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COA NO. 51589-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO COLT SARMIENTO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck, Judge

BRIEF OF APPELLANT (AMENDED)

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	16
1. THE SEARCH WARRANTS ARE OVERBROAD, REQUIRING SUPPRESSION OF EVIDENCE OBTAINED FROM THEM.....	16
a. The trial court proclaimed the warrants "perfectly appropriate" and perfunctorily denied Sarmiento's suppression motion.....	17
b. The trial court's ruling is reviewed de novo.....	18
c. Overbroad warrants are constitutionally defective	18
d. The warrant for the phones lacks probable cause and is otherwise overbroad.....	21
e. The warrants for the phone accounts lack probable cause and are otherwise overbroad	34
f. The warrant for Sarmiento's Facebook records lacks probable cause and is otherwise overbroad	37
g. The warrants for the Facebook records of Martinez and Salinas lack probable cause and are otherwise overbroad	42
h. The exclusionary rule requires suppression of evidence obtained from the invalid warrants	44

TABLE OF CONTENTS

	Page
i. The argument related to the affidavits is preserved for review, but if not, then defense counsel was ineffective for failing to raise it	46
2. DEFENSE COUNSEL'S FAILURE TO REQUEST INSTRUCTION ON DEFENSE OF OTHERS DENIED SARMIENTO HIS RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL	50
3. CUMULATIVE ERROR DEPRIVED SARMIENTO OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL	57
4. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL FIREARM POSSESSION.....	57
D. <u>CONCLUSION</u>	65

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Yung-Cheng Tsai,</u> 183 Wn.2d 91, 351 P.3d 138 (2015).....	50
<u>Lutheran Day Care v. Snohomish County,</u> 119 Wn.2d 91, 829 P.2d 746 (1992).....	59
<u>Maynard Inv. Co. v. McCann,</u> 77 Wn.2d 616, 465 P.2d 657 (1970).....	47
<u>State v. Askham,</u> 120 Wn. App. 872, 86 P.3d 1224, review denied, 152 Wn.2d 1032, 103 P.3d 201 (2004)	31
<u>State v. Belgarde,</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	45
<u>State v. Besola,</u> 184 Wn.2d 605, 359 P.3d 799 (2015).....	20, 31
<u>State v. Bowen,</u> 157 Wn. App. 821, 239 P.3d 1114 (2010).....	63
<u>State v. Burke,</u> 163 Wn.2d 204, 181 P.3d 1 (2008).....	45
<u>State v. Callahan,</u> 77 Wn.2d 27, 459 P.2d 400 (1969).....	58, 61
<u>State v. Chouinard,</u> 169 Wn. App. 895, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013)	58, 61-62
<u>State v. Coe,</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	57

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Colquitt,</u> 133 Wn. App. 789, 137 P.3d 892 (2006).....	64
<u>State v. Constantine,</u> 182 Wn. App. 635, 330 P.3d 226 (2014).....	22
<u>State v. Cote,</u> 123 Wn. App. 546, 96 P.3d 410 (2004).....	62
<u>State v. Davenport,</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	57
<u>State v. Davis,</u> 182 Wn.2d 222, 340 P.3d 820 (2014).....	61
<u>State v. DeVries,</u> 149 Wn.2d 842, 72 P.3d 748 (2003).....	65
<u>State v. Echeverria,</u> 85 Wn. App. 777, 934 P.2d 1214 (1997).....	63
<u>State v. Fischer,</u> 23 Wn. App. 756, 598 P.2d 742 (1979).....	52
<u>State v. Gallo,</u> 20 Wn. App. 717, 582 P.2d 558, <u>review denied</u> , 91 Wn.2d 1008 (1978)	47
<u>State v. Garvin,</u> 166 Wn.2d 242, 207 P.3d 1266 (2009).....	44
<u>State v. George,</u> 146 Wn. App. 906, 193 P.3d 693 (2008).....	58, 60-61

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Griffith,
129 Wn. App. 482, 120 P.3d 610 (2005),
review denied, 156 Wn.2d 1037, 134 P.3d 1170 (2006) 22

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980)..... 58

State v. Hartzell,
156 Wn. App. 918, 237 P.3d 928 (2010)..... 58, 63

State v. Hickman,
135 Wn.2d 97, 954 P.2d 900 (1998)..... 60

State v. Higgins,
136 Wn. App. 87, 147 P.3d 649 (2006)..... 24, 35, 38, 43, 47, 49

State v. Higgs,
177 Wn. App. 414, 311 P.3d 1266, 1272 (2013),
review denied, 179 Wn.2d 1024, 320 P.3d 719 (2014) 19-21

State v. Hinton,
179 Wn.2d 862, 319 P.3d 9 (2014)..... 43

State v. Hundley,
126 Wn.2d 418, 895 P.2d 403 (1995)..... 58

State v. Janes,
121 Wn.2d 220, 850 P.2d 495 (1993)..... 52

State v. Jennings, 33910-6-III, 2018 WL 3199556 (unpublished),
review denied, 428 P.3d 1187 (2018) 60

State v. Jensen,
125 Wn. App. 319, 104 P.3d 717 (2005)..... 60

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Jones,
163 Wn. App. 354, 266 P.3d 886 (2011),
review denied, 173 Wn.2d 1009, 268 P.3d 941 (2012) 48

State v. Keodara,
191 Wn. App. 305, 364 P.3d 777 (2015),
review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016)
.....18, 26-27, 30-31, 37, 39-40, 44

State v. Kruger,
116 Wn. App. 685, 67 P.3d 1147,
review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003) 51, 56

State v. Kyllo,
166 Wn.2d 856, 215 P.3d 177 (2009)..... 49

State v. Ladson,
138 Wn.2d 343, 979 P.2d 833 (1999)..... 44

State v. Laico,
97 Wn. App. 759, 987 P.2d 638 (1999)..... 51

State v. LeFaber,
128 Wn.2d 896, 913 P.2d 369 (1996),
abrogated on other grounds,
State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009) 52

State v. Maddox,
116 Wn. App. 796, 67 P.3d 1135 (2003),
aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004)..... 20, 23, 36, 39

State v. Martinez,
2 Wn. App. 2d 55, 408 P.3d 721,
review denied, 190 Wn.2d 1028, 421 P.3d 458 (2018) 18

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. McCreven</u> , 170 Wn. App. 444, 284 P.3d 793 (2012).....	52
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	52, 54
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	48
<u>State v. McKee</u> , 3 Wn. App. 2d 11, 413 P.3d 1049, <u>review granted</u> , 426 P.3d 749 (2018).....	20, 26, 28-29, 31-32, 36, 39-41
<u>State v. Nordlund</u> , 113 Wn. App. 171, 53 P.3d 520 (2002), <u>review denied</u> , 149 Wn.2d 1005, 70 P.3d 964 (2003)	19
<u>State v. Painter</u> , 27 Wn. App. 708, 620 P.2d 1001 (1980).....	55
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	19-20, 26-27
<u>State v. Powell</u> , 150 Wn. App. 139, 206 P.3d 703 (2009).....	51, 56
<u>State v. Rich</u> , 184 Wn.2d 897, 365 P.3d 746 (2016).....	58
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	20, 24, 40, 47, 49
<u>State v. Samalia</u> , 186 Wn.2d 262, 375 P.3d 1082 (2016).....	25, 27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Spruell,</u> 57 Wn. App. 383, 788 P.2d 21 (1990).....	61
<u>State v. Stenson,</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	32
<u>State v. Thein,</u> 138 Wn.2d 133, 977 P.2d 582 (1999).....	19, 23, 36, 39
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	49-51
<u>State v. Turner,</u> 103 Wn. App. 515, 13 P.3d 234 (2000).....	62-63
<u>State v. Vasquez,</u> 178 Wn.2d 1, 309 P.3d 318 (2013).....	64
<u>State v. Walker,</u> 136 Wn.2d 767, 966 P.2d 883 (1998)	55
<u>State v. Watt,</u> 160 Wn.2d 626, 160 P.3d 640 (2007).....	44
<u>State v. Westlund,</u> 13 Wn. App. 460, 536 P.2d 20 (1975).....	52
<u>State v. WWJ Corp.,</u> 138 Wn.2d 595, 980 P.2d 1257 (1999).....	48
<u>State v. York,</u> 50 Wn. App. 446, 749 P.2d 683 (1987).....	45
<u>Wilcox v. Basehore,</u> 189 Wn. App. 63, 356 P.3d 736, 750 (2015), <u>aff'd</u> , 187 Wn.2d 772, 389 P.3d 531 (2017).....	47

