

FILED  
Court of Appeals  
Division II  
State of Washington  
6/4/2018 4:17 PM  
NO. 51575-0-II

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

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STATE OF WASHINGTON, Respondent

v.

MIGUEL ANGEL ALBARRAN, Petitioner

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01301-1

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RESPONSE TO PERSONAL RESTRAINT PETITION

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### **IDENTITY OF RESPONDENT**

The State of Washington is the Respondent in this matter. Mr. Miguel Albarran (hereafter 'Albarran') is restrained under the authority of the judgment and sentence entered by the Clark County Superior Court for Rape in the Second Degree in Cause Number 13-1-01301-1. CP 48-62.<sup>1</sup>

### **FACTUAL AND PROCEDURAL HISTORY**

Albarran was initially charged with one count of Child Molestation in the Second Degree for an incident that occurred against T.P. on April 1, 2013. CP 1. Prior to trial, the State amended the information to charge Rape of a Child in the Second Degree, Attempted Rape of a Child in the Second Degree, Rape in the Second Degree, Attempted Rape in the Second Degree, Indecent Liberties, and Child Molestation in the Second Degree. CP 12-13, 16-18. The State alleged Albarran violated a position of trust in committing these offenses and that these crimes involved an invasion of the victim's privacy. CP 12-13, 16-18. The State amended the information again prior to trial, reducing the number of charges to Rape of a Child in the Second Degree, Attempted Rape of a Child in the Second Degree, Rape in the Second Degree, and Child Molestation in the Second

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<sup>1</sup> This Court has transferred the record from the direct appeal. The State refers to the clerk's papers as CP [page number] and the verbatim report of proceedings as RP [page number] from the direct appeal.

Degree. CP 21-23. The State continued to allege that the crimes involved a violation of a position of trust and an invasion of the victim's privacy. CP 21-23. The State also alleged that the Rape in the Second Degree was committed against a child victim under the age of 15. CP 21-23.

The State initially filed charges against Albarran on July 12, 2013. CP 1. Trial was held January 13 through 15, 2014. CP 24-27. The prosecutor handling the case prepared and communicated an offer of settlement to Albarran's attorney by September 2013. *See* Appendix A. At that time, the prosecutor indicated in her offer that Albarran could plead as originally charged, to Child Molestation in the Second Degree, or that she would be amending the information to add charges of Rape of a Child in the Second Degree, Rape in the Second Degree, and Indecent Liberties. *Id.* Albarran's attorney told the prosecutor that he had communicated the offer to Albarran and that Albarran had refused to accept the offer. *Id.* Another offer of settlement was communicated to Albarran by his attorney, and he again rejected that offer. *Id.* A week prior to trial the prosecutor emailed the defense attorney to confirm that she would be adding the aggravator that the victim was under the age of 15 to the Rape in the Second Degree charge. *Id.* The prosecutor was informed by defense counsel that Albarran refused to plead guilty to any offer that she would be willing to extend. *Id.*

In a voicemail defense counsel left for the prosecutor in this case on January 11, 2018, the defense attorney indicated that

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

*Id.*

At trial the testimony showed as follows: Albarran and Denise Domke were in a dating relationship; Albarran moved in with Ms. Domke and her daughter, T.P., in July of 2012. T.P. was thirteen years-old at the time of the rape, on April 1, 2013. RP 248. Although the relationship had, at times, been rocky due to Albarran’s repeated infidelity, Ms. Domke wanted the relationship to work and repeatedly took Albarran back. RP 244. In the eight months preceding this incident, the relationship was going well. RP 244. Albarran and T.P. would do things together like go to a movie or the mall. RP 245.

On March 31, 2013, which was Easter Sunday, Albarran joined Ms. Domke and T.P. at Domke’s parents’ home for Easter dinner. RP 245-

46. That evening T.P. was permitted to stay up later than usual because she was on Spring Break from school. RP 248. The next morning, Ms. Domke awoke for work at 7:15 a.m. and made a pot of coffee, which was her normal routine. RP 249. Her normal custom was to get up, make a pot of coffee, occasionally have a cigarette, select her work clothes, then take her things into her bathroom and get ready in there. RP 247. She would brush her teeth and get dressed in the bathroom. RP 247. On a normal day, she would then check on T.P. and make sure she was getting ready for school. RP 247. Albarran normally went to work at nine or ten in the morning. RP 247. Ms. Domke always showered before anyone else because it took her longer to get ready for her day. RP 248. On this particular morning, Ms. Domke had brought her clothes into the bathroom to get dressed, as was her custom, but after her shower she realized that she'd forgotten her tights in the dryer so she left her room to retrieve her tights, thus leaving the bathroom sooner than she normally would. RP 249-50.

As Ms. Domke walked by T.P.'s room, which was adjacent to her own, she looked inside T.P.'s open door and saw Albarran in T.P.'s room. RP 249-50. T.P. sleeps "like a rock," and was asleep on her bed when Ms. Domke looked in. RP 250-51. Albarran, however, was partially on T.P.'s bed. RP 251. He had his left leg down on the floor and his right leg up on

the bed. RP 250. His left hand was down by his side. RP 251. Albarran's face was in T.P.'s vaginal area. RP 251. Upon seeing this, Ms. Domke began yelling, "What the f\*ck are you doing?" RP 251. Albarran sat up quickly and fled the room. RP 251. Ms. Domke shut the door and continued to yell "What the hell are you doing?" RP 251. Albarran replied "I'm covering her up. I'm just covering her up." RP 251. Ms. Domke got dressed and retrieved her phone, all the while saying, "What did you do? Why would you hurt my baby?" RP 251-52. Albarran continued to claim he was just covering her up and was "just looking." RP 252. He also pleaded with Ms. Domke not to call the police, saying he wouldn't be able to see his kids anymore. RP 252. Ms. Domke disregarded his pleas and took her phone into T.P.'s room, where she called 911. RP 252.

