⁹ This includes sufficiently detailed discussions to help the
5 defendant understand the risks associated with each choice. An attorney who fails to adequately
6 explain "the plea offer or sentencing information and its ramifications" falls short of providing
7 effective assistance of counsel.⁵⁰ Even if a client expresses a desire to go to trial, an attorney is
8 obligated to investigate the sentencing consequences and competently advise his client of those
9 consequences.⁵¹

10 In deciding the appropriate level of communications, an attorney must take into
11 consideration the abilities of the person he is representing. Here, as noted by his GED teacher at
12 the Department of Corrections, Miguel reads below the sixth grade level and has difficulty
13 understanding oral information provided to him.⁵² This is consistent with the observations of
14 family members, who have noted that Miguel generally has difficulty understanding things.⁵³
15 None of this is surprising, given that Miguel grew up in a house where his mother did not speak
16 English and he never knew his dad. Miguel was living on the streets by the time he was 14 years
17 old.⁵⁴ Given Miguel's background, extra care was needed to ensure Miguel understood the
18 strength of the evidence against him and the nature of the State's offer. But that is not what
19 occurred.

20 With the exception of a short meeting in the Law Library after Miguel bailed out of

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22 ⁴⁹ *State v. James*, 48 Wn. App. 353, 362 (1987).

⁵⁰ *In re Discipline of Longarce*, 155 Wn.2d 723, 738 (2005).

⁵¹ *Crawford*, 159 Wn.2d at 97-99.

⁵² Dixon Declaration at 2; Albarran Declaration at 2

⁵³ Flores Declaration and King Declaration at 2

⁵⁴ Flores Declaration at 2

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3 custody, all of the attorney client meetings between Miguel and Mr. Kurtz occurred at a
4 Starbucks. Given the nature of the charges, Miguel tried to keep his voice down so he would not
5 be heard.⁵⁵ These were all short meetings, rarely lasting more than 20 minutes. Mr. Kurtz never
6 went over the police report in any detail but simply summarized its contents. Mr. Kurtz would
7 just talk in generalities about he was going to attack the evidence.⁵⁶

8 From the Starbucks meetings, Miguel remembers Mr. Kurtz telling him that he could
9 plead guilty. But Miguel's recollection is that the State was asking for a lot of time, something
10 like 5 to 10 years.⁵⁷ Miguel said he did not want to plead guilty, and Mr. Kurtz never advised
11 Miguel to plead guilty.⁵⁸ Instead, he kept telling Miguel that it was his choice, and would briefly
12 describe his intent to attack the DNA evidence and Denise's credibility at trial. Although Miguel
13 does not recall seeing it, he has since learned that Mr. Kurtz mailed the State's offer to Miguel's
14 mother's house, where Miguel was staying following his arrest.⁵⁹

15 During this time, Miguel asked Mr. Kurtz whether their meeting could be at his law
16 office instead of a coffee shop. Mr. Kurtz replied it was not necessary to change locations, and in
17 any event, his Battle Ground office was too far away. Miguel assured him it was not too far, and
18 that he had children in Battle Ground. Mr. Kurtz said it was just better to keep meeting at
19 Starbucks.⁶⁰ Given the public location, discussions about the facts in the case were limited. This
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22 ⁵⁵ Albarran Declaration at 2

⁵⁶ Albarran Declaration at 2

⁵⁷ Albarran Declaration at 3

⁵⁸ Albarran Declaration at 2-3

⁵⁹ Albarran Declaration at 3

⁶⁰ Albarran Declaration at 2

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3 also meant that Mr. Kurtz did not assist Miguel in preparing to testify in court.⁶¹

4 It was not until after conviction that Miguel learned the judge had no discretion as to the
5 minimum sentence of 25 years. He was under the impression his attorney and family could ask
6 the judge for a shorter sentence. The failure to convey this crucial information constitutes a
7 deficient performance. As the federal circuit court in *Teague v. Scott* explained:

8 Failing to properly advise the defendant of the maximum sentence that he could
9 receive falls below the objective standard required by *Strickland*. When the
10 defendant lacks a full understanding of the risks of going to trial, he is unable to
11 make an intelligent choice of whether to accept a plea or take his chances in
12 court.⁶²

13 Likewise, in *Alvernaz v. Ratelle*, a federal district court in California found ineffective assistance
14 of counsel where defense counsel understated the possible sentencing consequences of
15 proceeding to trial and the defendant consequently rejected the plea offer.⁶³ Similarly, here the
16 failure to apprise Miguel that he was facing a mandatory 25-year sentence constitutes ineffective
17 assistance of counsel.

18 c. Prejudice

19 As described above, the key question in establishing prejudice is whether the defendant
20 would have pled guilty in the absence of the ineffective assistance of counsel. The State may
21 argue that because Miguel was adamant as to his innocence, it is unlikely he would have pled
22 guilty had he been properly advised. Any such argument should be rejected. As a federal circuit
23 court in *Pham v. United States* explained, “where the disparity in potential sentences is great, a

24 ⁶¹ Albarra Declaration at 3

⁶² *Teague v. Scott*, 60 F.3d 1167, 1171 (5th Cir. 1995).

⁶³ *Alvernaz v. Ratelle*, 831 F.Supp. 790 (S.D.Cal. 2000).

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3 finder of fact may infer that defendants who profess their innocence still will consider a plea.”⁶⁴
4 It is beyond dispute that the disparity between 15 months in prison and a minimum of 300
5 months in prison is tremendous.

6 Nor can the State rely upon the fact that Miguel thought he had a strong case. As an
7 initial matter, the only reason he believed he had a particularly strong case was because his
8 attorney failed to adequately apprise Miguel of his situation. Moreover, a belief in one’s
9 innocence will often give way to practicality when a defendant fully understands the risks of
10 going forward. The court in *Magana v. Hofbauer*, a second circuit case, addressed a similar
11 situation.⁶⁵ There, the defendant had turned down a plea, stating that he thought he had some
12 good issues that would weigh in his favor at trial.⁶⁶ The trial court relied upon this statement to
13 conclude that the defendant would not have pled guilty, even if properly advised. The appellate
14 court disagreed, finding the statement did not undermine Magana’s testimony that he would have
15 pled guilty had he known of the longer sentence.⁶⁷ Rather, reasoned the appellate court, Mr.
16 Magana’s reasons for rejecting the plea merely showed he had assessed the relative strengths and
17 weaknesses of his case.⁶⁸ Similarly, here Miguel believed he had a strong case. But under
18 *Magana*, that does not undermine Miguel’s declaration that he would have accepted the plea had
19 he been properly advised.

20 As *Magana* explained, *Strickland v. Washington* does not require certainty or even a
21 preponderance of the evidence that the outcome would have been different with effective

22 ⁶⁴ *Pham v. United States*, 317 F.3d 178, 182-183 (2nd Cir. 2003).

⁶⁵ *Magana v. Hofbauer*, 263 F.3d 542, 552 (2001).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

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3 assistance of counsel; it requires only 'reasonable probability' that the outcome would have been
4 different.⁶⁹ Here, there is at least a reasonable probability that Miguel would have pled guilty to
5 this reduced charge but for his counsel's failings.

6 **d. Remedy**

7 As the Ninth Circuit in *Blaylock* explained, "when ineffective assistance has been found,
8 the proper remedy is to 'put the defendant back in a position he would have been in if the Sixth
9 Amendment violation had not occurred.'"⁷⁰

10 Thus, where, as here, the defendant was deprived of the opportunity to accept a
11 plea offer, putting him in the position he was in prior to the Sixth Amendment
violation ordinarily will involve reinstating the original offer.⁷¹

12 Applying *Blaylock* here, Miguel would not have pled guilty had he been properly advised as to
13 the possible life sentence he would receive. Accordingly, the plea offer should be reinstated and
14 Miguel should be allowed to plead guilty to the charge of communicating with a minor for
15 immoral purposes.

16 2. MR. ALBARRAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL
17 WHEN HIS ATTORNEY OPENED THE DOOR TO PREVIOUSLY
EXCLUDED EVIDENCE AND ELICITED DAMAGING OPINION
18 TESTIMONY FROM THE LEAD DETECTIVE.

19 The defense moved to suppress prior arrests for burglary (1998), taking a motor vehicle
20 without the owner's consent (1999), and a drive by shooting (2000).⁷² Defense counsel argued
21 that the arrest information was inaccurate, and that none of the alleged arrests resulted in charges
being filed. The State averred that it did not intend to introduce Miguel's arrest history. The State

22 ⁶⁹ *Id.* at 550.

23 ⁷⁰ *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994)

24 ⁷¹ *Id.* at 1469.

25 ⁷² VRP 117.

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3 noted there were jail calls in which Miguel mentioned criminal history, but “if we were to use
4 those jail calls, we would probably redact those portions.”⁷³ The court directed the State to
5 instruct its officer not to mention the criminal history.⁷⁴

6 When defense counsel cross-examined the detective, however, he inexplicably asked:

7 Q: As part of your investigation prior to arresting him, did you look into his
8 criminal background at all?

9 A: I attempted to, yes.

10 Q: And were you looking for anything specific relative to sexual assault
11 convictions or anything of that nature.”⁷⁵

12 At this point the prosecutor objected, “because I believe he’s opened a door (inaudible) down
13 that path.” The court sustained the objection.⁷⁶ The prosecutor did not ask any follow up
14 questions, waiting instead for Miguel to take the stand.

15 During Miguel’s direct examination, defense counsel asked about whether he had any
16 prior felony convictions, to which Miguel said no.⁷⁷ After Miguel testified, the prosecutor began
17 her cross-examination by asking him if he had ever been in trouble before. When he said he had
18 never pled guilty for anything she asked Miguel about prior arrests. There was no objection.
19 Miguel had to explain that it was a case of mistaken identity.⁷⁸ Making matters worse, defense
20 counsel asked Miguel a few more questions about the arrest on redirect. Miguel answered, “The
21 police officer who arrested me said, that I looked like the suspect. So after they found the

22 ⁷³ VRP 118.

⁷⁴ *Id.*

⁷⁵ VRP 324.

⁷⁶ VRP 324.

⁷⁷ VRP 339

⁷⁸ VRP 363.

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3 suspect, they let me go. They questioned me and they let me go and told me it was a mistaken
4 identity.” Defense counsel asked if the police apologized and Miguel responded, “Oh, yes, they
5 did.”⁷⁹

6 The prosecutor responded with the following:

7 Q: Do you recall talking to your sister in the jail calls and mentioning that
8 you were afraid you were going to get arrested on the stuff?

9 A: Yes, I do recall that.

10 Q: Okay, so if they told you that were exonerated, that it was false identity,
11 why would you tell your sister in the last few months that you were afraid
12 that they were going to rearrest you on the California stuff?

13 A: Because the detective had brought – when he got me in his car, he had told
14 me, oh we got prior arrests right here for shooting, burglary. I’ve never
15 done anything like that. So why will I be scared of it? I’ve never been
16 convicted of nothing. I’ve never been in trouble in my life.⁸⁰

17 Miguel added on redirect that he was afraid the police were going to try to trump something up
18 against him.⁸¹

19 Opening the door to these prior arrests stripped away the presumption of innocence. The
20 violent nature of the offenses made them all the more memorable for the jury. There was no
21 rationale defense tactic behind asking the officer about running a check on Miguel’s criminal
22 history. A rational defense attorney would have understood that this question would open a door
23 to undesirable evidence.

24 ⁷⁹ VRP 367.

⁸⁰ VRP 367-68.

⁸¹ VRP 368.

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3 Miguel was woefully unprepared to face the prosecutor's questions on the witness stand.
4 His attorney had not spent any time preparing him for his testimony. As a result, Miguel offered
5 conflicting and confusing testimony, which further damaged his case in the eyes of the jury.

6 That the prosecutor may have engaged in misconduct in asking these questions does not
7 relieve defense counsel of responsibility for what transpired. The prosecutor should have
8 inquired of the court before violating the motion in limine to exclude prior arrests. The court
9 could have then decided whether to allow further inquiry. But even assuming the prosecutor
10 engaged in misconduct, defense counsel should have objected as soon as the prosecutor began
11 this line of questioning about prior arrests. The failure to object to this misconduct is yet another
12 instance of defense counsel falling short of his professional responsibility.