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<u>Andresen v. Maryland</u> , 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976).....	26
<u>Boyd v. United States</u> , 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).....	25
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	58
<u>Marron v. United States</u> , 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927).....	20
<u>Parle v. Runnels</u> , 505 F.3d 922 (9th Cir. 2007)	57
<u>Payton v. New York</u> , 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).....	25
<u>Riley v. California</u> , ___ U.S. ___, 134 S. Ct. 2473, 2489-91, 189 L. Ed. 2d 430 (2014)	25
<u>Stanford v. Texas</u> , 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).....	27
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	49-50
<u>United States v. Blake</u> , 868 F.3d 960 (11th Cir. 2017), <u>cert. denied</u> , 138 S. Ct. 753, 199 L. Ed. 2d 616 (2018).....	40, 43
<u>United States v. George</u> , 975 F.2d 72 (2d Cir. 1992)	33
<u>United States v. Jones</u> , 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).....	43

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Strand,
761 F.2d 449 (8th Cir. 1985) 24

OTHER STATE CASES

Bloom v. State,
283 So.2d 134 (Fla. Dist. Ct. App. 1973) 24

In re 381 Search Warrants Directed to Facebook, Inc.,
132 A.D.3d 11, 14 N.Y.S.3d 23, 24 (N.Y. App. Div. 2015),
aff'd, 29 N.Y.3d 231, 78 N.E.3d 141, 55 N.Y.S.3d 696 (N.Y. 2017)..... 39

Wheeler v. State,
135 A.3d 282 (Del. 2016) 26

OTHER AUTHORITIES

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (4th Ed) 69

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th Ed) 70

15 L. Orland & K. Tegland, Wash. Prac., Judgments § 380 (4th ed. 1986)
..... 59

GR 14.1(a) 60

RAP 2.5(a)(3)..... 48-49

RCW 9.41.040(2)(a) 58

U.S. Const. amend. I 1, 27-28, 31, 36

U.S. Const. amend. IV 1, 17, 18, 25-26, 29-30, 33, 37, 48

U.S. Const. amend. VI 49-50

TABLE OF AUTHORITIES

	Page
<u>OTHER AUTHORITIES</u>	
U.S. Const. amend. XIV	57-58
Wash. Const. art. I, § 3	57-58
Wash. Const. art. I, § 7	1 17-18, 33, 37, 43, 48
Wash. Const. art. I, § 22	49
Webster's Third New Int'l Dictionary (2002)	61
WPIC 16.02	69
WPIC 17.02	70
WPIC 17.04	54

A. ASSIGNMENTS OF ERROR

1. The court erred when it denied appellant's motion to suppress evidence obtained with constitutionally invalid warrants, in violation of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution.

2. Appellant received ineffective assistance of counsel due to counsel's failure to argue the affidavits could not be used to cure defects in the warrants.

3. Appellant received ineffective assistance of counsel due to counsel's failure to request jury instructions on defense of others.

4. Cumulative error deprived appellant of his due process right to a fair trial.

5. Insufficient evidence supports the conviction for second degree unlawful possession of a firearm.

Issues Pertaining to Assignments of Error

1. Police obtained warrants permitting them to search through cell phones, phone accounts, and Facebook accounts, including information unrelated to the crime and information protected by the First Amendment. Did the court err when it ruled the warrants were not overbroad and did not violate the probable cause and particularity requirements of the Fourth Amendment and article I, section 7?

2. Under established law, an affidavit not incorporated into the warrant cannot be used to cure defects in the warrant. This argument is preserved for review, but if this Court disagrees, was counsel ineffective in failing to make the argument below?

3. Where evidence supported instruction on defense of others in connection with the murder and assault charges, whether defense counsel was ineffective in failing to seek such instruction?

4. Whether a combination of errors specified above violated the due process right to a fair trial under the cumulative error doctrine?

5. Whether the State failed to prove beyond a reasonable doubt that appellant actually or constructively possessed a firearm?

B. STATEMENT OF THE CASE

The State charged Alberto Colt Sarmiento with first degree murder by extreme indifference, second degree felony murder, two counts of first degree assault, and one count of second degree unlawful possession of a firearm. CP 27-30. The State also alleged a gang aggravator for all counts and a firearm enhancement for all but the possession count. Id.

Before trial, defense counsel moved to suppress evidence obtained from phones, phone records, and Facebook records because the warrants authorizing these searches were not supported by probable cause and were

overbroad. CP 34, 50-61, 76-85, 388-405; RP¹ 5, 31-32, 40-47. The trial court denied the suppression motion. RP 48-49. Defense counsel also sought to impeach one of the State's witnesses, Raymundo Gomez, with evidence of bias relating to his interest in the U-Visa form of immigration relief. RP 1297, 1320-21, 1327-28, 1378, 1382-83, 1427-28. The court excluded this evidence as irrelevant. RP 1327-29, 1384, 1430.

Evidence at trial showed a shooting took place in Tacoma on November 2, 2015. RP 553. Elijah Crawford was shot in the back and died. RP 556-57, 1152, 1156. Isaac Fogalele was shot but survived. RP 782. Eddie Contreras ran off and emerged unscathed. RP 893-95. Juan Zuniga was the shooter. RP 1822. The State theorized Sarmiento planned an ambush shooting in retaliation for perceived disrespect from Contreras. RP 1960-65, 1973-79. The defense theory was that Sarmiento planned a fist fight with Contreras, but Zuniga shot at the three men because he mistakenly thought they were rival gang members that posed a danger to Sarmiento. RP 2013-14, 2021-23, 2031-33.

In the beginning of October 2015, Contreras and Sarmiento had a fist fight. RP 814-16. After the fight, they shook hands and talked. RP

¹ This brief cites to the verbatim report of proceedings as follows: RP - 15 consecutively paginated volumes consisting of 1/8/18, 1/9/18, 1/17/18, 1/18/18, 1/22/18, 1/23/18, 1/24/18, 1/25/18, 1/29/18, 1/30/18, 1/31/18, 2/1/18, 2/6/18, 2/7/18, 2/8/18, 2/12/18, 2/13/18, 3/9/18; 2RP - 1/23/18 (Vol. VI-A); 3RP - 1/24/18 (Vol. VII-A).

817-18. Sarmiento introduced himself as "Taxer" and said he was from "VSL," an acronym for the Varrio Sureño Lokotes gang. RP 819, 832. Contreras told him he was from California and represented the 18th Street gang, which is a Sureño gang. RP 819-20, 849. Contreras was not an active gang member. RP 819.

The two subsequently began to socialize on Facebook. RP 824-25. Their Facebook communications were admitted into evidence as Exhibit 32. CP 381. On October 27, Sarmiento asked what a "chongo" is. Ex. 32 at 7.² Contreras indicated he did not know. Id. Sarmiento replied "I dont know u from cali wat is it" and "Oh I c u ain't from there." Id. at 7-8. Later that evening, Sarmiento asked if Contreras had someone call from Yakima. Id. at 13. Contreras replied "Yea Deez nuts." Id. at 14. Sarmiento replied, "They said westside and hung up." Id.³

On November 1, Sarmiento expressed his desire for another fight with Contreras. Id. at 15; RP 859. The two taunted one another but did not meet up on November 1. Id. at 15-19. On November 2, another fight was arranged, with Contreras telling him "Bring your homies too cause we all gonna get down" and "No weapons man to man." Id. at 19-25. The

² At trial, Contreras said he knew "chongo" meant "monkey," but he did not know if the term had any significance to a Sureño. RP 846.