There, T.P. was crying. RP 252. Ms. Domke asked her what happened, but T.P. didn't know. RP 252. She was merely aware of Albarran and Ms. Domke fighting. RP 252. Ms. Domke asked T.P. if her underwear were wet, based on where she had seen Albarran's face. RP 252. T.P. replied that they were, but that she didn't know what happened because she was sleeping. RP 253.

T.P. recalled that she fell asleep the night before while watching a movie. RP 57. It wasn't a school night, so she got to stay up late. RP 57. She woke up to her mom yelling, "What's happening?" RP 57. Albarran

was also there, saying, "I'm just covering her." RP 58. Albarran asked Ms. Domke not to call the police, fearing his kids would be taken away. RP 63. Ms. Domke told Albarran to get out of T.P.'s room. RP 58. T.P.'s underwear was wet in the crotch area. RP 59. That was unusual for her. RP 59. The area also felt "tickly." RP 59. When the police came to her house she went into her room and changed her underwear, giving the pair she had been wearing to the police. RP 60.

Officer Rey Reynolds of the Vancouver Police Department responded to the 911 call. RP 120. When he arrived, he observed Ms. Domke holding a young teenage girl, and they were both crying. RP 121. Ms. Domke told Reynolds that she was walking by T.P.'s room and saw her boyfriend with his head between T.P.'s legs. RP 125. She said that T.P. was asleep. RP 126. T.P. was extremely upset during the discussion with Reynolds. RP 126.

Dr. Staci Kristin examined T.P. in the emergency room of Legacy Salmon Creek hospital. RP 156-58. Dr. Kristin took swabs of T.P.'s external vaginal area, her right inner thigh, and her left inner thigh. RP 173-75. Teresa Shank of the Washington State Patrol Crime Lab examined the evidence from T.P.'s sexual assault kit, as well as T.P.'s underwear. RP 192, 197. She also received reference DNA samples from Albarran and T.P. RP 197. This is a summary of her findings: She did not find

semen in any of the swabs that were taken from T.P.'s external vaginal areas or inner thighs. RP 198. The swabs from the external vaginal area and inner left thigh were positive for saliva, but the swab from the right inner thigh was negative for saliva. RP 199. The external vaginal swab had male DNA but there was not a large enough sample to obtain a DNA profile. RP 199-200. There was enough from the swab from the inner left thigh to get a profile. RP 200. In that sample was a mixture of DNA, which is to be expected because the person whose skin was swabbed would be expected to contribute DNA. RP 201-02. In this sample, it was 6.6 million times more likely that the DNA was a mixture of Albarran and T.P., as opposed to T.P. and someone else. RP 202. T.P.'s underwear was positive for saliva in the crotch area. RP 204. Ms. Shank took three cutouts from the crotch area of the underwear for testing.

RP 204. Semen was found in all three cutouts. RP 204-05, 209. Saliva was also found in all three cutouts. RP 205-09. The cutout labeled sample A had a mixture of DNA of T.P. and Albarran. RP 211. It was 211 trillion times more likely that the DNA from that mixture came from Albarran and T.P. than T.P. and someone else. RP 211. Sample C of the cutouts had a sperm fraction and a non-sperm fraction. RP 212. The sperm fraction matched Albarran to a degree of one in 780 quadrillion. RP 212. The non-sperm fraction matched T.P. Id.

Albarran was interviewed by Detective Hafer. Det. Hafer asked Albarran what happened on the morning of April 1<sup>st</sup> and Albarran said that he followed his normal routine, but went into T.P.'s room to cover her with a blanket. RP 305. Albarran said at that point, Ms. Domke walked in and accused him of touching T.P. RP 305. Det. Hafer asked what could have happened to make Ms. Domke think he had his face between T.P.'s legs and he replied, "I'm not no ugly fuck that couldn't get anyone off the street." RP 306. When pressed again with this question by Det. Hafer, Albarran began telling Det. Hafer about his history of cheating on Ms. Domke. RP 306. However, Albarran confirmed that he and Ms. Domke had gotten back together eight months prior to this incident and said things had been going well. RP 306. When pressed again about why Ms. Domke would think he had his head between T.P.'s legs, he said that an ex-girlfriend of his made Ms. Domke jealous, but then said "[b]ut that has nothing to do with that." RP 306. Albarran denied begging Ms. Domke not to call the police, claiming that he simply told her, "there's no need to call the cops, because nothing happened." RP 307-08. Albarran said Ms. Domke was a nice girl and he'd always known her to be honest. RP 308. Albarran said he had no idea why T.P.'s underwear was wet that morning. RP 310. Albarran also claimed that Ms. Domke punched him in the eye that morning and gave him a black eye. RP 311. Albarran again reiterated

that his cheating past had “nothing to do with” Ms. Domke’s accusation against him. RP 312.

Albarran also sought to testify that he and Ms. Domke used sex toys each time they had sex, which were kept in a drawer on the left side of the bed where he slept. RP 352-54. He sought to testify that Ms. Domke called him one day and told him that one of her sex toys and some lubricant were missing. RP 352. Albarran wanted to testify that the implication of what Ms. Domke told him was that T.P. stole the sex toy because she was the only other person in the house. RP 352. He never saw T.P. take a sex toy. RP 353. He also wanted to testify that Ms. Domke told him that she (Ms. Domke) had allowed T.P. to use one of Ms. Domke’s sex toys. RP 353. Albarran wanted to use this hearsay to opine for the jury that the presence of his DNA on T.P.’s body and underwear was from this shared sex toy. RP 353. The Court ruled that people are not allowed to testify about statements made by someone else, which are offered for the truth of the matter asserted, because such testimony is unreliable. RP 355. The court disallowed the proposed testimony. RP 355.