13 Unfortunately, this was not the only instance of defense counsel opening doors that
14 should have remained shut. As the State concluded its direct examination of the detective, the
15 prosecutor asked what additional actions the detective took. The detective stated that after he
16 booked Miguel into jail, there were jail phone calls that he reviewed. "That's pretty routine in my
17 investigations."⁸² The prosecutor did not ask any questions about the phone calls.

18 In cross-examination, defense counsel asked whether there were any confessions. The
19 detective responded, "There were no direct confessions made, no."⁸³

20 Upon questions by defense counsel as to indirect confessions, the detective said, "Well,
21 there were things that I felt would support the State's case, but no direct 'I did this' confessions."
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23 ⁸² VRP 313

24 ⁸³ VRP 325.

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3 When asked for more details, the detective stated, "Well, there were statements made,
4 where I took it that he was concerned that DNA evidence had been collected." ⁸⁴ Asked to
5 describe:

6 They talked about some things. They had talked about his current lawyer. And
7 then Trisha had talked about how the case was all just, quote, accusations. Miguel
8 switched from English to Spanish. They started to have some sort of conversation
9 there. . . . I don't speak Spanish, so I don't know what was said, Trisha responded,
10 and then Miguel responded, "Like—like DNA." And he sounded to me like he
11 was worried about something. ⁸⁵

12 It is beyond mind-boggling that defense counsel believed this line of questioning could
13 help his client. By asking the detective what statements he believed supported the State's case,
14 defense counsel not only permitted the detective to highlight certain evidence, but to share his
15 personal opinion that Miguel sounded worried about the DNA evidence that was collected in this
16 case.

17 Personal opinions offered by police officers carry an "aura of reliability."⁸⁶ Here, based
18 on his years of experience in law enforcement, the detective characterized Miguel's voice as
19 "worried" and "concerned" about the DNA. This gave the impression that even Miguel knew the
20 DNA was going to be a match. This deficient performance created an unfair trial.

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**3. MR. ALBARRAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL
WHEN HIS ATTORNEY FAILED TO LAY A PROPER FOUNDATION FOR
ADMISSION OF THE VIBRATOR.**

The defense wished to present evidence of the sex toy as an alternative source of Miguel's DNA. The State expert had already acknowledged that DNA can transfer from one

⁸⁴ VRP 325.

⁸⁵ VRP 326.

⁸⁶ *State v. Demery*, 144 Wn.2d 753, 765 (2001)

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3 inanimate object to another, and that it would be difficult or impossible to know if the DNA had
4 rubbed off from an inanimate object.⁸⁷ Mr. Kurtz sought to lay the foundation through Miguel.

5 Out of the presence of the jury, Miguel testified that the sex toy was located in a
6 nightstand drawer, and was used regularly by both Miguel and Denise.⁸⁸ Denise phoned Miguel
7 one day to say the toy and lubricant were missing. T.P. was the only person in the house at the
8 time. Denise had previously told Miguel that she allowed T.P. to use the sex toy.⁸⁹ Miguel
9 believed the police or Denise most likely used the sex toy to spread his DNA.⁹⁰

10 The State argued that what the mother said was hearsay and therefore inadmissible. The
11 defense did not present any argument. The court found for the State and the mother's statements
12 were excluded. The court explained, "People are not generally permitted to testify here in court
13 as to what they claim somebody else told them . . . what you've suggested is hearsay and
14 opinion, which again, is not something that is admissible into evidence."⁹¹

15 Instead of explaining that he was not seeking to admit Denise's statement but an
16 alternative source of the DNA, Mr. Kurtz simply said, "I understand."⁹² Defense counsel never
17 asked the court to admit the vibrator independent of the hearsay statement.

18 On appeal, the appellate court noted that the evidence was relevant because it provided
19 "an alternative explanation" for the DNA.⁹³ The court continued, "The next inquiry is whether
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21 ⁸⁷ VRP 227-290

22 ⁸⁸ VRP 352

⁸⁹ VRP 353

⁹⁰ VRP 353-54

⁹¹ VRP 355

⁹² VRP 352-355.

⁹³ Slip Op. at 15

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3 the evidence, *as the defense sought to have it admitted*, was admissible.”⁹⁴ The court agreed with
4 the State that the proffered evidence was hearsay:

5 The trial court ruled that the evidence Albarran proffered constituted inadmissible
6 hearsay. Although the evidence arguably could have been admitted in another
7 fashion, no other mode was pursued by Albarran. Here, the defense tried to lay
8 the foundation on inadmissible hearsay. The trial court ruled on the admissibility
9 of the evidence as it was presented, not on the admissibility of evidence that could
10 have been presented in a different way.⁹⁵

11 The appellate court suggested one way in which the evidence would have been
12 admissible. If defense counsel had questioned Denise about her statement relating to the vibrator,
13 then “Miguel might have been able to challenge her answer in his testimony, per ER 607.”⁹⁶
14 Defense counsel never questioned Denise on this issue, however, and that means of admitting the
15 evidence was lost.

16 In addition to the method suggested by the appellate court, the defense could have simply
17 focused on admitting the vibrator without the statements. As the court of appeals explained, “The
18 potential for the vibrator to be an alternative means of transferring Albarran’s DNA onto T.P.’s
19 thigh and underwear makes any such evidence relevant.”⁹⁷ The defense theory was that Denise
20 was out to get him. The fact that she had Miguel’s DNA at her disposal made the evidence
21 relevant and necessary. Only if the State’s need to exclude the evidence is “compelling in nature”
22 may the trial court exclude even minimally relevant evidence.⁹⁸ In this case there was no
23 compelling need and the alternative source of DNA was certainly more than minimally relevant.
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25 ⁹⁴ Slip Op. at 15

⁹⁵ Slip Op. at 16

⁹⁶ Slip Op. at 16, fn. 8

⁹⁷ Slip Op. at 15

⁹⁸ *State v. Jones*, 168 Wn.2d 713, 723 (2010)

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3 Defense counsel's failure to advance this argument, or to introduce the evidence through ER 607,
4 constitutes a deficient performance.

5 As to prejudice, without this vibrator evidence, Miguel was not able to present his
6 defense. In closing, defense counsel had little to offer the jury to explain the DNA evidence. He
7 told the jury, "I don't know how my semen and my saliva got on her, but I didn't put it there."
8 RP 439. The prosecutor in rebuttal hammered away at the DNA evidence, reminding the jury
9 that the possibility of the DNA belonging to someone else was "one in 780 quadrillion." RP 452.

10 There is more than a reasonable probability that failure to lay the necessary foundation
11 for the vibrator evidence impacted the jury verdict.

12 4. PROSECUTORIAL MISCONDUCT AND THE FAILURE TO OBJECT
13 DEPRIVED MIGUEL OF A FAIR TRIAL.

14 A prosecutor has a special duty in trial to act impartially in the interest of justice and not
15 as a "heated partisan." *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Her "devotion
16 to duty is not measured, like the prowess of the savage, by the number of their victims." *State v.*
17 *Montgomery*, 56 Wash. 443, 447-48, 105 P. 1035 (1909). Rather, as a quasi-judicial officer, a
18 prosecutor must seek verdicts free of prejudice and based on sound reason and admissible
19 evidence. *In re Glassmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In falling short of this
20 standard, the prosecutor not only deprives the defendant of a fair trial, but also denigrates the
21 integrity of the prosecutor's role. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

22 On appeal or in a motion for a new trial, the defendant carries the burden of establishing
23 that the prosecutor's actions were both improper and prejudicial when viewed "in the context of
24 the record and all of the circumstances at trial." *Glassmann*, 175 Wn.2d at 704. In establishing

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3 prejudice, the appellant must establish a “substantial likelihood” that the misconduct affected the
4 jury’s verdict. *Id.*

5 Proof beyond a reasonable doubt is the bedrock upon which our justice system stands.
6 Statements that trivialize the role of this concept undermine a defendant’s due process rights and
7 are considered improper.⁹⁹ Here, the prosecutor portrayed this instruction as a last refuge for
8 guilty defendants. She told jurors that the reasonable doubt instruction “is one that your attention
9 will be drawn to repeatedly by the defense. Because when all the evidence is out there, when you
10 have a very simple case such as this one, that’s all they can hammer on is reasonable doubt.”¹⁰⁰

11 During trial, the prosecutor argued, and the judge agreed, that evidence Denise assaulted
12 Miguel due to jealousy was not relevant to whether she fabricated this accusation. Miguel’s
13 testimony regarding Denise’s behavior was cut off when the prosecutor objected. The prosecutor
14 then, without objection from the defense, put on a CPS worker to testify about Miguel’s previous
15 statement that he and Denise had never experienced domestic violence. In closing, the prosecutor
16 reminded the jurors of the CPS worker’s testimony, telling them Miguel “lied” when he said
17 Denise had hit him.¹⁰¹ She also called Miguel arrogant,¹⁰² and a moment later said, “Child
18 molesters are arrogant.”¹⁰³ Defense counsel finally objected to this last statement as improper
19 profile evidence.

20 The prosecutor’s argument about the prior assaults was improper and prejudicial for at
21 least two reasons. First, it was fundamentally unfair to prevent Miguel from testifying about

22 ⁹⁹ *State v. Lindsay*, 180 Wn.2d 423, 435-36 (2014).

¹⁰⁰ VRP 413

¹⁰¹ VRP 462

¹⁰² VRP 451

¹⁰³ VRP 452

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3 Denise's prior assaults, and then call him a liar because he had not provided evidence to support
4 his assertion that she had assaulted him. Despite this mischaracterization, defense counsel sat
5 silent.

6 Additionally, in calling Miguel a liar and arrogant, the prosecutor was clearly expressing
7 her personal opinion regarding Miguel. Such personal characterizations are not only improper,¹⁰⁴
8 but are highly prejudicial because of the prestige associated with the prosecutor's office.¹⁰⁵
9 Again, there was no objection from defense counsel.

10 There was also no objection when the prosecutor argued about Miguel's audacity in
11 claiming he was not responsible for the DNA evidence found on T.P:

12 You wonder why we're at trial today? Even with DNA evidence, he thinks he can tell
13 you, I don't know; I don't know how my DNA got there. How many times do you think
14 he used that?¹⁰⁶

15 But Miguel did have an explanation for the DNA, the court had simply not allowed him to
16 present him. The prosecutor knew this, but proceeded with the mischaracterization designed to
17 put Miguel in a bad light.

18 The prosecutor also suggested to the jury that there might be additional evidence which
19 they had not heard. Miguel had testified that he did not have any prior felony convictions.
20 Defense counsel reminded the jury of that in closing, and told them that if this were not true, the
21 State would have said something. The prosecutor responded:

22 And he also raises this—these crimes, these other crimes that the defendant was
23 not found guilty or—the defendant had no criminal history. He presupposes that

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¹⁰⁴ *State v. Reed*, 102 Wn.2d 140, 143-45 (1984).

¹⁰⁵ *In re Glassmann*, 175 Wn.2d 696, 706 (2012), (citing to ABA Standards for Criminal Justice std. 3-5.8).

¹⁰⁶ VRP 451.

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3 we would even be able to bring that and put that in front of you if he did. And
that's nothing for you to consider.¹⁰⁷

4 In making this argument to the jury, the prosecutor intimated that Miguel had prior
5 convictions that the State was not allowed to present. Defense counsel was speaking from the
6 evidence—Miguel's testimony—and the prosecutor went beyond, suggesting that telling
7 evidence was being withheld from the jury. This argument was particularly damaging after the
8 prosecutor had earlier elicited Miguel's prior arrest, which purportedly involved a burglary and
9 firearms. Again, there was no objection: Our Supreme Court has recognized jurors will give
10 extra weight to the prosecutor's arguments because the jury will believe that the prosecutor has
11 special knowledge because of the "fact-finding facilities presumably available to the office."¹⁰⁸

12 There was no reasonable defense strategy in failing to object the misconduct. To the
13 extent that the above prejudicial misconduct could have been cured by a timely objection,
14 defense counsel was ineffective in failing to do so. Thus it matters little whether this is treated as
15 flagrant misconduct that can be raised for the first time on appeal or ineffective assistance of
16 counsel, the impact remains the same. Miguel was deprived of a fair trial.