³ Detective Merrill testified "eastside" refers to gang territory on the east side of Tacoma but did not explain the significance of "westside." RP 1651, 1735-36.

last string of messages contained photos of the location where the fight was to take place. Id. at 25-30; RP 885-86. Contreras picked up his friends, Fogalele and Crawford, in his van and drove there. RP 812-13, 871-72, 887-88.

Contreras testified that he saw Sarmiento standing behind his truck. RP 888. Contreras pulled into a parking stall and the three got out of the van. RP 891. As Contreras walked toward Sarmiento, he saw somebody with a bandana over his face running in his direction. RP 892-96. He heard Sarmiento say, "You talking shit, huh?" RP 892-94. Sarmiento stood there while the other person ran and Contreras backed up. RP 910-11. Contreras took off running and heard gunshots. RP 893-95, 897, 920. He did not see what happened behind him as he ran. RP 913.

Fogalele testified that when they arrived in the parking lot, Sarmiento was standing by a truck. RP 771-72. Fogalele did not hear him say anything. RP 775. He saw Contreras back up, saying "It's like that? You want to pull that out?" RP 769, 774. Fogalele turned and saw someone standing there, pointing a gun at Fogalele and Crawford. RP 769-70, 774, 783-84. Neither the gunman nor Sarmiento said anything. RP 786, 804. Eight or nine shots were fired. RP 787. Fogalele did not

see Sarmiento duck for cover. RP 804-05.⁴ But then he only saw the shooter for a split second before he turned to get into the van. RP 782, 785-86, 794. Fogalele was shot once before he got inside. RP 782.

A neighbor saw the gunman chase Crawford and shoot him. RP 647-48, 651-52. Nine shell casings, .40 Smith & Wesson, were recovered from the scene. RP 630-33. The firearm was never recovered. RP 1686.

After the shooting, Sarmiento posted on a Facebook account an image of a skeleton, an image of an Aztec warrior, and a statement about warrior origins. RP 1670-72, 1751-53; Ex. 79.⁵ When Sarmiento's mother told him over the phone that police were looking for him, he hung up without responding. RP 924, 950.

Raymundo Gomez worked in a Centralia bakery, which had an upstairs apartment. RP 1303. Gomez agreed to let Sarmiento, a family relation on his wife's side, stay there in early November. RP 1301, 1304-06. Gomez heard from family that Sarmiento was wanted for murder and he eventually called the police. RP 1313-16, 1332. Police arrested Sarmiento in Centralia on November 16. RP 1388-1402. A white HTC cell phone was found wrapped in aluminum foil, which Gomez identified as Sarmiento's phone. RP 1242-43, 1404. A black LG cell phone was

⁴ Fogalele told a detective that Sarmiento just stood there. RP 1612-13.

⁵ Detective Merrill linked these things to gang culture. RP 1751-53.

from a storage area where Sarmiento was seen placing the phone. RP 1238-43, 1399, 1403. Gomez identified the LG phone as his own. RP 1403, 1407. Data recovered from the black LG phone showed someone did YouTube searches on November 15 for how to cross the Mexican border. RP 1697-99; Ex. 84A.

After the shooting, Contreras was blocked from Sarmiento's Facebook page. RP 830. Contreras allowed a detective to photograph the Facebook messages with Sarmiento from his phone, which were admitted as Exhibit 34. RP 830-31, 1493-94.

A summary of the various messages extracted from the phones and Facebook accounts was admitted into evidence as Exhibit 98.⁶ In addition to the exchange between Sarmiento and Contreras, the following communications took place:

1) On October 9, 2015, Sarmiento (TooxLokote Akataxer) told Jose (Conejo) Salinas that "Boxer," the person he fought, "isn't from 18." Salinas responded, "my big homies said they never heard of that click and he's a lame kicken it wit the lames." Ex. 98 at 1.⁷

⁶ Exhibit 98 summarizes communications from Ex. 32, 80, 81, 82, 83A, 91A and 96.

⁷ According to Detective Merrill, "lames" are "wanna bes" — someone who poses as a gang member. RP 1739.

2) Various messages from Sarmiento in which he expressed his affiliation with the VSL gang and his desire to strengthen it. Ex. 98 at 1-4.

3) Exchanges about the term "chongo," which Sarmiento described as meaning "those who come from California turn red." Ex. 98 at 2.⁸

4) On October 27, after the "deez nuts" comment from Contreras, Sarmiento and Salinas exchanged messages about Contreras not really being from the California barrio and had said some "dumb shit." Ex. 98 at 3.

5) On October 30, Martinez (Crimixales Baxixg) sent an image of a Glock firearm to someone. Ex. 98 at 3.

6) On October 30, Martinez told Zuniga they were going to take him to the woods and teach him how to shoot. Martinez attached an image of a firearm, asking if Zuniga liked his new burner. Zuniga messaged Salinas, saying he, Martinez ("Wobs"), and Sarmiento ("Toons") were going to the woods to try out the bangers. Ex. 98 at 3.

7) On October 31, someone messaged Sarmiento and asked if he was "packing," to which Sarmiento replied in the affirmative. When

⁸ Detective Merrill testified "chongo" is a derogatory term used to disrespect other Sureños. RP 1739-40. Norteños, a rival to Sureños, are associated with the color red. RP 1728.

asked what he was packing, Sarmiento said "We got a couple" and, in comparison to a Glock described by the other person, said "We have one like dat one." Ex. 98 at 3.

8) After the proposed fight on November 1 did not materialize, Sarmiento told Martinez he had "work" tomorrow and was mad, "fuk those lames from 18," "Hko started masa from 18,"⁹ "fuk he talked shit about boxer from my hood fuk him I'm mad wtf they think they are VSL AND SSC RUN IT," and "They startin shit we end it." Martinez said "Ill smoke em." Ex. 98 at 4. Sarmiento said "those 18 from hko are the ones his homies from evert r lookin for and they both tryna step on our toes I'll hammer there toes off." Martinez replied "ahha serio KILLKILLKILL."¹⁰ Ex. 98 at 5.

9) On November 2, Sarmiento said "hko" "aint about shit." Steven Gamez replied "Killa lets ride today on him then." Martinez and Zuniga arranged to meet up later that day. Ex. 98 at 5.

10) On November 10, Zuniga messaged Sarmiento, telling him to get rid of the backpack he left in the truck and the truck itself, and to

⁹ HKO referred to Contreras. RP 1652. "Masa" is Spanish for "shit." RP 1736.

¹⁰ Steven Gamez explained Martinez regularly said "kill kill kill," which is a phrase from a song. RP 1174-75. He described Martinez as mentally ill. RP 1174.

"remember this rule no snitching who ever goes down first is taken it all."

Ex. 98 at 6.

Steven Gamez testified he was not a gang member at the time of trial, but was a member of Southside Criminals, a Sureño clique, in the past. RP 962-64, 1178. Trino Martinez ("Wobbles") and Juan Zuniga ("Mobster") were also members of Southside Criminals. RP 965-66, 1057. Gamez knew Sarmiento ("Toon") for less than a month before the shooting, identifying him as in the VSL gang. RP 959-60, 967, 1198. Gamez described Sarmiento as an "associate" of Southside Criminals; he was an acquaintance but not part of the gang. RP 1070, 1077, 1087.¹¹

On November 2, Martinez, Zuniga and Sarmiento went over to Gamez's house. RP 966-67 1008. They were upset and angry. RP 976, 1009. They talked about having an altercation or beef with somebody. RP 1009. Before going over to Gamez's house, Sarmiento messaged Gamez on Facebook, saying he was mad at some tall fool who "started masa." RP 1032-33. Gamez responded "let's ride on him." RP 1033-34.¹² According to Gamez, Sarmiento had an issue with the guy because he was "false claiming," i.e., posing as being from the 18th Street neighborhood

¹¹ Detective Merrill testified that VSL, Southside Criminals and 18th Street are Sureño sets or cliques. RP 1726-27. "Sureño" is an umbrella term for the various sets. RP 1727.