Albarran was convicted of rape in the second degree, rape of a child in the second degree, attempted rape of a child in the second degree, and child molestation in the second degree. CP 31-34. He was also found to have committed the rape in the second degree against a person under

the age of 15. CP 37. The court entered judgment only on the rape in the second degree conviction. CP 48-61. The other convictions were vacated and dismissed. Albarran timely appealed his convictions and sentence. The Court of Appeals reversed the trial court's entry of judgment for Rape in the Second Degree, finding that under the general-specific rule, that only the conviction for Rape of a Child in the Second Degree should stand. *State v. Albarran*, 191 Wn.App. 1031 (2015).<sup>2</sup> The State then petitioned for review to the Supreme Court. The Supreme Court accepted review, and reversed the Court of Appeals, affirming the trial court's entry of judgment against Albarran for Rape in the Second Degree against a child under the age of 15. *State v. Albarran*, 187 Wn.2d 15, 383 P.3d 1037 (2016).

The Supreme Court issued its mandate on December 9, 2016. *See* Appendix B. Albarran filed a CrR 7.8 motion in Clark County Superior Court alleging he received ineffective assistance of counsel and that the prosecutor committed misconduct. *See* CrR 7.8 Motion. The Superior Court transferred Albarran's motion to this Court for consideration as a personal restraint petition. *See* Appendix C. This Court accepted the

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<sup>2</sup> While GR 14.1 does allow for citation to unpublished opinions of the Court of Appeals issued after March 1, 2013, the State does not cite to this case for precedential or persuasive value, but only to show the procedural history of this case.

matter as a personal restraint petition. The State now submits this response.

#### **RAP 16.9 STATEMENT**

RAP 16.9 (a) says the Respondent “should also identify in the response all material disputed questions of fact.” The State hereby declares that if any fact averred by the defendant would in any way dispute, refute, rebut, negate, undermine, or undercut any fact in the record or verdict of the jury, it is a disputed question of fact. Unless the State *specifically disavows* a fact adduced at trial, the State should be viewed as adhering to the settled record in total and to the extent anything said or averred by the defendant would stand in contrast with any fact from the record, the State disagrees with and disputes that fact. This includes any “opinion,” be it by expert or lay person, which purports to dispute, refute, rebut, negate, undermine, or undercut any fact adduced at trial or any verdict rendered by the jury. If the fact in question is germane to this Court’s consideration of the personal restraint petition such that the petition cannot be decided without settling the matter, this Court is then required by RAP 16.11 to remand this matter to the Superior Court for a reference hearing, wherein a proper trier of fact can settle the dispute. An appellate court is not a trier of fact and cannot settle factual disagreements.

See e.g. *State v. Rafay*, 168 Wn.App. 734, 285 P.3d 83 (2012), *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996). A party is not required to specifically request a reference hearing to trigger the appellate Court's duty to hold one in the event this Court determines there is a disputed fact that must be settled.

#### **ARGUMENT AS TO WHY PETITION SHOULD BE DISMISSED**

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982). The petitioner must prove either a constitutional error that caused actual prejudice, or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn. App. 329, 254 P.3d 899 (2011).

In evaluating a personal restraint petition, the Court may: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if

the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983). Any inferences must be drawn in favor of the validity of the judgment and sentence and not against it. *Hagler*, 97 Wn.2d at 825-26.

A mere showing of error is not enough in a personal restraint petition. The petitioner must show that “more likely than not, he was actually prejudiced by the claimed error.” *Hews*, 99 Wn.2d at 89. The test for determining whether a Court should grant a petition is stated in *Hagler, supra* as:

[The petitioner] must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

*Hagler*, 97 Wn.2d at 825 (citing *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)). A petitioner must do more than simply claim a conviction is unconstitutional. More is required. *In re Pers. Restraint of Williams*, 111 Wn.2d at 364. A personal restraint petition must be supported by affidavits or declarations stating particular facts,

certified documents, certified transcripts, and the like. *Id.* The petitioner bears the burden of showing prejudicial error. *State v. Brune*, 45 Wn.App. 354, 725 P.2d 454 (1986); *In re Pers. Restraint of Monschke*, 160 Wn.App. 479, 251 P.3d 884 (2010). Bare allegations unsupported to citation to authority, references to the record, or persuasive reasoning cannot sustain this burden of proof. *Brune*, 45 Wn.App. at 363. The petitioner must support the petition with the facts upon which the claim of unlawful restraint, and he may not rely solely on conclusory allegations. *Monschke*, 160 Wn.App. at 488; *In re Personal Restraint of Cook*, 114 Wn.2d at 813-14; RAP 16.7(a)(2) (i). When the allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *Monschke*, 160 Wn.App. at 488; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992). If the petitioner fails to make this threshold showing then he cannot bear his burden of showing prejudicial error. *Monschke*, 160 Wn.App. at 489.

Albarran has failed to demonstrate any actual error, much less error that worked to his actual and substantial prejudice. Albarran's petition should be dismissed for failure to show any actual error and for failing to show any prejudice.