17 4. RELIEF IS APPROPRIATE UNDER CrR 7.8.

18 A collateral attack must be brought within one year of the issuance of the mandate. In
19 this case, the mandate was issued on December 10, 2016, and this motion for a new trial was
20 filed on October 8, 2017. This motion has been timely filed.

21 Ineffective assistance of counsel is a recognized basis for setting aside a conviction under
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23 ¹⁰⁷ VRP 453.

24 ¹⁰⁸ *Id.*

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3 CrR 7.8(b). For instance, in *State v. Martinez*, the court of appeals reversed the trial court's
4 denial of motion to set aside a conviction, finding ineffective assistance in failing to advise the
5 defendant of sentencing consequences.¹⁰⁹

6 Criminal Rule 7.8(c) dictates that the Court should issue an order to show cause to the
7 State once the Court concludes that a factual hearing is required once Miguel has made a
8 substantial showing that he is entitled to relief. He has done so in this case.

9 CONCLUSION

10 Miguel Albarran was poorly represented in this matter. His attorney met him at
11 Starbucks, virtually assuring no meaningful, private conversation would occur. Given this
12 environment and Miguel's difficulties, it is apparent that his attorney did not substantially assist
13 his client in deciding whether to plead guilty. Had his attorney taken the time to ensure that
14 Miguel understood the offer, as well as the risks of going forward, this case would not have gone
15 to trial. The remedy for this Sixth Amendment violation is to direct the State to make it's pretrial
16 plea offer available to Miguel and his new counsel.

17 In addition to the ineffective assistance of counsel at the pretrial stage, Mr. Kurtz
18 performed ineffectively at trial. This included opening the door to prior arrests, failing to
19 prepare his client to testify, not objecting to misconduct by the prosecutor, and eliciting
20 damaging opinion testimony from the detective. The most damaging deficiency, however, was
21 when counsel failed to lay a proper foundation for the vibrator evidence. This prevented the
22 defense from presenting an alternative explanation to the DNA evidence. This was a costly

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24 ¹⁰⁹ 161 Wn. App. 436, 442, 253 P.3d 445 (2011).

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3 mistake by counsel. For the reasons set forth above, Miguel Albarran asks this Court to set
4 aside his conviction.

5 s/ James R. Dixon
6 State Bar Number 18014
7 Dixon & Cannon, Ltd.
8 601 Union Street, Suite 3230
9 Seattle, WA 98104
10 Telephone: (206) 957-2247
11 Fax: (206) 957-2250
12 E-mail: james@dixoncannon.com
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF CLARK

STATE OF WASHINGTON

No. 13-1-01301-1

Plaintiff/Petitioner

VS.

MIGUEL ALBARRAN

DECLARATION
PURSUANT TO
GR 17(a)(2)

Defendant/Respondent

I declare as follows:

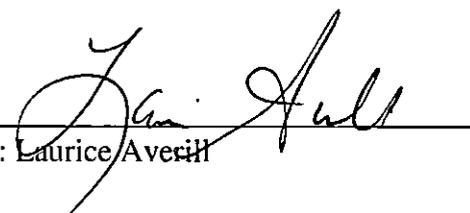
1. I am the party who received the foregoing email transmission for filing.
2. My address is: 310 SW 4th Avenue, Suite 440 Portland, Oregon 97204.
3. My phone number is 503-727-3100.
4. I have examined the foregoing document, determined that it consists of pgs 29 pages, including the signature page and this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated:, at Portland, Oregon.

Signature: _____

Print Name: Laurice Averill



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CLARK COUNTY

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendants.

No. 13-1-01301-1

Declaration of Olga Flores

I, Olga Flores, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. My name is Olga Flores. I am over 18 years of age and I make this declaration based on personal knowledge and my observations.
2. Miguel Albarran is my cousin; although, we grew up more like siblings as we are so close in age. We lived in Pomona California and always lived either in the

Olga Flores Declaration

PAGE 1 OF 3

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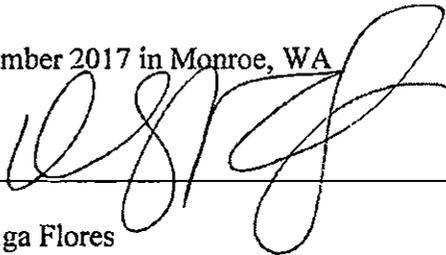
same house or apartment complex. Our parents had the usual struggles due to their inability to speak English and had to settle for minimum wage jobs forcing them to be gone all day and be absent for normal parenting duties most other family is accustomed to. Miguel never met his father. My dad provided the only male support in Miguel's life.

3. Miguel has always struggled in school, and was in Educational Support classes up until the time he dropped out. His mom had limited abilities to help, and once she found a new boyfriend, she had even less time to provided support for Miguel. Miguel moved out of the house and onto the street when he was 14 years old.
4. Around this same time, my dad became concerned about the gangs and the bad environment in Pomona. My family moved up to Vancouver Washington, leaving Miguel to fend for himself with his mom.
5. Miguel was adrift and ended up associating with people who were a bad influence. My dad stepped in to help. Seeing how Miguel was struggling to find a job and the bad environment down in Pomona, my dad decided to invite Miguel to move to Vancouver Washington in hopes he could find a better living, new atmosphere and a stable job. Miguel moved to Vancouver Washington with his two little boys and his then girlfriend, settling in Vancouver. The transaction worked very well for Miguel. Miguel has been a hard worker and a good influence for his children.

6. Miguel does not always seem to process information as quickly as some other people. Sometimes it is obvious he does not understand , and then I explain things to him a couple of times so that it makes sense.
7. When I heard that Miguel was meeting his attorney in a coffee shop, I was shocked. Miguel was not happy about it. I told Miguel that these charges were really serious and that he needed to make his attorney meet him somewhere else. Miguel does not like to make waves, and he did not force the issue with his attorney.

DATED this 7th day of December 2017 in Monroe, WA

Olga Flores



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF CLARK

STATE OF WASHINGTON

No. 13-1-01301-1

Plaintiff/Petitioner

VS.

MIGUEL ALBARRAN

DECLARATION
PURSUANT TO
GR 17(a)(2)

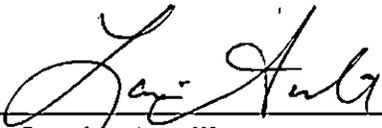
Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 310 SW 4th Avenue, Suite 440 Portland, Oregon 97204.
3. My phone number is 503-727-3100.
4. I have examined the foregoing document, determined that it consists of pgs 4 pages, including the signature page and this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated:, at Portland, Oregon.

Signature: 
Print Name: Laurice Averill

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SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendants.

No. 13-1-01301-1

Declaration of Tresha King

I, Tresha King, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. My name is Tresha King. I am over 18 years of age and I make this declaration based on personal knowledge and my observations.
2. I am Miguel Albarran's aunt and have known him since he was eight years old. At the time of these allegations against Miguel, I was living in Washington. Currently, I live in Pomona California.
3. From my time with Miguel, I know that he struggled in school before dropping

Tresha King Declaration

PAGE 1 OF 2

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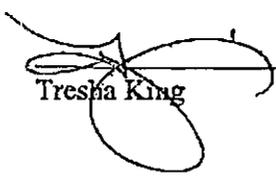
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out. I know that he has a hard time reading, and that he also often needs things to be repeated a few times before he understands. He is pretty open about this, and will usually admit when he does not follow what someone says to him.

4. Prior to Denise calling the police and making these sex abuse allegations against Miguel, he had sought out my advice about T.P. and the vibrator. He told me that he uses a vibrator with Denise, and that Denise told him that TP has been using the vibrator. He told us that did not seem right to him, but he does not know a lot about raising girls, so he decided to ask me and his mom. We didn't think it sounded right either.

5. After these allegations were made, Miguel was very concerned about not wanting to say anything that would embarrass Denise or TP. I told him that he has stop thinking that way, and he needs to think about himself and the situation they have put him in.

DATED this 8 day of December 2017 in Pomona, CA


Tresha King

Tresha King Declaration
PAGE 2 OF 2

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF CLARK

STATE OF WASHINGTON

No. 13-1-01301-1

Plaintiff/Petitioner

VS.

MIGUEL ALBARRAN

DECLARATION
PURSUANT TO
GR 17(a)(2)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 310 SW 4th Avenue, Suite 440 Portland, Oregon 97204.
3. My phone number is 503-727-3100.
4. I have examined the foregoing document, determined that it consists of pgs 3 pages, including the signature page and this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated:, at Portland, Oregon.

Signature: _____

Print Name: Laurice Averill



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CLARK COUNTY

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SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendants.

No. 13-1-01301-1

**Declaration of James Dixon in Support of
CrR 7.8 Motion**

I, James R. Dixon, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. My name is James Dixon. I am over 18 years of age and I make this declaration based on personal knowledge and my observations.
2. I represent Miguel Albarran in this matter.
3. Mr. Albarran is currently incarcerated at the Twin River's Unit at the Monroe Correction Complex, where he has been enrolled in the GED program for the last. I have twice spoken with his teacher, Mr. Jakoski regarding his observations and

James Dixon Declaration

PAGE 1 OF 2

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assessment of Mr. Albarran. Based on our conversations, I prepared a declaration as to Mr. Albarran's reading and comprehension difficulties. He reviewed the declaration and indicated that he would be sending it back to me.

4. Soon afterwards Mr. Jakoski advised me that there is a DOC release form that needs to be filed out by Mr. Albarran before he can send any information regarding Mr. Albarran. Because school is on a short break, he will not be able to send me the declaration for another couple of weeks.
5. I have attached Mr. Jakoski currently unsigned declaration to my declaration and will submit Mr. Jakoski's signed declaration once all of the necessary releases have been signed and processed through Department of Corrections.

DATED this 8th day of December 2017 in Seattle, WA

s/ James R. Dixon
State Bar Number 18014
Dixon & Cannon, Ltd.
601 Union Street, Suite 3230
Seattle, WA 98104
Telephone: (206) 957-2247
Fax: (206) 957-2250
E-mail: james@dixoncannon.com

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SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendants.

No. 13-1-01301-1

Declaration of John Jakoski

I, John Jakoski, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. My name is John Jakoski and I teach the GED program at Twin Rivers Unit at the Monroe Correctional Center. Miguel Albarran has been one of my students for the last four quarters.
2. After a year in the class, Mr. Albarran is still reading a little below the sixth-grade level. He also demonstrates difficulty with oral instruction, so that instructions and information often need to be repeated to him multiple times.

Jack Jakoski Declaration

PAGE 1 OF 2

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Seattle, WA 98101
(206) 957-2247*

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3. Mr. Albarran demonstrates good effort in class and appears very sincere in his desire to learn. Despite that effort, he has not been ready to take and pass any of the tests in the class.

DATED this _____ day of December 2017 in Monroe, WA

Jack Jakoski

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF CLARK

STATE OF WASHINGTON

No. 13-1-01301-1

Plaintiff/Petitioner

VS.

MIGUEL ALBARRAN

DECLARATION
PURSUANT TO
GR 17(a)(2)

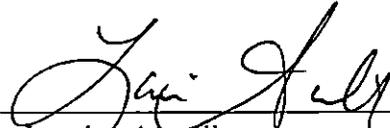
Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 310 SW 4th Avenue, Suite 440 Portland, Oregon 97204.
3. My phone number is 503-727-3100.
4. I have examined the foregoing document, determined that it consists of pgs 5 pages, including the signature page and this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated:, at Portland, Oregon.