¹² Detective Merrill testified that to "ride" on a person means to assault or shoot at them. RP 1736.

when he really wasn't. RP 1011. Gamez also maintained Sarmiento was upset because the guy said something about his genitals, which was disrespectful. RP 1009-10, 1178-79. Gamez further testified that Sarmiento was mad at the guy because he disrespected him, not because he was posing as a gang member. RP 1082.¹³

At some point Martinez pulled out a .40 caliber gun and passed it to Zuniga, showing it off. RP 1009, 1013-15.¹⁴ Zuniga looked at the gun and passed it back. RP 1015. Gamez told them to put the gun away. RP 1020. At some point Martinez said "let's go put in work," i.e., put in work for the gang. RP 1010, 1016-17. Gamez explained at trial that it is important to put in work to maintain or elevate gang status. RP 1189. They did not say what was going to happen. RP 1019. Gamez thought Sarmiento was going to drop Zuniga off at his house; he did not think Sarmiento was going along with them for any "work." RP 1078-79.

Raymundo Gomez also testified for the State. According to Gomez, Sarmiento told him that he had a fist fight, lost the fight, and

¹³ Detective Merrill testified respect is important in gang life and disrespect requires a reaction. RP 1730.

¹⁴ Gamez identified the gun photographed in Exhibit 46 as the gun Martinez pulled out. RP 1014. This was a Glock 27 with a distinctive after-market clip on its side. RP 1686-87. Detective Larsen testified the images of the Glock 27 Martinez sent on October 30 appeared to be the same gun. RP 1687-90. The photo on Sarmiento's phone, dated October 25 (Ex. 70), appeared to be the same gun. RP 1279, 1694-95.

wanted a rematch. RP 1330-31. Sarmiento also told him that Contreras had disrespected his wife by texting her. RP 1337-38. He "made a plan with his friends so that in case someone started saying something bad, talking smack or started shooting, that they should start shooting with an order to kill to stop it." RP 1331. Gomez could not remember what Sarmiento said exactly. RP 1346, 1364. Gomez's rendition of what Sarmiento said to him changed throughout his testimony.

Gomez variously described the plan as follows: (1) "he was going with the plan of fighting, but as soon as -- well, he told one of his friends that as soon as anybody else made a jump for it, to either shoot at him or kill him" (RP 1339); (2) there was to be a fight and if something went wrong the person with the gun was to step in (RP 1362); (3) "the plan was that they were going to fight and then they were going to kill, but that he was not just going there to fight. He was not going to wait before the killing." (RP 1397); (4) in an earlier interview, "For the beginning, it was to fight, but uh, they ended up killing him." (RP 1367); (5) Gomez agreed with the prosecutor's leading question that there was a plan to shoot and kill at this fight. RP 1385. On cross examination, Gomez said the plan was to fight. RP 1385. He then denied that he previously testified that the plan was for Sarmiento's side to shoot back if the other side started shooting. RP 1385-86. He agreed the plan was for Sarmiento's friend to

produce the gun if something went bad, but then said, "But even then they were going to do it; either way, they were going to do it." RP 1386. Sarmiento did not describe to Gomez what actually happened. RP 1340.

Zuniga, the shooter, testified as a defense witness. He identified himself, Martinez and Gamez ("Tripper") as members of the Southside Criminals gang. RP 1795-96. He described Sarmiento as being in the VSL gang; he was "solo," i.e., by himself. RP 1795-96, 1893.

On November 2, Martinez picked Zuniga up from school and they went to Gamez's house. RP 1802-03. Zuniga was 17 years old at the time. RP 1793. They partied, drank beer and smoked marijuana laced with cocaine. RP 1796, 1806-07. Before Sarmiento arrived, Martinez let Zuniga hold his firearm, and the two passed it back and forth. RP 1809, 1855. Sarmiento came over to Gamez's house at Zuniga's request. RP 1808. Eventually Gamez told them they had to leave because he had to work in the morning. RP 1811. Zuniga asked Sarmiento for a ride home. RP 1812. Martinez requested a ride home as well. RP 1812. Sarmiento was to first drop Zuniga off at his home, but they missed the exit. RP 1813-14. They stopped to smoke marijuana at BJ's Bingo in Fife. RP 1814-15. Zuniga took the gun from Martinez in the parking lot "just in case." RP 1816, 1923. Martinez told him "time to earn your stripes," meaning do work for the gang. RP 1857, 1880, 1923, 1939. Zuniga said

"yeah." RP 1881. Zuniga acknowledged telling a detective that Sarmiento said "don't be afraid," "you know what it is" and "just be ready," meaning "if anybody tries to harm us, be ready." RP 1881, 1913, 1925. Zuniga had an ongoing conflict with the Southside Psychos gang (SSP) gang. RP 1816. Zuniga armed himself due to his conflict with the SSP gang. RP 1817.¹⁵

Zuniga had been told about the fist fight that was planned between Sarmiento and Contreras. RP 1827. They drove to where the fight was to take place. RP 1818. Neither Zuniga nor Martinez had a problem with this other guy. RP 1818. Sarmiento did not tell him to shoot at the people he was there to fight. RP 1917. Sarmiento did not encourage him to shoot. RP 1917. Zuniga was heavily intoxicated by this time. RP 1820. After arriving, he went to urinate in the bushes. RP 1820. A blue van pulled up "pretty fast." RP 1822, 1910. Three guys hopped out and surrounded Sarmiento. RP 1822. Zuniga panicked; he was scared. RP 1831. When he saw the van, he was thinking the worst, meaning "I got to take action" because "there's someone out there to harm us." RP 1917. He heard Sarmiento say, "you going to talk shit now," and Sarmiento and Contreras

¹⁵ Gamez corroborated that there had been a shootout between Southside Criminals and SSP on October 28, 2015 in which Zuniga was one of the shooters. RP 1076, 1180-81. According to Gamez, the SSP gang was driving a white van. RP 1181, 1185-86. According to Zuniga, the van driven by the SSP gang was blue. RP 1857-58.

"talking shit" back and forth. RP 1885-86, 1929. Sarmiento called out Zuniga's nickname, "Mobster," which Zuniga interpreted as meaning come down and protect him with the gun. RP 1864-65, 1884, 1911, 1916, 1930-31, 1936, 1938, 1950-51. Zuniga thought Sarmiento was in harm's way because three people were surrounding him. RP 1950. He thought Sarmiento was about to get rushed by them. RP 1910-11. He thought they were the gang members from the van in the earlier incident. Ex. 100.

Zuniga ran down a hill and started firing to protect Sarmiento and Martinez. RP 1822, 1829, 1835. The van looked like it belonged to the SSP gang and he thought the people he was shooting at were SSP members. RP 1817, 1822-23, 1869.¹⁶ His intent was to back Sarmiento up after seeing him surrounded. RP 1828. He shot based on his perception that he was protecting his friends, only later learning that SSP members were not involved. RP 1869, 1920. After the shooting, Martinez did not want to let Zuniga back in the truck. RP 1835-36. Martinez was scared and angry at Zuniga because Zuniga used Martinez's gun. RP 1836-37. They left in the truck. RP 1838. The three of them said that

¹⁶ According to Gamez, Zuniga saw himself as a big gangster after the shooting. RP 1193. The shooting elevated his gang status. RP 1189. After the shooting, Gamez put a tattoo on Zuniga that said "BK," i.e., "blood killer," with a "C 13" standing for "Criminals Mexican," and a smoking gun. RP 1036-37, 1869-70; Ex. 47. Bloods are gang rivals with Sureños. RP 1728.

was crazy. RP 1836. Someone said, "That's crazy, what happened?" RP 1847. Zuniga had not been told to shoot at these people. RP 1823. He was told to "pretty much watch our back," meaning "if anything happens, you know what to do." RP 1823. Zuniga believed his role was to "protect us." RP 1824. Zuniga denied going over there to shoot somebody and denied that he was told to shoot. RP 1859. He "just reacted in the moment." RP 1882. He denied the shooting was planned. RP 1886, 1910.