**I. Albarran Cannot Show he was denied effective assistance of counsel or that any deficiency prejudiced him**

Albarran argues this Court should vacate the convictions against him in this case because he received ineffective assistance of counsel in the pre-trial negotiation phase. Albarran seeks an order from this Court forcing the State to reinstate an offer of settlement the defendant rejected and an order vacating his convictions and requiring a new trial. Albarran has not shown his attorney was deficient or that any deficiency worked to his actual and substantial prejudice. Albarran's claim of ineffective assistance of counsel fails.

To prevail on a claim of ineffective assistance of counsel, Albarran must overcome the presumption of effective representation and demonstrate that his attorney's performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Klinger*, 96 Wn.App. 619, 980 P.2d 282 (1999). Counsel is presumed effective. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). To support his claim he received ineffective assistance of counsel surrounding his decision to reject the State's offer of settlement, Albarran must show his attorney failed to adequately assist him in the decision on whether to accept the State's offer of settlement, or failed to provide him with

sufficient information to make an informed decision on whether or not to plead guilty. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), *rev. denied*, 137 Wn.2d 1011, 978 P.2d 1098 (1999); *State v. James*, 48 Wn.App. 353, 739 P.2d 1161 (1987). A petitioner's bald assertions and conclusory allegations are insufficient to support a claim of ineffective assistance of counsel. *In re Pers. Restraint of Rice*, 118 Wn.2d at 886. Here, there is no corroborative evidence of defense counsel's alleged ineffectiveness. *See State v. Gomez Cervantes*, 169 Wn. App. 428, 282 P.3d 98 (2012).

Defense counsel is under an ethical obligation to discuss plea negotiations with their clients. *In re Personal Restraint of McCready*, 100 Wn.App. 259, 996 P.2d 658 (2000) (citing to *State v. James*, 48 Wn.App. at 362). Further, defense counsel must provide their clients with sufficient information to make an informed decision on whether or not to plead guilty, *Holm*, 91 Wn.App. at 435, and must “actually and substantially [assist] his client in deciding whether to plead guilty.” *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn.App. 229, 633 P.2d 901 (1981)). Failing to communicate a plea offer, failing to give adequate information regarding the plea offer, or failing to assist the defendant in deciding whether to plead guilty could constitute deficient performance. *See James*, 48 Wn.App. at 363. If that is shown, the

inquiry becomes whether there is a reasonable probability that but for the attorney's deficient performance, the defendant would have accepted the plea offer. *Id* (citing to *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

An attorney's performance is presumed to have been adequate. *State v. Henrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996). And an attorney is not deficient simply because his client was convicted at trial. *Id*. Initially, the record shows that defense counsel did communicate plea offers with Albarran. The prosecutor e-mailed defense counsel a week prior to trial confirming her intent to amend the information to add the aggravator that the victim was under the age of 15. *See Appendix A*. Defense counsel responded that he would tell Albarran. *Id*. At the readiness hearing on January 10, 2014, the State filed that amendment and defense counsel, with Albarran present, told the court that the State had told him "months and months and months" prior that they'd be amending the information to add the aggravators if the case went to trial and that he had told Albarran about this back in August. *Id*. The prosecutor's statement and the emails between Albarran's attorney and herself discussing plea offers show that counsel did communicate plea offers with Albarran. The next part of the analysis is whether the attorney actually and substantially assisted in deciding whether to plead guilty. *See Osborne*,

*supra*. The defense attorney indicated that he and Albarran met “a lot,” and that despite their discussions and meetings, that he was “adamant” that he would not accept a plea offer. *See* Appendix A. This was a statement Albarran made to his attorney “over and over again.” *Id.* Albarran was insistent on his innocence, asking his attorney, “why should I plead guilty? I didn’t do anything.” *Id.* With counsel’s indication that he and Albarran met “a lot,” and that “at no time was [Albarran] ever going to accept anything,” it is clear that the attorney attempted to discuss the possibility of pleading guilty to an offer and what that would entail; Albarran’s attorney performed appropriately, but Albarran steadfastly refused to consider the possibility of pleading guilty to any offer. *See id.* The decision of whether to accept a plea offer is the defendant’s; no one can force an individual to plead guilty. While an attorney must actually and substantially assist a client in making that decision, it still remains the defendant’s decision on whether to accept a plea offer. It is clear here that his defense attorney communicated the offer to Albarran and discussed the options with him. It was Albarran’s choice to reject the plea offer and he cannot now claim that decision was his attorney’s fault. Albarran has not shown that his attorney was deficient.

Furthermore, Albarran cannot prove any prejudice in this instance. He adamantly and steadfastly refused to accept any responsibility in this

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

In *State v. Edwards*, 171 Wn.App. 379, 294 P.3d 708 (2012), Division II of the Court of Appeals evaluated whether defense counsel provided ineffective assistance during plea negotiations. There, the defendant alleged his attorney failed to adequately advise him of plea options and the sentencing consequences. *Edwards*, 171 Wn.Ap. at 393.

The defendant showed his attorney sent him two e-mails about the State's offer of settlement. *Id.* at 395-96. In the first, defense counsel incorrectly stated that the State would require he plead guilty to four counts of child molestation before the State would recommend a SSOSA sentence, when the offer actually only required the defendant to plead guilty to three counts to obtain a SSOSA recommendation from the State. *Id.* at 395. Defense counsel also did not convey the State's alternative offer of a straight up plea to one count of child molestation with a standard range sentence. *Id.* at 396. In this e-mail counsel stated that a SSOSA sentence would require the defendant plead guilty, obtain a sexual deviancy evaluation and undergo treatment. *Id.* The attorney further stated that he had consulted with a top criminal defense attorney who agreed the SSOSA offer was a "non-starter." *Id.* In the second e-mail, defense counsel included the State's "final offer," and advised the defendant to go to trial. *Id.* The defendant claimed his attorney had not explained what an "indeterminate sentence" was or its significance in the context of the State's offer. *Id.* Counsel had explained that his recommendation to go to trial was based on his belief it was the only reasonable course of action. *Id.* The Court of Appeals found this showed there was discussion of the strengths and weaknesses of the defendant's case so that the defendant

would know what to expect at trial and be able to make an informed decision on whether to plead guilty. *Id.*