Signature: 
Print Name: Lauriee Averill

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2017 DEC -8 PM 2:26

SCOTT G. WEBER, CLERK
CLARK COUNTY

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendants.

No. 13-1-01301-1

Declaration of Miguel Albarran

I, Miguel Albarran, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. My name is Miguel Albarran. I am 34 years old and competent to testify. The statements contained within this declaration are based on my personal knowledge and observations.
2. I was the defendant in this case. Except for a brief period of time following my arrest, I was out of custody until the time of my conviction
3. David Kurtz was the attorney assigned to represent me at the trial. During the entire

Miguel Albarran Declaration

PAGE 1 OF 4

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time I was awaiting trial, I never met Mr. Kurtz at his office. Each time we got together, it was at a Starbucks. Because of the crime that I was charged with, I was very uncomfortable talking about the case at Starbucks. I tried to keep my voice down.

4. I asked about meeting Mr. Kurtz at his office, but he told me it was too far away in Battle Ground. I informed him that I had children living there and that Battle Ground was not a problem for me. Mr. Kurtz told me it was just easier and better for everyone if we kept meeting at Starbucks. Because the only time I have met an attorney before this was when I was in juvenile detention for a short while, I didn't know that I could insist on meeting him at an office. I also did not want to make him angry at me.

5. I think that we met at Starbuck three or four times. He also called me on the phone a few times. None of our meetings lasted more than 20 minutes.

6. Mr. Kurtz summarized the police report for me, but he never read it to me or went over the evidence in very much detail. During this time, Mr. Kurtz never told me that he thought I should plead guilty. He just kept telling me that it was my decision. He also told me all of the things that he was going to argue.

7. I did not do very well in school. I dropped out around ninth grade. I am working on getting my GED here at Twin Rivers Unit here at the Monroe Correction Center, but it is slow going for me. My teacher told me that I am reading at about a 5th to 6th grade level and that I am not ready to take any tests.

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- 8. I was later told, after my conviction, that I could have pled guilty and spent just a little more than a year in jail. This is news to me. I thought that I would receive up to 15 years if I pled guilty. I thought the offer was crazy because it seemed that I could end up doing even more time than if they convicted me at trial. If I knew that I would be out in about a year. I would have been upset at pleading guilty to something I didn't do, but I would have taken the deal. My mom is getting old and having health problems. No way would I risk not being able to take care of her or to be with her when she is ready to die. I also wanted to be around my three sons.
- 9. My new attorney has told me that my attorney mailed me a letter with an offer of 15 to 20 months. I don't remember seeing that letter. It is possible that it arrived and I did not read it.
- 10. A little before the start of trial, he started saying things like "oh man, it doesn't look good" and started saying that we were going to lose.
- 11. Mr. Kurtz never helped me get ready to testify in court. The only thing he did was right before I took the stand. Mr. Kurtz told me that I needed to show my emotions at being unfairly charged. He said to give the jury an Oscar winning performance.
- 12. When the prosecutor started asking me questions about my prior arrests and about my telephone calls in the jail, it all kind of caught me by surprise and I was having a hard time explaining myself.
- 13. I had told Mr. Kurtz about my sex life with Denise, and how we had used a vibrator together, and that the vibrator was kept in a drawer in our bedroom. I also told him

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that I had learned from Denise that Taylor had used the vibrator.

14. I did not have experience raising girls, and I talked to my mom and Aunt Trish about the vibrator and what Denise had told me. I did all of this before Denise ever made any claim against me. When I told Mr. Kurtz about all of this, he agreed that this was important evidence for us to use.

15. I latter learned that Mr. Kurtz did not contact any of those people. He also did not contact Daisy Domennqus and Cynthia Wyatt, whom I had told him about much earlier.

16. At trial, the prosecutor gave her opening argument to the jury. I thought my attorney was going to get up and give our side of the story, and to explain how Denise was just trying to get even with me because I had been cheating on her with other women. I was upset when my attorney didn't stand up and give an opening.

17. It was only after I was convicted that I learned the judge had to give me 25 years for the second-degree rape and that the judge could not give me less even if the judge wanted to.

DATED this 6 day of December 2017 in Monroe, WA


Miguel Albarrian

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF CLARK

STATE OF WASHINGTON

No. 13-1-01301-1

Plaintiff/Petitioner

VS.

MIGUEL ALBARRAN

DECLARATION
PURSUANT TO
GR 17(a)(2)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 310 SW 4th Avenue, Suite 440 Portland, Oregon 97204.
3. My phone number is 503-727-3100.
4. I have examined the foregoing document, determined that it consists of pgs 5 pages, including the signature page and this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated:, at Portland, Oregon.

Signature: 

Print Name: Laurice Averill

CPW

File

13-1-01301-1

FILED

DEC 12 2017

8:21 am
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

Cause No. 13-1-01301-1 Date: 12/8/17

State of Washington vs Miguel Albarra
(defendant)

A motion was filed by the defendant in the above listed case on 12/8/17
And is being forwarded to Dept # 6. Please indicate below what type of action is
to be taken regarding this motion. [Signature] Deputy Clerk.

- Assigned Department will respond with a letter to the defendant.
- The Clerk is directed to note the motion for hearing on this court's next criminal docket date _____ at 9:00 a.m. / 1:30 p.m.
- The defendant may cite this motion to the Probation Violation Docket.
- No action to be taken.
- A copy of the motion is being sent to the Probstfeldt Prosecuting Attorney for their response. per judge.

Other _____
* 30 days tracking (1-11-18)
for PA Response.

Dated this 11 of December, 2017 12.11.17
D Wade cc'd copy of
(Judge or Judicial Assistant) Docs 105, 106, 107,
108 + 109
to DPA Probst 110

E-FILED

01-18-2018, 13:45

**Scott G. Weber, Clerk
Clark County**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendant.

No. 13-1-01301-1

STATE'S RESPONSE TO DEFENDANT'S
MOTION FOR RELIEF FROM JUDGMENT
PURSUANT TO CrR 7.8

COMES NOW the State of Washington, by and through its attorney, Rachael Rogers, Senior Deputy Prosecuting Attorney, and responds to defendant's motion to withdraw his guilty plea and requests this court transfer the matter to the Court of Appeals to be addressed as a Personal Restraint Petition as the defendant has not made a substantial showing that he is entitled to relief and resolution of the matter does not require a factual hearing.

CrR 7.8 PROCEDURE

A trial court's authority to grant relief from a judgment is limited by CrR 7.8. *State v. Gomez-Florencio*, 88 Wn.App. 254, 257, 945 P.2d 228 (1997). The procedure for any motion for relief from the judgment is set forth in CrR 7.8 and case law interpreting the rule. A defendant first must file a motion, supported by an affidavit or multiple affidavits, that includes a statement State's Response to Defendant's Motion for relief from judgment pursuant to CrR 7.8

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1 of facts or errors upon which the motion is based. CrR 7.8(c)(1). The trial court then shall review
2 the motion and affidavit(s) to determine whether the defendant has made “a substantial showing
3 that he or she is entitled to relief” or whether resolution of the motion will require a factual
4 hearing. CrR 7.8(c)(2). If the trial court finds the defendant has made a “substantial showing he
5 is entitled to relief,” then the trial court shall set a time and a place for a hearing for the State to
6 show cause why relief should not be granted. CrR 7.8(c)(3). Similarly, if the trial court finds that
7 resolution of the matter requires a factual hearing, then the trial court shall set a time and place
8 for a hearing. CrR 7.8(c)(3). If the trial court finds the defendant has not made a substantial
9 showing and that no factual hearing is necessary, the court must transfer the matter to the Court
10 of Appeals. The trial court does not grant or deny a motion pursuant to CrR 7.8 unless it holds a
11 hearing after finding the defendant has made a “substantial showing” or a factual hearing is
12 required.

13 **FACTUAL AND PROCEDURAL HISTORY**

14 Miguel Albarran (hereafter ‘Albarran’) dated T.P.’s mother starting in 2010 and moved in
15 with T.P. and her mother in July 2012. On April 1, 2013, T.P.’s mother walked past T.P.’s
16 bedroom, where 13-year old T.P. was sleeping, and saw Albarran on T.P.’s bed with his face
17 near her vagina. The mother immediately began shouting at Albarran, asking him what he was
18 doing to her daughter. T.P. woke up to the shouting and had no recollection of what occurred
19 while she was sleeping. T.P.’s mother immediately called police and reported the incident; T.P.
20 underwent a sexual assault exam where swabs were collected to test for DNA evidence. The
21 State crime lab received swabs taken from T.P.’s vaginal area and thigh, as well as a pair of
22

1 underwear T.P. had been wearing at the time. DNA results showed the presence of Albarran's
2 saliva on T.P.'s inner thigh, and his saliva and semen were found on her underwear.

3 The State initially charged Albarran with one count of Child Molestation in the Second
4 Degree, but later amended the charges adding Rape in the Second Degree, Rape of a Child in the
5 Second Degree, attempts of both of those crimes, and Indecent Liberties. Prior to trial the State
6 also added the aggravating factor that the Rape in the Second Degree was committed against a
7 victim who was under the age of 15. The State offered Albarran a plea agreement to plead guilty
8 to the Child Molestation in the Second Degree charge prior to amending the information to add
9 the additional counts. Albarran rejected the plea offer and proceeded to trial. The jury convicted
10 Albarran of all counts and found all aggravators were committed. Albarran argued his
11 convictions violated double jeopardy and that the Rape of a Child in the Second Degree count
12 should prevail over the Rape in the Second Degree conviction as it was the more specific crime.
13 The State agreed the trial court should vacate a conviction due to double jeopardy, but argued the
14 Rape in the Second Degree should remain in place as under double jeopardy analysis the more
15 serious crime remains. The trial court agreed and sentenced Albarran to 25 years to life for the
16 Rape in the Second Degree conviction.

17 Albarran appealed his conviction to the Court of Appeals. The Court of Appeals reversed
18 the trial court's ruling on the general-specific argument with regards to whether the Rape in the
19 Second Degree or the Rape of a Child in the Second Degree conviction should be vacated.
20 However, the State then petitioned for review to the Supreme Court. The Supreme Court
21 accepted review and reversed the Court of Appeals, thus affirming the trial court's initial
22 sentence.

23 State's Response to Defendant's Motion for relief from judgment
pursuant to CrR 7.8

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1 Albarran now submits this CrR 7.8 motion alleging he received ineffective assistance of
2 counsel and that the prosecutor committed misconduct and that due to these issues this Court
3 should vacate his conviction and grant him a new trial. .

4 **ARGUMENT**

5 Albarran argues this Court should vacate the convictions against him in this case because
6 he received ineffective assistance of counsel and the prosecutor committed misconduct. Albarran
7 seeks an order from this Court forcing the State to reinstate an offer of settlement the defendant
8 rejected and an order vacating his convictions and requiring a new trial. Albarran has not met his
9 burden to obtain relief. He has failed to make a substantial showing that he is entitled to relief or
10 that resolution of this matter will require a factual hearing. Accordingly, this Court should
11 transfer Albarran's motion to the Court of Appeals to handle as a personal restraint petition.

12 As an initial matter, the State agrees Albarran's motion is timely. All collateral attacks,
13 including CrR 7.8 motions for relief from judgment must be filed within one year from the date
14 the judgment became final. RCW 10.73.090. A judgment is final on the later of three potential
15 dates: 1) the date the judgment is filed with the clerk of the Superior Court; 2) the date an
16 appellate court issues its mandate; or 3) the date the U.S. Supreme Court denies a petition for
17 certiorari. RCW 10.73.090(3)(a)-(c). Here, the latest of those three possible dates is the date the
18 Supreme Court issued its mandate disposing of Albarran's direct appeal on this case. The
19 Supreme Court issued the mandate on December 9, 2016. Albarran filed the instant motion for
20 relief from judgment on December 8, 2017. Therefore, Albarran filed his motion on the last day
21 of the year after the mandate was issued. Therefore, Albarran's motion is timely.