The jury found Sarmiento guilty of first degree manslaughter as a lesser offense to murder by extreme indifference. CP 252-53. It otherwise found him guilty as charged, returned gang aggravator verdicts, and found he was armed with a firearm for enhancement purposes. CP 254-71. The court vacated the manslaughter conviction to avoid double jeopardy. CP 333. It imposed an exceptional sentence of 730 months in confinement. CP 324-27, 335. Sarmiento appeals. CP 318.

C. ARGUMENT

1. THE SEARCH WARRANTS ARE OVERBROAD, REQUIRING SUPPRESSION OF EVIDENCE OBTAINED FROM THEM.

Police obtained search warrants for phones associated with Sarmiento, Sarmiento's phone accounts, Sarmiento's Facebook account, and Facebook accounts belonging to Martinez and Salinas. These accounts revealed a vast trove of private information about Sarmiento.

The warrants authorizing search of this information violated the Fourth Amendment of the U.S. Constitution and article I, section 7 of the Washington Constitution. First, there was no probable cause to seize and search the phones, phone accounts, and Facebook accounts because the warrants do not establish a nexus between the crime and these locations. Second, the warrants are so overbroad and so lacking in specificity that they contravene the particularity requirement and constitute unlawful general warrants.

a. The trial court proclaimed the warrants "perfectly appropriate" and perfunctorily denied Sarmiento's suppression motion.

Before trial, Sarmiento's counsel moved to suppress evidence obtained from warrants for phones, phone accounts, and Facebook accounts. CP 34, 50-61, 76-85; RP 5, 31-32 (joining co-defendant's suppression motion). The warrants at issue were marked as pretrial exhibits 1-7. RP 35-39; CP 379. Counsel advanced several legal theories for suppression, including (1) the warrants were overbroad; (2) lack of probable cause to search for messages between Sarmiento and alleged co-conspirators; (3) lack of nexus between the crime and place to be searched; and (4) the police search exceeded the scope of the warrants. CP 52-59, 77-78, 390-97; RP 40-47. The State opposed the suppression motion. RP 48; CP 407-15. The State described the amount of

information obtained from the search warrants as "enormous," amounting to roughly 10,000 pages. RP 62, 105. The court denied the motion, ruling each warrant was not overbroad and was "perfectly appropriate." RP 48. The court further ruled there was a nexus to search for communications with Eddie Contreras and co-conspirators. RP 48-49. It commented "I don't think that there's a right to privacy in the things that are put, basically, through the Internet." RP 49.

b. The trial court's ruling is reviewed de novo.

The issuance of a search warrant by the magistrate is reviewed for abuse of discretion. State v. Keodara, 191 Wn. App. 305, 312, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016). The trial court's assessment of whether probable cause supports a warrant, and whether a warrant is overbroad, is reviewed de novo. Id.; State v. Martinez, 2 Wn. App. 2d 55, 66, 408 P.3d 721, review denied, 190 Wn.2d 1028, 421 P.3d 458 (2018).

c. Overbroad warrants are constitutionally defective.

The Fourth Amendment to the United States Constitution provides, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, section 7 of the Washington

Constitution mandates "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"These constitutional provisions impose two requirements for search warrants that are 'closely intertwined.'" State v. Higgs, 177 Wn. App. 414, 425, 311 P.3d 1266, 1272 (2013), review denied, 179 Wn.2d 1024, 320 P.3d 719 (2014) (quoting State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)). First, a warrant must be supported by probable cause. Id. "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus [between the items to be seized and the place to be searched] is not established as a matter of law." Id. at 147.

Second, "the warrant must be sufficiently definite to allow the searching officer to identify the objects sought with reasonable certainty." State v. Nordlund, 113 Wn. App. 171, 180, 53 P.3d 520 (2002), review denied, 149 Wn.2d 1005, 70 P.3d 964 (2003). The purpose of the particularity requirement "is to make a general search 'impossible and

prevent[] the seizure of one thing under a warrant describing another." State v. McKee, 3 Wn. App. 2d 11, 22, 413 P.3d 1049, review granted, 426 P.3d 749 (2018) (quoting Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927)). "The other purpose of the particularity requirement is to eliminate 'the danger of unlimited discretion in the executing officer's determination of what to seize' and to prevent the issuance of a warrant 'on loose, vague, or doubtful bases of fact.'" Id. at 22-23 (quoting Perrone, 119 Wn.2d at 546). "By describing the items to be seized with particularity, the warrant limits the discretion of the executing officer to determine what to seize." State v. Besola, 184 Wn.2d 605, 610, 359 P.3d 799 (2015). The particularity requirement also functions to "inform the person subject to the search what items the officer may seize." State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

A warrant is overbroad if either the probable cause requirement or particularity requirement is unsatisfied. Higgs, 177 Wn. App. at 426. Therefore, a warrant can be overbroad "either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist." State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003) (footnote omitted), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004). Further, a

warrant is overbroad if some portions are supported by probable cause and other portions are not. Id. at 806.

d. The warrant for the phones lacks probable cause and is otherwise overbroad.

Police obtained a warrant for the HTC and LG phones recovered from the Centralia bakery on November 17, 2015. Pre-trial Ex. 1 at 4-5. The warrant references the crime under investigation, "Murder 1st Degree RCW 9A.32.030," committed on November 2, 2015. Id. at 4. It states the following evidence is necessary to investigation or prosecution of this offense: "Any and all stored data, to include but not limited to, assigned handset number, call details, images, sound files, text and multimedia messages, voice and sound files, music files, web and internet history, sim and microSD content, proprietary and secondary memory data to include deleted data, related to communications between co-conspirators and/or participants in the homicide and the deceased[.]" Id.

Again, a warrant is overbroad if it describes items for which probable cause does not exist. Higgs, 177 Wn. App. at 426. The warrant states the detective's belief that evidence "related to communications between co-conspirators and/or participants in the homicide and the deceased" will be found on the phones. Pre-trial Ex. 1 at 4-5. But there is no nexus between those categories of evidence and the phones. The

warrant contains no factual description supporting the belief. "Probable cause requires not only a nexus between criminal activity and the item to be seized but also a nexus between the item to be seized and the place to be searched." State v. Constantine, 182 Wn. App. 635, 646, 330 P.3d 226 (2014). The warrant does not describe the circumstances of the murder, the participants in the murder, or any relationship between Sarmiento and any victim of the crime. The warrant does not allege either phone was used in the murder or had any connection to the crime. See State v. Griffith, 129 Wn. App. 482, 488-489, 120 P.3d 610 (2005), review denied, 156 Wn.2d 1037, 134 P.3d 1170 (2006) (in case involving nude photos of 16-year-old girl on defendant's computer, warrant authorizing search for defendant's internet use overly broad where affidavit failed to make connection between suspected criminal activity and internet).

The warrant seeks evidence of co-conspirator communications but does not contain any factual description showing that there were any co-conspirators, let alone that the co-conspirators communicated with Sarmiento on the phones. The warrant seeks evidence of communication between participants in the homicide and the deceased, but there is no factual allegation in the warrant that there was any communication between them, let alone that such communication was to be found in the phones. Note the warrant describes communications with "the deceased."