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

The *Edwards* opinion is helpful in evaluating this case. The evidence establishes that defense counsel for Albarran communicated the State's offer to his client. Albarran's affidavit itself shows that his attorney discussed the facts of the case, the evidence the State had, the offer of settlement, and what his attorney planned to argue at trial. *See* Affidavit of Miguel Albarran, p. 2. In both *Edwards* and here, the defendants wanted a plea offer after gambling on trial and being convicted. Buyer's remorse does not establish that trial counsel was ineffective. Here, Albarran clearly wishes he had chosen a different course of action because of the jury's verdict and the outcome of his case on appeal. That remorse, however, is simply not a basis for relief from the judgment. Albarran's claim his attorney was ineffective in assisting him in deciding whether to plead guilty fails.

## **II. Counsel was not ineffective for cross-examining Detective Hafer on certain subjects**

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

The subject matter covered in and the extent of cross-examination is a matter of judgment and strategy. *State v. Johnston*, 143 Wn.App. 1, 177 P.3d 1127 (2007) (citing *In re Personal Restraint of David*, 152 Wn.2d 647, 101 P.3d 1 (2004)). No court will find ineffective assistance of counsel based on trial counsel's decisions during cross-examination if counsel's performance fell within the range of reasonable representation. *Id.* Furthermore, great deference is afforded to a defense attorney's performance. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). A reviewing court strongly presumes that performance was appropriate and that the attorney's decisions and tactics were reasonable. *Id.* To rebut this presumption of reasonableness, the defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance. *Id.*

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable....” *In re Personal Restraint of Lui*, 188 Wn.2d 525, 397 P.3d 90 (2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 690-91)). Furthermore, our courts do not rest claims of ineffective assistance of counsel on cross-examination strategy in the absence of specific reasons on how the strategy undermines confidence in the conviction. *See State v. Thomas*, 109 Wn.2d 222, 743 P.3d 816 (1987) (citing *Strickland*, 466 U.S. at 694).

It is clear that defense counsel’s cross-examination of Det. Hafer was based on sound trial strategy. By asking Det. Hafer about Albarran’s prior criminal history counsel was able to introduce evidence of his client’s good character. Typically whether a defendant has been convicted of crimes in the past is inadmissible to show good, law-abiding character. Yet Albarran’s attorney was able to admit this evidence and use it in his closing argument to show the State did not have the type of evidence it typically had in such cases and had no way of undermining his client’s credibility, like with prior criminal convictions. *See* RP 434-35. Counsel’s questions to Det. Hafer about the defendant’s statements to the officer, and on jail phone calls, was to show that the defendant never confessed, never apologized, and never made any incriminating statements to anyone.

See RP 429-31. It is clear that these questions to Det. Hafer were intentionally asked to pave the way for counsel's closing argument, which highlighted what his client had going for him: no prior criminal history, no prior allegations of sexual assault, no confessions, apologies or incriminating statements regarding the alleged sexual abuse, and the fact that he was fully cooperative with police and engaged in several conversations with police during their investigation.

Defense counsel's questions of the detective that Albarran now complains of clearly were an integral part of his trial strategy. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *In re Personal Restraint of Caldellis*, 187 Wn.2d 127, 385 P.3d 135 (2016) (quoting *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009)). In *State v. Garrett*, our Supreme Court stated, "this court will not find ineffective assistance of counsel if 'the actions of counsel complained of go to the theory of the case or to trial tactics.'" *State v. Garrett*, 124 Wn.2d 504, 881 P.2d 185 (1994) (quoting *State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982)). From the questions Albarran's attorney asked and the theme of his closing argument, it is clear that his questions were specifically designed to promote his theory of the case. This is further exemplified in the attorney's questioning of the defendant. RP 339-40. On direct of his client,

counsel elicited that Albarran had never been convicted of any type of sexual assault, no other type of crimes, and had never pled guilty to any sexual assaults. RP 339. The prosecutor objected, and the court said this line of questioning would “open up other lines of questioning,” and defense counsel responded “All the more.” RP 339. This shows that defense counsel’s strategy was to show his client as law-abiding, and thus a good person. This theme ran through his questioning of the state’s witness, Albarran’s own testimony, and his closing argument. This is a classic example of trial strategy or tactics which our courts will not disturb or second guess. Albarran has not shown that his attorney’s questioning was unreasonable nor has he shown that there was no legitimate trial tactic to explain counsel’s actions. As Albarran has not shown deficient performance, his claim of ineffective assistance of counsel fails.

Furthermore, Albarran cannot show any actual and substantial prejudice from his attorney’s trial strategy of showing he was a law-abiding person who fully cooperated with the police investigation, and who has always maintained his innocence. In his petition, Albarran claims that his attorney’s questioning regarding lack of criminal history opened up the door to the fact that Albarran had been arrested before, but Albarran indicated it was a case of mistaken identity. Albarran further testified it did not result in a conviction. The State was unable to rebut this, and the

jury was left with the impression that Albarran was up front and honest about any past troubles he had, even when they were mistakes by police and not because he was guilty of any crime. Even if the jury took a negative view of Albarran from the mere fact of prior police contact, he cannot show that this prejudiced him to the point that had it not occurred the outcome of the case probably would have been different. There is overwhelming evidence of Albarran's guilt in this case. He was caught red-handed by the victim's mother with his head at her sleeping daughter's crotch; Albarran's DNA in the form of semen and other was found on the victim's thigh and inside her underwear on the crotch; saliva was also found on the victim's vagina and underwear; and police were immediately called. The evidence was overwhelming and even without the claimed improper testimony about Albarran's lack of criminal history, but that he was once arrested and questioned and let go, there is no possibility the jury verdict would have been different. Albarran's claim of ineffective assistance of counsel fails.