1 Albarran has not made a substantial showing that he is entitled to relief under CrR 7.8. In
2 order to succeed on a motion for relief from judgment, a defendant must show a basis for the
3 motion pursuant to CrR 7.8. CrR 7.8(b) provides:

4 On motion and upon such terms as are just, the court may relieve a party from a
5 final judgment, order, or proceeding for the following reasons:

- 6 1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in
obtaining a judgment or order;
- 7 2) Newly discovered evidence which by due diligence could not have been
discovered in time to move for a new trial under CrR 7.5;
- 8 3) Fraud (whether heretofore denominated intrinsic or extrinsic),
misrepresentation, or other misconduct of an adverse party;
- 9 4) the judgment is void; or
- 5) any other reason justifying relief from the operation of the judgment....

10 CrR 7.8(b).

11 Albarran does not specify upon which basis pursuant to CrR 7.8 he seeks relief. CrR 7.8
12 provides for relief in very limited circumstances, none of which appear to apply in Albarran's
13 case save the vague "any other reason justifying relief from the operation of the judgment" basis
14 found under subsection (b)(5) that is commonly referred to as the general "catch-all" provision of
15 CrR 7.8. Relief from a judgment pursuant to CrR 7.8(b)(5) is limited to extraordinary
16 circumstances not covered by any other section of the rule. *State v. Brand*, 120 Wn.2d 365, 369,
17 842 P.2d 470 (1992). And final judgments "may be vacated or altered only in those limited
18 circumstances where the interests of justice most urgently require." *State v. Shove*, 113 Wn.2d
19 83, 88, 776 P.2d 132 (1989). Actual ineffective assistance of counsel that prejudiced a defendant
20 would be a reason to justify relief from a judgment pursuant to CrR 7.8(b)(5). *State v. Martinez*,
21 161 Wn.App. 436, 440-41, 253 P.3d 445 (2011). But Albarran has a significant burden in
22 establishing ineffective assistance of counsel in the context of a CrR 7.8 motion and upon the

23 State's Response to Defendant's Motion for relief from judgment
pursuant to CrR 7.8

24 Page 5

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1 basis that counsel was ineffective for failing to force the defendant to take a guilty plea that was
2 good for him, especially when the defense attorney was dealing with a defendant who refused to
3 consider any plea negotiation as he was adamant in his innocence and insistent on trial.

4 To prevail on a claim of ineffective assistance of counsel, Albarran must overcome the
5 presumption of effective representation and demonstrate that his attorney's performance was
6 deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S.
7 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Klinger*, 96 Wn.App. 619, 622, 980
8 P.2d 282 (1999). Counsel is presumed effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899
9 P.2d 1251 (1995). To support his claim he received ineffective assistance of counsel surrounding
10 his decision to reject the State's offer of settlement, Albarran must show his attorney failed to
11 adequately assist him in the decision on whether to accept the State's offer of settlement, or
12 failed to provide him with sufficient information to make an informed decision on whether or not
13 to plead guilty. *State v. Holm*, 91 Wn.App. 429, 435, 957 P.2d 1278 (1998), *rev. denied*, 137
14 Wn.2d 1011, 978 P.2d 1098 (1999); *State v. James*, 48 Wn.App. 353, 362, 739 P.2d 1161
15 (1987). Furthermore, bald assertions and conclusory allegations are insufficient to support a
16 claim of ineffective assistance of counsel. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828
17 P.2d 1086 (1992). Here, there is no corroborative evidence of defense counsel's alleged
18 ineffectiveness. *See State v. Gomez Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012).

19 Defense counsel is under an ethical obligation to discuss plea negotiations with their
20 clients. *In re Personal Restraint of McCready*, 100 Wn.App. 259, 263, 996 P.2d 658 (2000)
21 (citing to *State v. James*, 48 Wn.App. 353, 362, 739 P.2d 1161 (1987)). Further, defense counsel
22 must provide their clients with sufficient information to make an informed decision on whether

1 or not to plead guilty. *Holm*, 91 Wn.App. at 435, and must “actually and substantially [assist]
2 his client in deciding whether to plead guilty.” *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d
3 683 (1984) (quoting *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981)). Failing to
4 communicate a plea offer, failing to give adequate information regarding the plea offer, or failing
5 to assist the defendant in deciding whether to plead guilty could constitute deficient performance.
6 See *James*, 48 Wn.App. at 363. If that is shown, the inquiry becomes whether there is a
7 reasonable probability that but for the attorney’s deficient performance, the defendant would
8 have accepted the plea offer. *Id* (citing to *Hill v. Lockhart*, 474 U.S. 52, 106 s.Ct. 366, 370, 88
9 L.Ed.2d 203 (1985)).

10 The evidence is clear that Albarran would never have accepted a plea offer in this case.
11 He was adamant in his innocence and adamant that he would not accept a plea offer under any
12 circumstances. It is clear that Mr. Kurtz communicated the plea offer to Albarran and that
13 Albarran consistently refused to accept any plea. His attorney indicates that Albarran told him
14 “over and over again” that he would not take any plea offer. The decision of whether to accept a
15 plea offer is the defendant’s; no one can force an individual to plead guilty. While an attorney
16 must actually and substantially assist a client in making that decision, it still remains the
17 defendant’s decision on whether to accept a plea offer. It is clear here that Mr. Kurtz
18 communicated the offer to Albarran and discussed the options with him. It was Albarran’s choice
19 to reject the plea offer and he cannot now claim that decision was his attorney’s fault. Albarran
20 has not shown that his attorney was deficient.

21 Furthermore, Albarran cannot prove any prejudice in this instance. He adamantly and
22 steadfastly refused to accept any responsibility in this case and refused to accept any offer of

23 State’s Response to Defendant’s Motion for relief from judgment
pursuant to CrR 7.8

24 Page 7

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1 settlement. Albarran cannot prove the second prong of an ineffective assistance of counsel claim,
2 prejudice, unless he can prove that but for the claimed deficient performance of his counsel, he
3 would have accepted an offer of settlement in this case. It is important to note that our Courts
4 have routinely affirmed the defendant's burden of proving prejudice in a claim of ineffective
5 assistance of counsel. It is not enough that a defendant show that some error "had some
6 conceivable effect on the outcome," but rather the defendant must "affirmatively *prove*
7 prejudice." *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006). In this context, a
8 defendant has the burden to prove there is a reasonable probability that he would have accepted
9 the offer absent his attorney's deficient performance. *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct.
10 1376, 1384, 182 L.Ed.2d 398 (2012); *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 1409, 182
11 L.Ed.2d 379 (2012). As Mr. Kurtz explains, Albarran refused to plead guilty and was never
12 going to enter a guilty plea no matter what the consequences were.

13 In *State v. Edwards*, 171 Wn.App. 379, 294 P.3d 708 (2012), Division II of the Court of
14 Appeals evaluated whether defense counsel provided ineffective assistance during plea
15 negotiations. There, the defendant alleged his attorney failed to adequately advise him of plea
16 options and the sentencing consequences. *Edwards*, 171 Wn.App. at 393. The defendant showed
17 his attorney sent him two e-mails about the State's offer of settlement. *Id.* at 395-96. In the first,
18 defense counsel incorrectly stated that the State would require he plead guilty to four counts of
19 child molestation before the State would recommend a SSOSA sentence, when the offer actually
20 only required the defendant to plead guilty to three counts to obtain a SSOSA recommendation
21 from the State. *Id.* at 395. Defense counsel also did not convey the State's alternative offer of a
22 straight up plea to one count of child molestation with a standard range sentence. *Id.* at 396. In

23 State's Response to Defendant's Motion for relief from judgment
pursuant to CrR 7.8

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1 this e-mail counsel stated that a SSOSA sentence would require the defendant plead guilty,
2 obtain a sexual deviancy evaluation and undergo treatment. *Id.* The attorney further stated that he
3 had consulted with a top criminal defense attorney who agreed the SSOSA offer was a “non-
4 starter.” *Id.* In the second e-mail, defense counsel included the State’s “final offer,” and advised
5 the defendant to go to trial. *Id.* The defendant claimed his attorney had not explained what an
6 “indeterminate sentence” was or its significance in the context of the State’s offer. *Id.* Counsel
7 had explained that his recommendation to go to trial was based on his belief it was the only
8 reasonable course of action. *Id.* The Court of Appeals found this showed there was discussion of
9 the strengths and weaknesses of the defendant’s case so that the defendant would know what to
10 expect at trial and be able to make an informed decision on whether to plead guilty. *Id.*

11 The Court of Appeals in *Edwards* found that the defendant did not show he would have
12 accepted the plea agreement made to him, only that he wanted a plea negotiation after the result
13 at trial. *Id.* at 396-97. The defendant failed to establish prejudice and thus the Court rejected his
14 ineffective assistance of counsel claim. *Id.* at 397.

15 The *Edwards* opinion is helpful in evaluating this case. The evidence establishes that
16 defense counsel for Albarran, Mr. Kurtz, communicated the State’s offer to his client. Albarran’s
17 affidavit itself shows that Mr. Kurtz discussed the facts of the case, the evidence the State had,
18 the offer of settlement, and what Mr. Kurtz planned to argue at trial. *See* Affidavit of Miguel
19 Albarran, p. 2. In both *Edwards* and here, the defendants wanted a plea offer after gambling on
20 trial and being convicted. Buyer’s remorse does not establish that trial counsel was ineffective
21 nor is it a basis for relief from judgment pursuant to CrR 7.8. Here, Albarran clearly wishes he
22 had chosen a different course of action because of the jury’s verdict and the outcome of his case

1 on appeal. That remorse, however, is simply not a basis for relief from the judgment. Albarran's
2 claim his attorney was ineffective in assisting him in deciding whether to plead guilty fails.

3 **Counsel was not ineffective for cross-examining Detective Hafer on certain subjects**

4 Albarran argues his attorney was ineffective for asking Detective Hafer about the fact
5 that Albarran had no prior criminal history and that he did not confess or give incriminating
6 statements. Albarran cannot show that his attorney's actions were anything but the result of
7 tactical decisions made to advance his theory of the case. Furthermore, Albarran cannot show
8 that absent this line of questioning the result at trial would have been different.

9 The subject matter covered in and the extent of cross-examination is a matter of judgment
10 and strategy. *State v. Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007) (citing *In re Personal*
11 *Restraint of David*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004)). No court will find ineffective
12 assistance of counsel based on trial counsel's decisions during cross-examination if counsel's
13 performance fell within the range of reasonable representation. *Id.* Furthermore, great deference
14 is afforded to a defense attorney's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260
15 (2011). A reviewing court strongly presumes that performance was appropriate and that the
16 attorney's decisions and tactics were reasonable. *Id.* To rebut this presumption of reasonableness,
17 the defendant must establish an absence of any legitimate trial tactic that would explain counsel's
18 performance. *Id.* "[S]trategic choices made after thorough investigation of law and facts relevant
19 to plausible options are virtually unchallengeable..." *In re Personal Restraint of Lui*, 188 Wn.2d
20 525, 539, 397 P.3d 90 (2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156
21 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 690-91)). Furthermore, our courts do not
22 rest claims of ineffective assistance of counsel on cross-examination strategy in the absence of

1 specific reasons on how the strategy undermines confidence in the conviction. *See State v.*
2 *Thomas*, 109 Wn.2d 222, 225-26, 743 P.3d 816 (1987) (citing *Strickland*, 466 U.S. at 694).

3 It is clear that Mr. Kurtz's cross-examination of Detective Hafer was based on sound trial
4 strategy. By asking Detective Hafer about Albarran's prior criminal history Mr. Kurtz was able
5 to introduce evidence of his client's good character. Typically whether a defendant has been
6 convicted of crimes in the past is inadmissible to show good, law-abiding character. Yet Mr.
7 Kurtz was able to admit this evidence and used it in his closing argument to show the State did
8 not have the type of evidence it typically had in such cases and had no way of undermining his
9 client's credibility like with prior criminal convictions. *See* RP 434-35. Mr. Kurtz's questions to
10 Detective Hafer about the defendant's statements to the officer, and on jail phone calls, was to
11 show that the defendant never confessed, never apologized, and never made any incriminating
12 statements to anyone. *See* RP 429-31. It is clear that these questions to Detective Hafer were
13 intentionally asked to pave the way for counsel's closing argument, which highlighted what his
14 client had going for him: no prior criminal history, no prior allegations of sexual assault, no
15 confessions, apologies or incriminating statements regarding the alleged sexual abuse, and the
16 fact that he was fully cooperative with police and engaged in several conversations with police
17 during their investigation.