Pre-trial Ex. 1 at 4. Contreras is not the deceased. So the warrant does not authorize search for communications with Contreras. Crawford is the deceased, but the warrant does not show there were any communications between co-conspirators or participants in the homicide and Crawford.

Moreover, the warrant authorized seizure of images, sound files, music files, web history and internet history. Pre-trial Ex. 1 at 4. Communications "between co-conspirators and/or participants in the homicide and the deceased" are not likely to be found in these locations. The warrant does not explain why they would be.

Finally, the warrant does not even allege that Sarmiento used either phone at any time. The facts contained in the warrant are insufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched, i.e., the phones. Thein, 138 Wn.2d at 140. The warrant is therefore constitutionally invalid for lack of probable cause. The lack of probable cause to search the data in the phones means the warrant is overbroad. Maddox, 116 Wn. App. at 805-06.

The affidavit describes the shooting, events leading up to the shooting, and the messages between Sarmiento and Contreras. Pre-trial Ex. 1 at 1-3. The record, however, does not show the affidavit was attached to the warrant for the phones. And even assuming the affidavit

was attached, the warrant does not incorporate the affidavit by reference. The warrant does not even mention the affidavit. Id. at 4-5.

"[A]n affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with 'suitable words of reference.'" Riley, 121 Wn.2d at 29 (quoting Bloom v. State, 283 So.2d 134, 136 (Fla. Dist. Ct. App. 1973)). "If the affidavit is not attached to the warrant and expressly incorporated therein, it may not cure generalities in the warrant even if some of the executing officers have copies of the affidavit." Id. (citing United States v. Strand, 761 F.2d 449, 453-54 (8th Cir. 1985) (affidavit attached to warrant could not cure warrant's lack of particularity because of improper words of incorporation)).

Review of the phone warrant in Sarmiento's case reveals the affidavit was not incorporated into the warrant. Pre-trial Ex. 1 at 4-5. This flaw requires the affidavit to be disregarded in determining whether the warrant fails to establish probable cause to search the phones and is otherwise overbroad. The affidavit can only be considered when the affidavit is both attached to the warrant and the warrant incorporates the affidavit by reference. State v. Higgins, 136 Wn. App. 87, 92, 147 P.3d 649 (2006) ("That the affidavit was attached to the warrant is irrelevant because the warrant did not incorporate the affidavit by reference.").

The lack of probable cause based on the nexus requirement invalidates the warrant by itself. The warrant is also a general warrant that unconstitutionally allows for an indiscriminate rummaging through the contents of the phones.

Cell phones contain an enormous amount of private information. Riley v. California, ___ U.S. ___, 134 S. Ct. 2473, 2495, 2489-91, 189 L. Ed. 2d 430 (2014); State v. Samalia, 186 Wn.2d 262, 269-71, 375 P.3d 1082 (2016). They "place vast quantities of personal information literally in the hands of individuals." Riley, 134 S. Ct. at 2485. "[M]any [cell phones] are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Id. at 2489.

Given the breadth and depth of private information contained on cell phones, the particularity requirement becomes singularly important as a check on police snooping. The Fourth Amendment was adopted in response to "indiscriminate searches and seizures conducted under the authority of 'general warrants.'" Payton v. New York, 445 U.S. 573, 583, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (quoting Boyd v. United States, 116 U.S. 616, 625, 6 S. Ct. 524, 29 L. Ed. 746 (1886)). The particularity requirement is designed to prevent "general, exploratory rummaging in a

person's belongings." Perrone, 119 Wn.2d at 545 (internal quotation marks omitted) (quoting Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). "The advent of devices such as cell phones that store vast amounts of personal information makes the particularity requirement of the Fourth Amendment that much more important." McKee, 3 Wn. App. 2d at 24.

One particularity defect in the warrant here is its failure to limit the search to a relevant time period. Pre-trial Ex. 1 at 4-5. Unlike the other warrants obtained by police, the warrant for the phones does not limit the search to a particular time period. Warrants lacking time constraints are insufficiently particular. Wheeler v. State, 135 A.3d 282, 304 (Del. 2016). Where a more precise description is available, the search and seizure should be "narrowed to the relevant time period so as to mitigate the potential for unconstitutional exploratory rummaging." Id. at 305. In Keodara, a search warrant for a phone was invalid in part because it failed to "limit the search to information generated close in time to incidents for which the police had probable cause." Keodara, 191 Wn. App. at 316. In McKee, the warrant was overbroad because it gave "the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation." McKee, 3 Wn. App. 2d at 29.

The situation is no different here. The warrant for the two phones associated with Sarmiento contained no temporal limitation on the data that could be searched and seized. And there was no other limitation to reign in what the police could seize. The entire content of the phone was at their disposal. The defect in the warrant is its failure to effectively limit what can be searched and seized. Cell phones disclose "intimate or discrete details of a person's life." Samalia, 186 Wn.2d at 271. And many of those details, including communications with other individuals, constitute speech protected by the First Amendment. When a search warrant implicates materials protected by the First Amendment, "the degree of particularity demanded is greater" and must "be accorded the most scrupulous exactitude." Perrone, 119 Wn.2d at 547-48 (quoting Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)). Similarly, the search of cell phones, computers and other electronic storage devices "gives rise to heightened particularity concerns." Keodara, 191 Wn. App. at 314.

Rather than employing scrupulous exactitude, however, the warrant in Sarmiento's case permitted seizure of the entire data content of the phones. Detective John Bair testified at trial that there can be parameters for searching phones based on nexus or probable cause range, but police were given no parameters in searching these phones and simply

obtained all the data from them. RP 1292-93. The warrant references the homicide under investigation and police desire to search for evidence of "co-conspirator" communications and communications between participants in the homicide and "the deceased," but this list of evidence does not limit the seizure in any way because the warrant authorized seizure of "any and all stored data." Pre-trial Ex. 1 at 4. Pursuant to the warrants, police used Cellebrite software to extract the entire content of the phones. RP 1264, 1269-72, 1287-89; Ex. 66, 67. "Cellebrite software obtains all information saved on the cell phone as well as deleted information and transfers the data from the cell phone to a computer." McKee, 3 Wn. App. 2d at 19. Over 1000 pages of material were extracted for the black LG phone. Ex. 67. Over 1700 pages of material were extracted for the HTC phone, including over 9000 images. RP 1270-72; Ex. 66. The detective explained that once the extraction report is created, it is turned over to a case agent whose responsibility is to go through the report to identify pertinent evidence. RP 1271. Police downloaded everything off the phones and rummaged through it, plucking out evidence from the sea of information contained therein.

Because the warrant in this case involved an electronic storage device, and implicated materials protected by the First Amendment, it triggered heightened privacy concerns and demanded greater particularity.

Rather than comply with the Fourth Amendment's requirements, however, the warrant in Sarmiento's case failed to incorporate the supporting affidavit, included a broad list of items not inherently associated with the alleged crimes, and ultimately authorized examination of all data on the phone, rendering superfluous any language limiting the scope of the search.

McKee is instructive. In that case, police obtained a warrant to search McKee's cell phone to investigate the crimes of "Sexual Exploitation of a Minor RCW 9.68A.040" and "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050." McKee, 3 Wn. App. 2d at 17-18. "The warrant contained broad descriptions of cell phone data the police were allowed to search and seize, including '[i]mages, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, [and] tasks'; and authorized a 'physical dump' of 'the memory of the phone for examination.'" Id. at 14. The search was unconstitutional because the warrant violated the particularity requirement of the Fourth Amendment. Id.