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

As part of his attempt to explain away the DNA evidence, Albarran attempted to show that he and his girlfriend, the victim's mother, used a vibrator together and that his DNA might have been on that vibrator that

the victim then used, thus transferring his DNA to the victim. Not only was counsel not deficient in failing to get evidence of this speculative explanation admitted, but Albarran cannot show any prejudice as no reasonable jury would have been swayed by this far-fetched and unsupported hypothesis.

Essentially, Albarran had no idea whether the victim ever used a vibrator, let alone her mother's vibrator. *See* RP 352-54. Albarran claimed that his girlfriend, the victim's mother, told him once that the victim had used her vibrator. RP 352-53. This is something the victim and her mother both denied in their pre-trial interviews, interviews that defense counsel conducted. Albarran now claims that his attorney should have cross-examined the victim and her mother about the mother's vibrator and the victim's use of the vibrator. Had he done that at trial, both the victim and her mother would have denied any use of the vibrator by the victim, or ever telling Albarran anything like that. Albarran could then have possibly attempted to impeach the victim and her mother's testimony through his own testimony that the mother told him the victim had used her vibrator. However, that evidence would not have had the impact that Albarran now argues it would have. First, that evidence would only have been for impeachment purposes. ER 607(3)(e) contemplates impeaching a witness by a prior inconsistent statement. ER 607 further states that "impeachment

by prior inconsistent statement is governed by Rule 613.” ER 613 allows cross-examination of a witness on a prior inconsistent statement, and introduction of the prior statement via extrinsic evidence in some circumstances. However, impeachment evidence is not substantive evidence and may not be argued as such. *State v. Clinkenbeard*, 130 Wn.App. 552, 123 P.3d 872 (2005) (holding that prior statement of witness that was not admissible under ER 801, but admissible under ER 613 for impeachment, was not substantive evidence). This prior statement Albarran claims his girlfriend said to him, that T.P. once used her vibrator, is hearsay, and meets no hearsay exception. ER 801 defines hearsay as a statement made outside of the current trial that is offered to prove the truth of the matter asserted. ER 801(c). Albarran only wanted the statement from his girlfriend that T.P. had used the vibrator to prove that T.P. had used the vibrator, thus explaining how his DNA was found on T.P.’s body. Thus it falls squarely within the definition of hearsay. ER 802 prohibits admission of hearsay unless it meets an exception. ER 803 and ER 804 provide many exceptions to the hearsay rule, but none would apply to the statement Albarran now argues should have been admitted at trial. Therefore, the only possible way in which this statement could have been admitted at trial was as impeachment evidence as a prior inconsistent statement. Impeachment evidence is not substantive evidence and may not

be argued as such. *See Clinkenbeard, supra*. The State would have been able to object to any improper use of that evidence in defense's closing argument. Impeachment evidence cannot be argued to a jury to prove the underlying fact. Therefore Albarran could not have argued that the mother's hearsay statement to him about the victim using her vibrator proved the victim used the vibrator. That hearsay statement could have only properly been used by defense counsel in closing argument to argue that the mother was not credible in her testimony as she previously said something different. Thus the jury still would not have been able to properly consider the vibrator evidence as a way of explaining the DNA on the victim's body and underwear.

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

altered the outcome of the case. Albarran cannot show prejudice and thus his claim of ineffective assistance of counsel fails.

#### **IV. The prosecutor did not commit misconduct**

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

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant

who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Contextual consideration of the prosecutor’s statements is important. *State v. Burton*, 165 Wn. App. 866, 269 P.3d 337 (2012).

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

Only those errors [that] may have affected the outcome of the trial are prejudicial. 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 consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

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

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Albarran highlights short statements, fractions of sentences, and singular words used through the prosecutor's lengthy closing and rebuttal

arguments to support his contention that the prosecutor committed misconduct. However, case law is explicit that a prosecutor's argument must be taken in the entire context of the argument and the trial as a whole. Albarran's arguments of misconduct focus mostly on the State's response to his own trial strategy and closing argument. The prosecutor is properly allowed to rebut argument from defense's closing statement in his or her rebuttal argument. Further, by failing to object, Albarran waived his right to object to any misconduct unless it would have been impossible to cure by an instruction from the Court. Juries are presumed to follow the court's instructions and in every instance Albarran cites to in his brief, an instruction from the court would have neutralized the State's argument.

Albarran argues the prosecutor committed misconduct by saying defense was going to rely on the reasonable doubt instruction a lot. Yet immediately preceding and following that statement the prosecutor read the instructions as given by the court to the jury and at no time argued that her burden should be anything less than proof beyond a reasonable doubt. RP 413-14. The prosecutor did not engage in burden-shifting and when her comment is taken in context of her entire argument and the case as a whole, it is clear no prejudice ensued from her remark.