18 Mr. Kurtz's questions of the detective that Albarran now complains of clearly were an
19 integral part of his trial strategy. "When counsel's conduct can be characterized as legitimate
20 trial strategy or tactics, performance is not deficient." *In re Personal Restraint of Caldellis*, 187
21 Wn.2d 127, 141, 385 P.3d 135 (2016) (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177
22 (2009)). In *State v. Garrett*, our Supreme Court stated, "this court will not find ineffective

1 assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to
2 trial tactics.’” *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (quoting *State v.*
3 *Renfro*, 96 wn.2d 902, 909, 639 P.2d 737 (1982)). From the questions Mr. Kurtz asked and the
4 theme of his closing argument, it is clear that his questions were specifically designed to promote
5 his theory of the case. This is further exemplified in Mr. Kurtz’s questioning of the defendant.
6 RP 339-40. On direct of his client, Mr. Kurtz elicited that Albarran had never been convicted of
7 any type of sexual assault, no other type of crimes, and had never pled guilty to any sexual
8 assaults. RP 339. The prosecutor objected, and the court said this line of questioning would
9 “open up other lines of questioning,” and Mr. Kurtz responded “All the more.” RP 339. This
10 shows that Mr. Kurtz’s strategy was to show his client as law-abiding, and thus a good person.
11 This theme ran through his questioning of the state’s witness, his own testimony, and closing
12 argument. This is a classic example of trial strategy or tactics which our courts will not disturb or
13 second guess. Albarran has not shown that Mr. Kurtz’s questioning was unreasonable nor has he
14 shown that there was no legitimate trial tactic to explain counsel’s actions. As Albarran has
15 shown neither deficient performance or prejudice, his claim of ineffective assistance of counsel
16 fails.

17 **Counsel was not ineffective for failing to admit evidence of the speculative use of a vibrator**

18 As part of his attempt to explain away the DNA evidence, Albarran attempted to show
19 that he and his girlfriend, the victim’s mother, used a vibrator together and that his DNA might
20 have been on that vibrator that the victim then used, thus transferring his DNA to the victim. Not
21 only was counsel not deficient in failing to get evidence of this speculative explanation admitted,
22

1 but Albarran cannot show any prejudice as no reasonable jury would have been swayed by this
2 far-fetched and unsupported hypothesis.

3 Essentially, Albarran had no idea whether the victim ever used a vibrator, let alone her
4 mother's vibrator. Albarran claimed that his girlfriend, the victim's mother, told him once that
5 the victim had used her vibrator. This is something the victim and her mother both denied in their
6 pre-trial interviews, interviews that Mr. Kurtz conducted. Albarran now claims that Mr. Kurtz
7 should have cross-examined the victim and her mother about the mother's vibrator and the
8 victim's use of the vibrator. Had he done that at trial, both the victim and her mother would have
9 denied any use of the vibrator by the victim, or ever telling Albarran anything like that. Albarran
10 could then have possibly attempted to impeach the victim and her mother's testimony through
11 his own testimony that the mother told him the victim had used her vibrator. However, that
12 evidence would not have had the impact that Albarran now argues it would have. First, that
13 evidence would only have been for impeachment purposes. The State would have been able to
14 object to any improper use of that evidence in defense's closing argument. When statements are
15 admitted to impeach another witness, those statements are not admitted as substantive evidence,
16 but are merely impeaching. Impeachment evidence cannot be argued to a jury to prove the
17 underlying fact. Therefore Albarran could not have argued that the mother's hearsay statement to
18 him about the victim using her vibrator proved the victim used the vibrator. That hearsay
19 statement could have only properly been used by Mr. Kurtz in closing argument to argue that the
20 mother was not credible in her testimony as she previously said something different. Thus the
21 jury still would not have been able to properly consider the vibrator evidence as a way of
22 explaining the DNA on the victim's body and underwear.

1 Furthermore, in order to show this action was ineffective, Albarran has to show that had
2 his attorney proceeded in the fashion he now says his attorney should have, that the outcome at
3 trial would have been different. No reasonable juror would believe that Albarran's saliva and
4 semen survived a transfer from a vibrator used at some unknown point in the past by Albarran
5 and his girlfriend, to the victim's vagina, thigh and underwear, and was used at the exact time
6 Albarran happened to be found in the victim's room while she was asleep with his head near her
7 vagina. The evidence as Albarran wishes it had been introduced would not have altered the
8 outcome of the case. Albarran cannot show prejudice and thus his claim of ineffective assistance
9 of counsel fails.

10 **The prosecutor did not commit misconduct**

11 Albarran argues the prosecutor committed misconduct by making improper argument
12 regarding the reasonable doubt instruction, regarding Albarran's inconsistent statement on the
13 stand and to a CPS worker, in characterizing Albarran as arrogant, in arguing the DNA evidence
14 and Albarran's explanation for it, and in arguing the evidence Albarran offered that he had never
15 been convicted of a crime. Albarran cannot show that the prosecutor's argument amounted to
16 misconduct nor can he show that any potential misconduct prejudiced him.

17 To prevail on a claim of prosecutorial misconduct, a defendant must establish that the
18 prosecutor's complained-of conduct was "both improper and prejudicial in the context of the
19 entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126
20 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v.*
21 *Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must
22 show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*,

1 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant
2 must object at the time of the alleged improper remarks or conduct. A defendant who fails to
3 object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an
4 enduring and resulting prejudice that could not have been neutralized by an admonition to the
5 jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of
6 prosecutorial misconduct, the court should review the statements in the context of the entire case.
7 *Id.*

8 In the context of closing arguments, a prosecuting attorney has “wide latitude in making
9 arguments to the jury and prosecutors are allowed to draw reasonable inferences from the
10 evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*,
11 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be
12 reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s
13 comments during closing in the context of the total argument, the issues in the case, the evidence
14 addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79
15 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523
16 U.S. 1007 (1998). Contextual consideration of the prosecutor’s statements is important. *Burton*,
17 165 Wn. App. at 885.

18 Improper argument does not require reversal unless the error was prejudicial to the
19 defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in
20 *Davenport* stated:

21 Only those errors [that] may have affected the outcome of the trial are prejudicial.
22 Errors that deny a defendant a fair trial are per se prejudicial. To determine
whether the trial was fair, the court should look to the trial irregularity and
determine whether it may have influenced the jury. In doing so, the court should

1 consider whether the irregularity could be cured by instructing the jury to
2 disregard the remark. Therefore, in examining the entire record, the question to be
3 resolved is whether there is a substantial likelihood that the prosecutor's
4 misconduct affected the jury verdict, thereby denying the defendant a fair trial.

5 *Davenport*, 100 Wn.2d at 762-63.

6 A defendant's failure to object to potential misconduct at trial waives his challenge to the
7 misconduct unless no curative instruction would have obviated the prejudicial effect on the jury
8 and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict.

9 *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's
10 analysis on a prosecutorial misconduct claim when the defendant did not object at trial is
11 whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

12 Albarran highlights short statements, fractions of sentences, and singular words used
13 through the prosecutor's lengthy closing and rebuttal arguments to support his contention that the
14 prosecutor committed misconduct. However, case law is explicit that a prosecutor's argument
15 must be taken in the entire context of the argument and the trial as a whole. Albarran's
16 arguments of misconduct focus mostly on the State's response to his own trial strategy and
17 closing argument. The prosecutor is properly allowed to rebut argument from defense's closing
18 statement in his or her rebuttal argument. Further, by failing to object, Albarran waived his right
19 to object to any misconduct unless it would have been impossible to cure by an instruction from
20 the Court. Juries are presumed to follow the court's instructions and in every instance Albarran
21 cites to in his brief, an instruction from the court would have neutralized the State's argument.

22 Albarran argues the prosecutor committed misconduct by saying defense was going to
23 rely on the reasonable doubt instruction a lot. Yet immediately preceding and following that
24 statement the prosecutor read the instructions as given by the court to the jury and at no time

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1 argued that her burden should be anything less than proof beyond a reasonable doubt. The
2 prosecutor did not engage in burden-shifting and when her comment is taken in context of her
3 entire argument and the case as a whole, it is clear no prejudice ensued from her remark.

4 Albarran also argues the prosecutor committed misconduct by introducing evidence of
5 Albarran's prior inconsistent statement to a CPS worker. Albarran is the one who testified,
6 repeatedly, over the State's objections and despite the Court's pretrial ruling prohibiting
7 admission of evidence of violence, and despite his own attorney's warning prior to taking the
8 stand that he not testify about that subject, who introduced the evidence that he claimed the
9 victim's mother had previously hit him. This statement was directly contradictory to a statement
10 the defendant made to CPS, contained in a document provided by the State during pretrial
11 discovery, that there had been no domestic violence between the defendant and the victim's
12 mother. The State properly elicited this evidence and did not improperly argue this evidence to
13 the jury. Albarran's claim that this amounts to prosecutorial misconduct is wholly without any
14 legal support. The State properly sought to impeach the defendant by a prior inconsistent
15 statement. Albarran improperly argues in his motion that the State alleged Albarran lied because
16 he could not provide proof to support his assertion that the mother had struck him, but the State's
17 reference to Albarran's credibility was regarding the prior inconsistent statement that he made to
18 the CPS worker. Both statements could not be true: one was a lie. The State is allowed to argue
19 the evidence admitted at trial and Albarran takes issue here with wholly proper argument based
20 on properly admitted evidence.

21 Albarran next argues the prosecutor committed misconduct when she referred to the
22 defendant as "arrogant." In his closing argument, Albarran argued that when the State goes to

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1 trial they usually have confessions and there was no confession here, in an attempt to convince
2 the jury that the State did not have sufficient evidence to convict. The prosecutor rebutted,

3 And he indicates, and he presupposes that if the State were to go to trial, they
4 would have to depend on a confession. If there was a confession, you have to ask
5 yourself, would we be here? Would we be here today? Is this the type of stuff the
6 State relies on for trial? But I'll also tell you why someone would take this to trial.
7 Why this defendant would take this to trial. This defendant is arrogant. He
8 cheated on her by her count four times, by his a gazillion. And each time he was
9 able to talk his way back into the house. Each time. You wonder why we're at
10 trial today? Even with DNA evidence, he thinks he can tell you, I don't know; I
11 don't know how my DNA got there. How many times do you think he used that?
12 That same type of argument when trying to slide his way back into that home.
13 And, in fact, getting his way back into the home.

9 RP 450-51. The defendant put his cheating into evidence in the trial. He put the fact that the
10 victim's girlfriend continuously taking him back into evidence in the trial. The prosecutor
11 properly made inferences, and argued conclusions from the evidence that was admitted at trial.
12 That despite what defense counsel claimed, that they were at trial because the State didn't have a
13 confession, that they were at trial because the defendant was once again hoping to avoid being
14 held responsible for his actions, that he once again thought he could get away with it. That
15 argument was proper and appropriate given the argument Albarran made to the jury and the
16 evidence admitted at trial.

17 Albarran also argues the prosecutor committed misconduct by arguing that Albarran had
18 no explanation for the DNA evidence. Again, the prosecutor argued exactly what had been
19 admitted into evidence at trial. When defense counsel asked Albarran on direct examination what
20 explanation he had for his DNA being found on the victim and in her underwear, he only
21 responded that he did not do this, he loves the victim and her mother and that it broke his heart.

22 RP 357. Albarran had no explanation given to the jury for why his DNA was found on the

23 State's Response to Defendant's Motion for relief from judgment
24 pursuant to CrR 7.8

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1 victim. And to argue that a theory, wholly speculative and entirely based on hearsay was a proper
2 “explanation” the jury should have considered and the prosecutor committed misconduct by
3 saying Albarran had no explanation is entirely without merit.