The warrant cited and identified the crimes under investigation but did not use the language in the statutes to describe the data sought from the cell phone. Id. at 26. The list of items wanted was "overbroad and allowed the police to search and seize lawful data when the warrant could

have been made more particular." Id. The detailed allegations in the affidavit submitted in support of the search warrant, which described the allegations related to the crimes under investigation, the video clips and photographs located on the phone, and the time frame, could have satisfied the particularity requirement. Id. at 28. The affidavit, however, was not attached and incorporated by reference into the warrant, so the determination of the particularity requirement was limited to the warrant itself. Id.

The warrant "was not carefully tailored to the justification to search and was not limited to data for which there was probable cause." Id. at 29. The language of the search warrant, which authorized police to search its entire data content, "clearly allows search and seizure of data without regard to whether the data is connected to the crime. The warrant gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation." Id. "There was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information generated close in time to incidents for which the police had probable cause." Id. (quoting Keodara, 191 Wn. App. at 316). The search warrant violated the particularity requirement of the Fourth Amendment because it "allowed the police to search general categories of data on the cell phone with no

objective standard or guidance to the police executing the warrant" and "[t]he language of the search warrant left to the discretion of the police what to seize." Id.

The warrant in Sarmiento's case, like the defective warrant in McKee, authorized police to seize the entire data content of the two phones. The warrant in Sarmiento's case described the crime under investigation, first degree murder, and cited to the statute. Pre-trial Ex. 1 at 4. Citation to a criminal statute, however, does not limit or modify the list of items to be seized or provided guidance to the officers executing the search. McKee, 3 Wn. App. 2d at 26 (citing Besola, 184 Wn.2d at 614-15).

In McKee, the warrant was overbroad because its language "clearly allows search and seizure of data without regard to whether the data is connected to the crime." McKee, 3 Wn. App. 2d at 29. Similarly, the warrant here authorizes collection of the entirety of the phone's memory for examination of its content; it contains no limitations on what officers could examine. Police were free to find and seize items entitled to First Amendment protection as well as any other materials legally possessed and electronically stored on the phone. "A properly issued warrant 'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers or digital storage devices." Keodara, 191 Wn. App. at 314 (quoting State v.

Askham, 120 Wn. App. 872, 879, 86 P.3d 1224, review denied, 152 Wn.2d 1032, 103 P.3d 201 (2004). The warrant describes what is to be seized and searched. The constitutional problem is that it describes everything. Police wanted to search the entire content of the phones and the warrant gave it to them. There is no distinguishing between items for which probable cause exists and those for which it does not.

"[W]here the precise identity of items sought cannot be determined when the warrant is issued, a generic or general description of items will be sufficient if probable cause is shown and a more specific description is impossible." State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). The reviewing court considers "whether the warrant could have been more specific considering the information known to police officers at the time the warrant was issued." McKee, 3 Wn. App. 2d at 28.

The warrant here was capable of being narrowed to a search for communications with named co-conspirators. A more specific description was possible. By the time the warrant for the phones was obtained on November 17, police already knew the names of Trino Martinez and Jose Salinas as potential co-conspirators, as shown by the warrant that police obtained for the Facebook accounts of Martinez and Salinas on November 12. Pre-trial Ex. 4. Police were capable of identifying the known co-conspirators with particularity in the phone warrant but chose not to do so.

Instead, the net was cast as wide as possible, which permitted a general search of the phone data.

For that matter, neither Contreras nor other victims of the shooting, Fogalele and Crawford, was specified in the warrant. Police knew the identity of the deceased at the time. It was Crawford, but he is not named in the warrant. Police knew the identity of the living victims of the shooting, Contreras and Fogalele. But they are not named in the warrant either. "[A] failure to describe the items to be seized with as much particularity as the circumstances reasonably allow offends the Fourth Amendment because there is no assurance that the permitted invasion of a suspect's privacy and property are no more than absolutely necessary." United States v. George, 975 F.2d 72, 76 (2d Cir. 1992).

No particularity in the search warrant limits the scope of the search. When the place to be searched covers a vast amount of private information, almost all of which will have nothing to do with the crime under investigation, then police are engaging in a forbidden general search that the Fourth Amendment was designed to prevent. Because the search warrant was unnecessarily broad and left too much discretion to law enforcement officers in deciding what to search, it violated Sarmiento's rights under Fourth Amendment and article I, section 7.

e. The warrants for the phone accounts lack probable cause and are otherwise overbroad.

The police obtained three warrants for phone accounts associated with Sarmiento. On November 5, police obtained a warrant to search the account and subscriber information, all Short Message Service (SMS), Multimedia Message Service (MMS) content, connectivity information, and location information for T-Mobile number 253-226-5262 for the period October 1st to November 4th, 2015. Pre-trial Ex. 2 at 1-2. The warrant states this evidence "is necessary to the investigation and/or prosecution" of the offense. Id. The warrant references the crime under investigation, "Murder in the First Degree RCW 9A.32.030," committed on November 2, 2015. Id. at 1. The warrant further states the evidence is "material to the investigation or prosecution" of the felony and is "concealed" in the T-Mobile business. Id. at 2.

On November 9, police also obtained warrants to search the account and subscriber information, all Short Message Service (SMS), Multimedia Message Service (MMS) content, connectivity information, and location information for three additional phone numbers for the period of October 1st to November 9th, 2015: Sprint 253-737-0200, Metro PCS/T-Mobile 253-248-5833, Metro PCS/T-Mobile 253-398-4394. Pre-trial Ex. 6 at 5-6; Pre-trial Ex. 7 at 6-7. The warrants otherwise set forth

the same kind of language used in the November 5 warrant specified above. Pre-trial Ex. 6 at 5-6; Pre-trial Ex. 7 at 6-8.

The defects bedeviling the warrant for the phones themselves plague the warrants for the phone accounts as well. The record does not show the affidavit was attached to the warrant and, even if it were, the affidavit is not incorporated into the warrant by suitable words of reference. As a result, the affidavit cannot be relied on to find probable cause to cure any overbreadth in the warrant. Higgins, 136 Wn. App. at 92. The warrant is all that can be considered and each one is insufficient to establish a nexus between the crime and the place to be searched.

Each warrant states the detective's belief that the evidence located in the phone accounts is material to the investigation or prosecution of the referenced murder. Pre-trial Ex. 2 at 2; Pre-trial Ex. 6 at 6; Pre-trial Ex. 7 at 7. The warrant contains no factual description supporting the belief. There is no nexus between evidence of the crime and the phone accounts set forth in the warrant. The warrant does not describe the circumstances of the murder, the participants in the murder, or any relationship between the murder and use of a phone by means of any of the listed accounts. The warrant does not allege these phone accounts were used in the crime or had any connection to the crime. The warrant does not even allege that any of these phone accounts belonged to Sarmiento or that Sarmiento

accessed any of them by using a phone connected with an account. The facts contained in the warrant are therefore insufficient to establish a reasonable inference that evidence of the crime can be found in the place to be searched, i.e., the phone records. Thein, 138 Wn.2d at 140. The warrants lack of probable cause. As a result, the warrants, in searching for data from the phone accounts, is overbroad. Maddox, 116 Wn. App. at 805-06.

The problem of the general exploratory search also rears its ugly head here. Similar to the search of the phones, the search of the phone accounts encompasses a large swatch of personal information, including numbers called and received, voice mail content, on-line backup data, instant messages, emails, photos, videos, text messages (i.e., SMS messages), multimedia messages, and location data. The warrants lack particularity because, in the context of protected First Amendment material, they fail to effectively limit what can be searched and seized.

They are overbroad because their language "clearly allows search and seizure of data without regard to whether the data is connected to the crime." McKee, 3 Wn. App. 2d at 29. Police were given carte blanche to rummage through every nook and cranny of the phone accounts, finding and seize items entitled to First Amendment protection as well as any other materials legally possessed and stored in the accounts. These

warrants did not distinguish between items the State had probable cause to seize and those it does not. Keodara, 191 Wn. App. at 314. Because the search warrants are unnecessarily broad and left too much discretion to police in deciding what to search, they violated Sarmiento's rights under Fourth Amendment and article I, section 7.

f. The warrant for Sarmiento's Facebook records lacks probable cause and is otherwise overbroad.