Albarran also argues the prosecutor committed misconduct by introducing evidence of Albarran's prior inconsistent statement to a CPS

worker. Albarran is the one who testified, repeatedly, over the State's objections and despite the Court's pretrial ruling prohibiting admission of evidence of violence, and despite his own attorney's warning prior to taking the stand that he not testify about that subject, that the victim's mother had previously hit him. RP 347-49. This statement was directly contradictory to a statement the defendant made to CPS, contained in a document provided by the State during pretrial discovery, that there had been no domestic violence between the defendant and the victim's mother. RP 372. The State properly elicited this evidence and did not improperly argue this evidence to the jury. Albarran's claim that this amounts to prosecutorial misconduct is wholly without any legal support. The State properly sought to impeach the defendant by a prior inconsistent statement. Albarran improperly argues in his motion that the State alleged Albarran lied because he could not provide proof to support his assertion that the mother had struck him, but the State's reference to Albarran's credibility was regarding the prior inconsistent statement that he made to the CPS worker. Both statements could not be true: one was a lie. The State is allowed to argue the evidence admitted at trial and Albarran takes issue here with wholly proper argument based on properly admitted evidence.

Albarran next argues the prosecutor committed misconduct when she referred to the defendant as “arrogant.” In his closing argument, Albarran argued that when the State goes to trial they usually have confessions and there was no confession here, in an attempt to convince the jury that the State did not have sufficient evidence to convict. The prosecutor rebutted,

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

RP 450-51. The defendant put his cheating into evidence in the trial. RP 343-47. He put the fact that the victim’s mother continuously took him back into evidence in the trial. *Id.* The prosecutor properly made inferences, and argued conclusions from the evidence that was admitted at trial. That despite what defense counsel claimed, that they were at trial because the State didn’t have a confession, that they were at trial because

the defendant was once again hoping to avoid being held responsible for his actions, that he once again thought he could get away with it. That argument was proper and appropriate given the argument Albarran made to the jury and the evidence admitted at trial.

Albarran also argues the prosecutor committed misconduct by arguing that Albarran had no explanation for the DNA evidence. Again, the prosecutor argued exactly what had been admitted into evidence at trial. When defense counsel asked Albarran on direct examination what explanation he had for his DNA being found on the victim and in her underwear, he only responded that he did not do this, he loves the victim and her mother and that it broke his heart. RP 357. Albarran had no explanation given to the jury for why his DNA was found on the victim. And to argue that a theory, wholly speculative and entirely based on hearsay was a proper “explanation” the jury should have considered and the prosecutor committed misconduct by saying Albarran had no explanation is entirely without merit.

Albarran cannot show the prosecutor’s statements were in any way improper or amounted to prosecutorial misconduct. Furthermore, none of the statements Albarran now complains of were objected to and they therefore are waived unless there is absolutely no way the trial court could have successfully instructed the jury to disregard the arguments. Nothing

the prosecutor said was so flagrant or prejudicial that the jury could not have been instructed to disregard the statements, thus curing the trial of any error. By failing to object, Albarran waived this argument. Furthermore, Albarran cannot show that absent these few statements, picked and chosen from a lengthy closing argument, the outcome of the trial would have been different. Albarran has failed to meet his burden in showing prosecutorial misconduct. This claim fails.

#### CONCLUSION

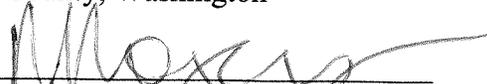
Albarran has failed to show his attorney's actions were improper or that any claimed actions prejudiced him. In addition, the prosecutor's statements were appropriate given the context of her entire argument and the trial, and were not so flagrant or ill-intentioned that an instruction from the trial court could not have obviated any potential prejudice. Albarran cannot show he was denied a fair trial. His petition should be dismissed.

DATED this 4<sup>th</sup> day of June, 2018.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
RACHAEL A. ROGERS, WSBA #37878  
Senior Deputy Prosecuting Attorney  
OID# 91127

# **APPENDIX A**

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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  
Page 1

CLARK COUNTY PROSECUTING  
ATTORNEY'S OFFICE  
1013 FRANKLIN STREET  
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VANCOUVER, WA 98666  
(360) 397-2261

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

CLARK COUNTY PROSECUTING  
ATTORNEY'S OFFICE  
1013 FRANKLIN STREET  
PO BOX 5000  
VANCOUVER, WA 98666  
(360) 397-2261

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."

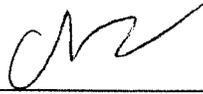
23 In my capacity as a deputy prosecutor handling this case, I am aware that my office  
24 provided Mr. Kurtz with 284 pages of discovery prior to trial. These documents included the  
25 police reports, witness statements, medical reports and records, photographs, scientific test

26 DECLARATION OF CAMARA BANFIELD  
27 Page 3

CLARK COUNTY PROSECUTING  
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VANCOUVER, WA 98666  
(360) 397-2261

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 11<sup>th</sup> day of January, 2018 in Vancouver, Washington.

6 

7 \_\_\_\_\_  
Camara Banfield

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## **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](mailto: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](mailto: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](mailto: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

>

> Sent from my iPhone

> Dave Kurtz

>

>> On Jan 7, 2014, at 16:58, "Banfield, Camara" <[Camara.Banfield@clark.wa.gov](mailto: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](tel:360.397.2261) x4432 (w)

>>

>>

>>

>> 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 RAW	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 1/c. Order:
7/12/13	1	SR: - cond. from set, bail posted an Order CD →
7/25/13 RAW	9	A/c Arr. PING JT 9/9 RH 9/5 (40 days elapsed) SAPD entered omnibus 8/27 @ 1:30
8/16/13	6	OH/CPH/DR/NE. OH entered. OH date of 8/27 stricken
9/4/13	8	STW MTC - Δ does not oppose talsm wants continuance RH 1/9/14 TS 1/13/14 elapsed: 43 STW filed STC 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 child 2 Rape 2 attempted rape 2 attempt ROL 2 2 indecent libel

2  
K

FILED

2013 SEP 19 PM 12: 13

SCOTT G. WEBER, CLERK  
CLARK COUNTY

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

STATE OF WASHINGTON,

Plaintiff,

v.