4 Albarran cannot show the prosecutor’s statements were in any way improper or amounted
5 to prosecutorial misconduct. Furthermore, none of the statements Albarran now complains of
6 were objected to and they therefore are waived unless there is absolutely no way the trial court
7 could have successfully instructed the jury to disregard the arguments. Nothing the prosecutor
8 said was so flagrant or prejudicial that the jury could not have been instructed to disregard the
9 statements, thus curing the trial of any error. By failing to object, Albarran waived this argument.
10 Furthermore, Albarran cannot show that absent these few statements, picked and chosen from a
11 lengthy closing argument, the outcome of the trial would have been different. Albarran has failed
12 to meet his burden in showing prosecutorial misconduct. This claim fails.

13 **CONCLUSION**

14 Albarran’s motion for relief from judgment is without merit. Albarran has not met his
15 burden of making a substantial showing that he is entitled to relief or that a factual hearing is
16 necessary to decide this issue. Therefore the State respectfully requests this court transfer this
17 matter to the Court of Appeals to be addressed as a Personal Restraint Petition pursuant to CrR
18 7.8(c).

19 RESPECTFULLY SUBMITTED this 18th day of January, 2018.

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21 _____
22 Rachael Rogers, WSBA #37878
Senior Deputy Prosecuting Attorney

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

Defendant.

No. 13-1-01301-1

DECLARATION OF CAMARA BANFIELD

STATE OF WASHINGTON)
 :ss
COUNTY OF CLARK)

I, Camara Banfield, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

I am the Chief Criminal Deputy Prosecuting Attorney for the Clark County Prosecuting Attorney's office. In my capacity as a deputy prosecuting attorney for Clark County I was assigned to handle the matter of State of Washington v. Miguel Albarran, 13-1-01301-1. As part of my duties in handling this matter I filed the charges in the case, engaged in plea negotiations, handled the pre-trial discovery process, presented the case at trial, and represented the State at sentencing, among other things. As part of the plea negotiation process I prepared an offer of

DECLARATION OF CAMARA BANFIELD
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1 settlement in this case and communicated that offer to the assigned attorney for the defendant,
2 David Kurtz.

3 I have handled many cases for my office in which David Kurtz was the assigned defense
4 attorney. It was customary for me to communicate with Mr. Kurtz over e-mail, via the telephone,
5 and in person. Throughout the pendency of this case I exchanged multiple e-mails with Mr.
6 Kurtz and spoke to him many times. One topic of our conversations had been potential offers of
7 settlement on the case.

8 I communicated the original offer of settlement to Mr. Kurtz well prior to trial. My notes
9 on this case, attached to this declaration, show that I spoke to Mr. Kurtz on or about September
10 5, 2013 and told him that his client could plead guilty as originally charged or I would amend the
11 information to add charges of Rape of a Child in the Second Degree, Rape in the Second Degree,
12 attempt to commit of both of those crimes, and Indecent Liberties. E-mail exchanges with Mr.
13 Kurtz also show that an offer was extended prior to November 20, 2013. Mr. Kurtz confirmed to
14 me orally that he had communicated the offer to his client and his client refused to accept the
15 offer. Mr. Kurtz also sent an e-mail to me dated November 20, 2013, attached to this declaration,
16 in which he indicates he spoke to his client about the offer of settlement and that his client asked
17 that he mail him a copy of the offer of settlement so that he could review it with his family prior
18 to making a decision. The defendant rejected this offer of settlement.

19 On January 7, 2014 I e-mailed Mr.Kurtz to let him know that I was adding the aggravator
20 as discussed in RCW 9.94A.507(1)(c)(ii) to the Rape in the Second Degree charge, alleging the
21 victim was under the age of 15 at the time of the rape. Mr. Kurtz's e-mail response is also
22 attached to this declaration. In that e-mail Mr. Kurtz said that he would tell his client but that he

23 DECLARATION OF CAMARA BANFIELD
24 Page 2

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1 thought "it [would] only result in more anger." Mr. Kurtz then asked if the offer was still open. I
2 informed Mr. Kurtz the last offer was no longer an option, but that I could make a new offer if
3 the defendant wanted one. Through my conversations with Mr. Kurtz prior to trial I understood
4 that the defendant refused to plead guilty to any offer I was willing to extend, including the
5 original offer.

6 On January 10, 2014, I appeared in Court before the Honorable Judge Robert Lewis at
7 the readiness hearing on this case. Mr. Kurtz was also present at the hearing with his client. At
8 the time I filed an amended information adding an aggravating factor that alleged the victim of
9 the Rape in the Second Degree charge was under the age of 15. Mr. Kurtz then informed the
10 court that I had advised him "months and months and months" prior that I would be amending
11 the information to add the aggravators if the case ended up going to trial and Mr. Kurtz further
12 told the court that he had informed his client of this back in August.

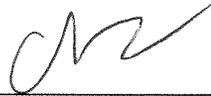
13 On January 11, 2018 I received a voicemail from Mr. Kurtz regarding this case. In that
14 voicemail Mr. Kurtz states that he remembered Mr. Albarran's case and remembers that Mr.
15 Albarran refused to accept a plea offer. Specifically Mr. Kurtz stated in his voicemail,

16 "...at no time did he *ever* consider taking any plea offer. He told me that over and
17 over again. He was out of custody, so we met several times, actually we met a lot,
18 and at no time was he ever going to accept anything, even after you added the
19 other stuff – the aggravator. It just made him more determined to go to trial. He
20 said 'why should I plead guilty? I didn't do anything.' I remember that case now.
21 Yeah. He was adamant. I don't know what's going on there. I don't know if he's
22 saying he didn't get a plea offer, but oh yeah, he did."

23 In my capacity as a deputy prosecutor handling this case, I am aware that my office
24 provided Mr. Kurtz with 284 pages of discovery prior to trial. These documents included the
25 police reports, witness statements, medical reports and records, photographs, scientific test

1 results, and transcripts of multiple phone calls Mr. Albarran made from the jail, as well as
2 transcripts of witness interviews. I was present when Mr. Kurtz interviewed the victim, her
3 mother, and the State's DNA expert prior to trial. We also provided transcripts of those
4 interviews to Mr. Kurtz as part of our pretrial discovery process.

5 SUBSCRIBED AND SWORN this 11th day of January, 2018 in Vancouver, Washington.

6 

7 _____
Camara Banfield

Rogers, Rachael

From: Banfield, Camara
Sent: Wednesday, January 10, 2018 5:17 PM
To: Rogers, Rachael
Subject: FW: State v. Albarran

From: David Kurtz [<mailto:kurtzlaw81@gmail.com>]
Sent: Monday, November 18, 2013 9:54 AM
To: Banfield, Camara
Subject: State v. Albarran

Camara:

Still waiting for an offer.

In the interim, let's do some preliminary discovery. Could you please have Jennifer contact me so I can provide her my dates of availability.

I will need to interview the alleged victim, her mother, and the DNA technician.

Thanks,

Dave Kurtz

Rogers, Rachael

From: Banfield, Camara
Sent: Wednesday, January 10, 2018 5:17 PM
To: Rogers, Rachael
Subject: FW: State v. Albarran

From: David Kurtz [<mailto:kurtzlaw81@gmail.com>]
Sent: Wednesday, November 20, 2013 7:49 AM
To: Banfield, Camara
Subject: State v. Albarran

Camara:

I know that you cited this matter on for arraignment on amended Information, for 12/3 at 1:30pm, but I will not be available that day.

I am going to cite it on for 11/26 at 1:30pm.

If you don't or can't handle it that day just let the docket deputy do it, as it is just an arraignment.

Also, with regard to the plea offer, I spoke with Mr. Albarran and he has asked me to mail him the offer, he doesn't have an email address, so that he can review it with his family before he makes a decision.

I will drop off a copy of the citation for you some time today.

Thanks,

Dave Kurtz

Rogers, Rachael

From: Banfield, Camara
Sent: Wednesday, January 10, 2018 5:18 PM
To: Rogers, Rachael
Subject: FW: Albarran

-----Original Message-----

From: David Kurtz [<mailto:kurtzlaw81@gmail.com>]
Sent: Wednesday, January 08, 2014 8:49 AM
To: Banfield, Camara
Subject: Re: Albarran

Thanks Camara. I will tell him but think it will only result in more anger.
Is the offer still open?
Dave

Sent from my iPhone
Dave Kurtz

> On Jan 7, 2014, at 16:58, "Banfield, Camara" <Camara.Banfield@clark.wa.gov> wrote:

>

> Adding the aggravator 9.940.5071(c)(ii)- victim under the age of 17 for Rape 2

>

> Thank you,

>

> Camara L. J. Banfield

> Senior Deputy Prosecuting Attorney

> Arthur D. Curtis Children's Justice Center

> 360.397.2261 x4432 (w)

>

>

>

> This e-mail and related attachments and any response may be subject to public disclosure under state law.

Rogers, Rachael

From: Banfield, Camara
Sent: Wednesday, January 10, 2018 5:18 PM
To: Rogers, Rachael
Subject: FW: Albarran

From: David Kurtz [<mailto:kurtzlaw81@gmail.com>]
Sent: Wednesday, January 08, 2014 9:45 AM
To: Banfield, Camara
Subject: Re: Albarran

Will it be more time?
Dave

On Wed, Jan 8, 2014 at 9:26 AM, Banfield, Camara <Camara.Banfield@clark.wa.gov> wrote:
No, sorry. If he wants a new offer I will make him one. Let me know.

Sent from my iPhone

> On Jan 8, 2014, at 8:49 AM, "David Kurtz" <kurtzlaw81@gmail.com> wrote:

>

> Thanks Camara. I will tell him but think it will only result in more anger.

> Is the offer still open?

> Dave

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>>

>> Thank you,

>>

>> Camara L. J. Banfield

>> Senior Deputy Prosecuting Attorney

>> Arthur D. Curtis Children's Justice Center

>> [360.397.2261](tel:360.397.2261) x4432 (w)

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>> This e-mail and related attachments and any response may be subject to public disclosure under state law.

This e-mail and related attachments and any response may be subject to public disclosure under state law.

ALBARRAN, MIGUEL ANGEL

DOB: 9/18/1983

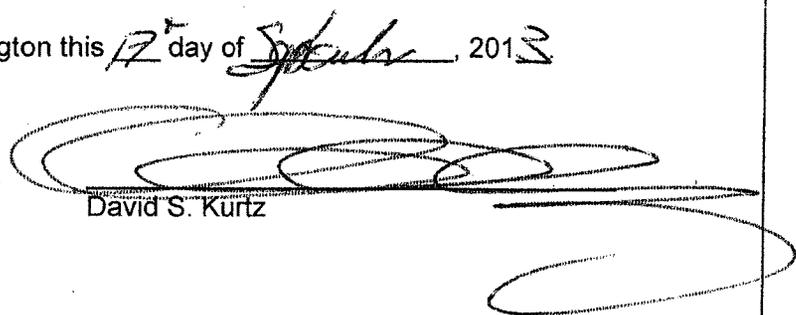
DATE	JUDGE	FILE NOTES
7/11/13 RW	6	A/c. 1st App. PC found. A cty Kurtz Bail #75K conditions Arr 7/25/13 @ 9:00 SAPD entered. *A says victim (mother) trying to contact him i/c Order!
7/12/13	1	SR: - cond. from set, Bail posted an Order CD →
7/25/13 RW	9	A/c. Arr. PNG. JT 9/9 RH 9/5 (40 days elapsed). SAPD entered. omnibus 8/27 @ 1:30
8/16/13	6	OH/CPH/1st DK/1st: OH entered. OH date of 8/27 stricken
9/4/13	8	SHS MTC - Δ does not oppose t also wants continuance RH 1/9/14 TS 1/13/14 elapsed: 43 STW filed JTC 12/1/13
9/5/13		Spoke to Kurtz told him Δ could plead guilty as charged or I will be amending the info to Rape of child 2 Rape 2 attempted rape 2 attempt ROL 2 2 indecent libel

CERTIFICATION OF COUNSEL

I, David S. Kurtz, hereby certify under penalty of perjury under the laws of the State of Washington as follows:

1. I am counsel for the Defendant in the above matter.
2. By virtue of the Court's appointment of me as Defendant's attorney, there is a demonstrated need for the requested service to be at public expense under CrR 3.1(f).
3. Defendant has been charged with **ROC II, ATT. ROC II, RAPE II ATT. RAPE II.**
4. In, my experience as a defense lawyer, the services of an investigator is necessary for the adequate defense of this Defendant.
5. John Visser is an experienced and capable investigator, and I anticipate that his services, initially, will not exceed \$800 (20 hours at \$40 per hour), absent additional request and authorization.
6. This request is my first request for investigator services.

Signed at Vancouver, Washington this 17th day of September, 2013


David S. Kurtz

MA

FILED

2013 SEP 20 AM 10:15

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

No. 13-1-01301-1

vs.

EX PARTE AUTHORIZATION FOR

MIGUEL ALBARRAN,

INVESTIGATION SERVICES AT PUBLIC EXPENSE

Defendant.

THIS MATTER having come before the Clark County Indigent Defense Coordinator upon the *ex parte* request of Defendant by Defendant's attorney.

HAVING CONSIDERED counsel's request and certification and having determined the services are necessary for Defendant's adequate defense, the following services are authorized:

Investigation services by Investigative Solutions LLC, not to exceed \$ 800.00.
(20.00 hours at \$40.00 per hour).

Dated this 19 day of September, 2013.


Ann S. Christian
Indigent Defense Coordinator

EX PARTE AUTHORIZATION OF FUNDS FOR
INVESTIGATION SERVICES AT PUBLIC EXPENSE A-1439

Ann S. Christian
Indigent Defense Coordinator
1408 Franklin St
PO Box 5000
Vancouver, WA 98666
360-397-2256

15
David Kurtz
C-jail



FILED

APR 16 2014

4:55pm
Scott G. Weber, Clerk, Clark Co.

**Superior Court of Washington
County of Clark**

State of Washington, Plaintiff,

vs.

MIGUEL ANGEL ALBARRAN,
Defendant.

SID: WA27234569
If no SID, use DOB: 9/18/1983

No. 13-1-01301-1

Felony Judgment and Sentence --
Prison

14-9-01328-D

RCW 9.94A.507 Prison Confinement
(Sex Offense and Kidnapping of a Minor)

(FJS)

Clerk's Action Required, para 2,1, 4.1, 4.3a,
4.3b, 5.2, 5.3, 5.5 and 5.7

Defendant Used Motor Vehicle

Juvenile Decline Mandatory Discretionary

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
 guilty plea jury-verdict 1/15/2014 bench trial :

Count	Crime	RCW (w/subsection)	Class	Date of Crime
03	RAPE IN THE SECOND DEGREE	9A.44.050/9A.44.050(1) (b)	FA	4/1/2013

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.507**.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count ____ RCW 9.94A.839.

The offense was predatory as to Count _____, RCW 9.94A.836.

The victim was under 15 years of age at the time of the offense in Count 3 RCW 9.94A.837.

Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))
Page 1 of 12

8/14

- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ RCW 9.94A.825, 9.94A.533.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within, 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1	No known felony convictions						

*DV: Domestic Violence was pled and proved

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).
- The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
03	0	XI	78 MONTHS to 102 MONTHS		78 MONTHS to 102 MONTHS	LIFE	\$50,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows: _____

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence: *sentence imposed pursuant to RCW 9.94A.507(3)(c)(ii)*

below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

within the standard range for Count(s) _____ but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

- That the defendant has the ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
- That the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.
- That the defendant is indigent and disabled and is not anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.
- Other: _____ RCW 9.94A.753.
- The following extraordinary circumstances exist that make restitution inappropriate. (RCW 9.94A.753): _____

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court **vacates** Counts 01, 02, and 04 in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

300 months on Count 03 *based on RCW 9.94A.507(3)(c)(i)*

The confinement time on Count(s) 3 contain(s) a mandatory minimum term of 300 MONTHS.

The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon sexual motivation VUCSA in a protected zone manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 300

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein: _____

Confinement shall commence immediately unless otherwise set forth here: _____

The total time of incarceration and community supervision shall not exceed the statutory maximum for the crime.

(b) **Confinement.** RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count 03 minimum term 300 maximum term Statutory Maximum Life

(c) **Credit for Time Served:** The defendant shall receive 93 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.

(d) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.701)

(A) The defendant shall be on community placement or community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count(s) 2, 36 months for Serious Violent Offenses
Count(s) _____, 18 months for Violent Offenses
Count(s) _____, 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)
Count(s) _____, _____ months. RCW 9.94A.701(9)

(Sex offenses, only) For count(s) 03, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

- consume no alcohol.
- have no contact with: _____
- remain within outside of a specified geographical boundary, to wit: _____

not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

participate in the following crime-related treatment or counseling services: _____

undergo an evaluation for treatment for domestic violence substance abuse mental health anger management, and fully comply with all recommended treatment. _____

comply with the following crime-related prohibitions: _____

Additional conditions are imposed in Appendix 4.2, if attached or are as follows:

Appendix A and Appendix F

(C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN	\$ <u>To be set</u>	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
PDV	\$ _____	Domestic Violence assessment	RCW 10.99.080
CRC	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ <u>250.00</u>	JFR
		Extradition costs \$ _____	EXT
		Other \$ _____	
	\$ <u>1,500.00</u>	Fees for court appointed attorney	RCW 9.94A.760
	\$ <u>144.00</u>	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$ _____	DUI fines, fees and assessments	
FCM/MTH	\$ <u>500.00</u>	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	\$ _____	Drug enforcement Fund # <input type="checkbox"/> 1015 <input type="checkbox"/> 1017 (TF)	RCW 9.94A.760
	\$ <u>100.00</u>	DNA collection fee	RCW 43.43.7541
CLF	\$ _____	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
FPV	\$ _____	Specialized forest products	RCW 76.48.140
RTN/RJN	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum)	RCW 38.52.430
		Agency: _____	
	\$ _____	Other fines or costs for: _____	
	\$ _____	Total	RCW 9.94A.760

Waived indigency due to WFR

- The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
 - shall be set by the prosecutor.

is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____.

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with TMP (female, 12/4/1999) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within:

500 feet 880 feet 1000 feet of:

TMP (female, 12/4/1999) (name of protected person(s))'s

home/ residence work place school

(other location(s)) PERSON

other location _____,

for LIFE years (which does not exceed the maximum statutory sentence).

A separate ~~Domestic Violence No-Contact Order, Antiharassment No-Contact Order,~~ or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 **Off-Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040 and RCW 9.41.047.

5.5b **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Sex and Kidnapping Offender Registration Laws of 2010, ch. 367 § 1, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or a kidnapping offense involving a minor as defined in Laws of 2010, ch. 367 § 1, you are required to register.

If you are a resident of Washington you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington, or you are employed in Washington, or you carry on vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents or Returning Washington Residents: If you move to Washington or if you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three business days prior to beginning to work at the institution. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your

residence of your termination of enrollment or employment within three business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within three business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

8. Length of Registration:

Class A felony – Life; Class B Felony – 15 years; Class C felony – 10 years

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

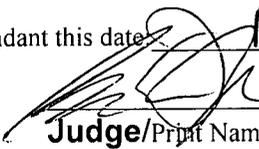
5.8 Other: _____

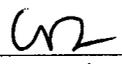
5.9 Persistent Offense Notice

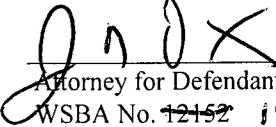
The crime(s) in count(s) 03 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date April 16, 2014


Judge/Print Name Barbara D. Johnson


Deputy Prosecuting Attorney
WSBA No. 33835
Print Name: Camara L. Banfield

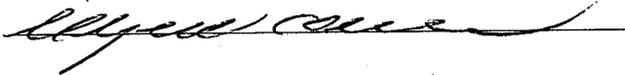

Attorney for Defendant
WSBA No. ~~12152~~ 18014
Print Name: David S. Kurtz


Defendant
Print Name:
MIGUEL ANGEL ALBARRAN

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: 

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

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

Signed at Vancouver, Washington on (date): _____

Interpreter Print Name

I, Scott G. Weber, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

MIGUEL ANGEL ALBARRAN

13-1-01301-1

SID No: WA27234569
(If no SID take fingerprint card for State Patrol)

Date of Birth: 9/18/1983

FBI No. 888648JB6

Local ID No. 215117

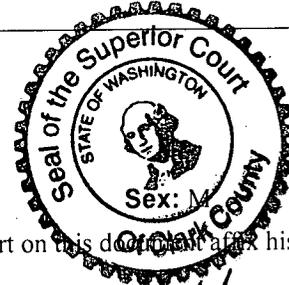
PCN No. _____

Other _____

Alias name, DOB:

Race: W

Ethnicity:



Fingerprints: I attest that I saw the same defendant who appeared in court on this docket after his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk *Elizabeth Miller* Dated: 4/16/14

The defendant's signature: *Miguel Albarran*

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
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SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

MIGUEL ANGEL ALBARRAN,

Defendant.

SID: WA27234569

DOB: 9/18/1983

NO. 13-1-01301-1

**WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
03	RAPE IN THE SECOND DEGREE	9A.44.050/9A.44.050(1)(b)	4/1/2013

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
03	RAPE IN THE SECOND DEGREE	300 Days Months

These terms shall be served concurrently to each other unless specified herein:

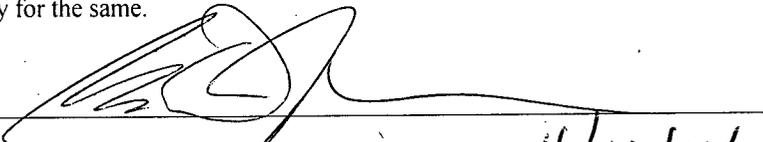
The defendant has credit for 93 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

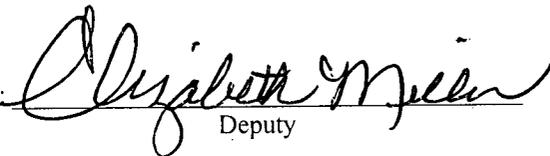
HEREIN FAIL NOT.

WITNESS, Honorable



JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 4/16/14

SCOTT G. WEBER, Clerk of the
Clark County Superior Court

By: 
Deputy



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.
MIGUEL ANGEL ALBARRAN,
Defendant
Date of Birth: 9/18/1983

No. 13-1-01301-1

APPENDIX 2.2
DECLARATION OF CRIMINAL HISTORY



COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.525 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

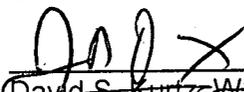
CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	DV*? YES	PTS.
NO KNOWN FELONY CONVICTIONS					

*DV: Domestic violence was pled and proved.

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

DATED this 16 day of April, 2014.

Defendant


David S. Kurtz, WSBA#12152, 18.014
Attorney for Defendant



Camara L. Banfield, WSBA#33835
Deputy Prosecuting Attorney

CLARK SUPERIOR COURT

March 12, 2018 - 10:55 AM

Filing PRP Transfer Order

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: Albarran, Miguel a
Trial Court Case Number: 13-1-01301-1
Trial Court County: Clark Superior Court
Signing Judge: John Fairgrieve
Judgment Date: 03/06/2018

The following documents have been uploaded:

- PTO_PRP_Transfer_Order_Plus_20180312105032D2691046_7140.pdf
This File Contains:
Judgment and Sentence/Order/Judgment - Signing Judge:
Other - declarations from other individuals and response pleadings
PRP Transfer Order
The Original File Name was 131013011AlbarranPRP.pdf

Comments:

Sender Name: Amanda L Willden - Email: amanda.willden@clark.wa.gov

Note: The Filing Id is 20180312105032D2691046