MIGUEL ALBARRAN,

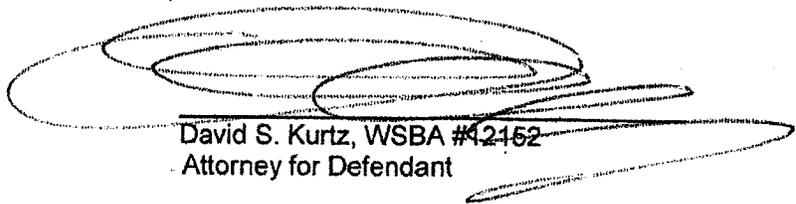
Defendant.)

No. 13-1-01301-1

EX PARTE REQUEST FOR AUTHORIZATION  
FOR PRIVATE INVESTIGATOR SERVICES AT  
PUBLIC EXPENSE

COMES NOW the Defendant, by and through his attorney, DAVID S. KURTZ, and hereby requests authorization for payment of public funds for investigator services. This request is based on the federal and state constitutions, CrR 3.1(f), and the attached Certification of Counsel.

DATED this 17<sup>th</sup> day of September, 2013

  
David S. Kurtz, WSBA #42162  
Attorney for Defendant

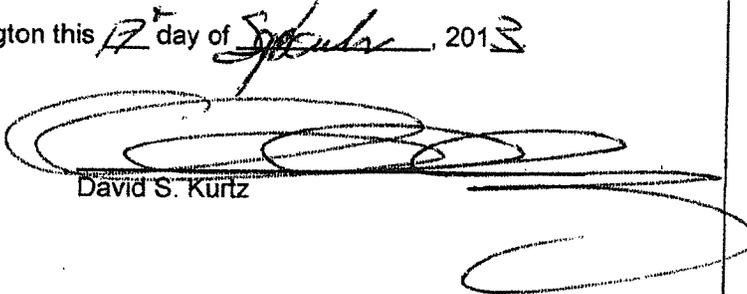
LAW OFFICE OF  
DAVID S. KURTZ  
ATTORNEY-AT-LAW  
P.O. BOX 897  
BATTLE GROUND, WASHINGTON 98604  
(360) 606-7834

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 17<sup>th</sup> day of September, 2013

  
David S. Kurtz

LAW OFFICE OF  
DAVID S. KURTZ  
ATTORNEY-AT-LAW  
P.O. BOX 897  
BATTLE GROUND, WASHINGTON 98604  
(360) 606-7934

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

# **APPENDIX B**

**FILED**

**DEC - 9 2016**  
WASHINGTON STATE  
SUPREME COURT

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 MIGUEL ANGEL ALBARRAN, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

## MANDATE

No. 92775-8

Court of Appeals No.  
46162-5-II

Clark County Superior Court  
No. 13-1-01301-1

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington  
in and for Clark County

The opinion of the Supreme Court of the State of Washington was filed on November 10, 2016, and became the decision terminating review of this Court in the above entitled case on November 30, 2016. This case is mandated to the superior court from which the appellate review was taken for further proceedings in accordance with the attached true copy of the opinion.

No cost bills having been timely filed, pursuant to RAP 14.4, costs are deemed waived.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Olympia, Washington, this 9<sup>th</sup> day of December, 2016.

SUSAN L. CARLSON  
Clerk of the Supreme Court  
State of Washington

Page 2  
No. 92775-8  
MANDATE

cc: Hon. Barbara Johnson, Judge  
Clerk, Clark County Superior Court  
Anne Mowry Cruser  
James Robert Dixon  
Reporter of Decisions

# APPENDIX C

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

FILED  
2018 MAR -6 PM 1:40

SCOTT G. WEBER, CLERK  
CLARK COUNTY

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

<p>THE STATE OF WASHINGTON,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>MIGUEL ALBARRAN,</p> <p style="text-align: right;">Defendant.</p>	<p>No. 13-1-01301-1</p> <p><b>ORDER RE CrR 7.8 MOTION</b></p> <p><b>CLERK'S ACTION REQUIRED</b></p> <p>*Copies to Defendant and Prosecuting Attorney</p>
--	--

**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 \_\_\_\_\_.

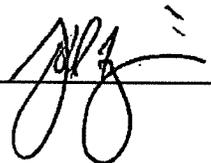
Having determined that the motion is not barred by RCW 10.73.090 (motion was filed within one year of date judgment and sentence became final or judgment and sentence is invalid on its face), but having determined that the Defendant has not made a substantial showing that s/he is entitled to relief or 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 

**CLARK COUNTY PROSECUTING ATTORNEY**

**June 04, 2018 - 4:17 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51575-0  
**Appellate Court Case Title:** Personal Restraint Petition of Miguel A Albarran  
**Superior Court Case Number:** 13-1-01301-1

**The following documents have been uploaded:**

- 515750\_Personal\_Restraint\_Petition\_20180604161608D2273317\_6487.pdf  
This File Contains:  
Personal Restraint Petition - Response to PRP/PSP  
*The Original File Name was Brief - Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- james@dixoncannon.com
- litigators@dixoncannon.com

**Comments:**

---

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov

**Filing on Behalf of:** Rachael Rogers - Email: rachael.rogers@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:  
PO Box 5000  
Vancouver, WA, 98666-5000  
Phone: (360) 397-2261 EXT 5686

**Note: The Filing Id is 20180604161608D2273317**