On November 5, police obtained a warrant for Sarmiento's Facebook records for the period of October 1st to November 5, 2015. Pre-trial Ex. 3 at 1-2. With reference to the crime of first degree murder, RCW 9A.32.030 that occurred on November 2, the warrant states "the following evidence is necessary to the investigation and/or prosecution of the said offense." Id. at 1. That "evidence" consists of the "Facebook User Profile," which includes "User Expanded Subscriber Content (known as Neoprint), User Photoprint, all User Contact Information including secondary email address names, User 'friends' list, User IP Logs showing IP address at sign up including date and time, contents of 'wall' messages, contents of users private messages in the users account including send and deleted messages if any." Id.

The affidavit states Contreras and Sarmiento communicated through Facebook, Sarmiento "may have used the Facebook page to

communicate with co-conspirators," and IP addresses may place Sarmiento at the scene and currently help locate him. Id. at 4-5. That affidavit, however, was not incorporated by reference into the warrant. Id. at 1-2. For this reason, the affidavit cannot be relied on to find probable cause or cure overbreadth in the warrant. Higgins, 136 Wn. App. at 92.

The warrant is fatally defective because it does not establish evidence of the crime would be found in the Facebook records, the place to be searched. This is a nexus problem. The warrant states "the listed items are material to the investigation or prosecution" because they are "evidence of the aforementioned crime and may help to determine the circumstances surrounding the victim's injuries and to aid in the prosecution of the crime." Pre-trial Ex. 3 at 1. It states the detective's belief that the evidence is located in the Facebook record. Id. at 1-2. The warrant contains no factual description supporting the assertion that the listed items are material to the investigation or prosecution. No factual connection is drawn between evidence of the crime and the Facebook records. The warrant does not describe the facts of the murder, the participants in the murder, or any relationship between the murder and the Facebook records. The warrant does not allege Facebook had any connection to the crime. The warrant does not allege Sarmiento communicated with Contreras on Facebook.

There is no established nexus between the Facebook account and communications between Sarmiento and Contreras, so police lacked probable cause to search for such communications in the Facebook records. The warrant does not allege Sarmiento communicated with any "co-conspirators" on Facebook. There is no established nexus between the Facebook records and co-conspirator statements, so police lacked probable cause to search for them in the Facebook record. The warrant does not even allege the Facebook account belonged to Sarmiento. The facts contained in the warrant are therefore insufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. Thein, 138 Wn.2d at 140. The warrant lacks probable cause. As a result, the warrant, in authorizing the search of data from the Facebook account, is overbroad. Maddox, 116 Wn. App. at 805-06. The lack of nexus alone renders the warrant unconstitutional.

The warrant also otherwise constitutes an impermissible general warrant. Washington courts have not yet addressed an overbreadth challenge to a Facebook warrant, but decisions such as McKee and Keodara are instructive because Facebook records, like cell phones, contain vast troves of personal information.¹⁷ The content in a Facebook

¹⁷ See In re 381 Search Warrants Directed to Facebook, Inc., 132 A.D.3d 11, 13, 14 N.Y.S. 3d 23, 24 (N.Y. App. Div. 2015) ("Facebook is an

account may be the sum of a person's private life. See United States v. Blake, 868 F.3d 960 (11th Cir. 2017), cert. denied, 138 S. Ct. 753, 199 L. Ed. 2d 616 (2018) (citing Riley, 134 S. Ct. at 2488-91 ("The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions"))).

In Keodara, the warrant listing the suspected crimes while authorizing the collection of a broad range of items from a cell phone violated the particularity requirement where the list essentially imposed no limit on information to be searched and permitted the phone "to be searched for items that had no association with any criminal activity and for which there was no probable cause whatsoever." Keodara, 191 Wn. App. at 309-310, 316-317. Similarly, in McKee, the search warrant for a cell phone was overbroad because it authorized the search and seizure of data "without regard to whether the data is connected to the crime."

online social networking service with over one billion users worldwide that allows its users to create an online presence to record all manner of life events, opinions, affiliations, and other biographical and personal data. Through Facebook's online website's security settings, users can decide, through a wide variety of options, with whom they wish to share information. Options may vary, from the user who posts information publicly for every user to view, to the user who restricts the number of users who may view his/her information. Users may comment on items posted by other users, assuming those posting the content have given the viewing user access to the material and permission to comment. Facebook also has a private messaging service that works much like an email account, or text function on a smart phone."), aff'd, 29 N.Y.3d 231, 78 N.E.3d 141, 55 N.Y.S.3d 696 (N.Y. 2017).

McKee, 3 Wn. App. 2d at 29. The broad descriptions of the cell phone data set forth in the warrant violated the particularity requirement. Id. at 14.

The warrant here likewise allowed officers to seize and search a universe of information pertaining to a person's private life, including information that had no connection with the crime. The warrant allowed police to search every aspect of Sarmiento's Facebook account. It required disclosure of all data and information that was contained in his account. It included contact and personal identifying information, the content of all private messages, the content of all "wall" messages, all photo history, all IP logs, and all lists of friends. Pre-trial Ex. 3 at 1.

It's too much. When the list of items to be seized and searched includes everything, the particularity requirement ceases to function because there is no limit to what police can seize and search. Police are given total discretion to look at anything they want, regardless of whether those things have any relevance to the crime being investigated. Although the warrant contains a temporal period, the amount of data disgorged in response to the warrant is enormous — over 2400 pages of Facebook material for the 36-day period at issue. RP 238, 241; Ex. 85 (entirety of disclosed Facebook records; identified but not admitted into evidence at trial). The Facebook warrant is invalid because it allowed the

police to search an overbroad list of items unrelated to the identified crimes under investigation.

g. The warrants for the Facebook records of Martinez and Salinas lack probable cause and are otherwise overbroad.

On November 12, 2015, police obtained a warrant for the Facebook accounts associated with Martinez and Salinas for the period of October 1 to November 12, 2015. Pre-trial Ex. 4 at 6-7. The warrant tracks the language used in the warrant for Sarmiento's Facebook account. It states the crime of first degree murder with its statutory citation and states "the following evidence is necessary to the investigation and/or prosecution of the said offense." Id. at 6. That "evidence" is the same as that described in the warrant for Sarmiento's Facebook records. Id.

The affidavit sets forth the circumstances of the shooting, identification of Salinas as someone with the same appearance as the shooter, investigation showing Sarmiento associated with Martinez and Salinas, Facebook communication between Sarmiento and Martinez, and Facebook communication between Sarmiento and Contreras. Id. at 3-5. That affidavit, however, was not incorporated by reference into the warrant. Id. at 6-7. For this reason, the affidavit cannot be relied on to find probable cause or cure overbreadth in the warrant. Higgins, 136 Wn. App. at 92.

Sarmiento has standing to challenge these warrants because his communications are in the Facebook records that were seized and searched. State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) supports this conclusion. Under article I, section 7, a party retains a privacy interest in a text message conversation contained on a third party's cell phone and can challenge the police search of the phone. Id. at 865, 873. Sarmiento likewise had a privacy interest in the Facebook messages he sent to and received from Martinez and Salinas. There is no basis to distinguish the text messages at issue in Hinton and the Facebook messages at issue here. "Viewing the contents of people's text messages exposes a 'wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.'" Hinton, 179 Wn.2d at 869 (quoting United States v. Jones, 565 U.S. 400, 415, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring)). The same goes for Facebook records, which likewise contain messages passed between people as well as other intimate details of a person's life. Blake, 868 F.3d at 974.

The warrant here is defective for the same reasons the warrant for Sarmiento's Facebook records is defective: lack of nexus and lack of particularity. The analysis from section C.1.e., supra is incorporated here.

h. The exclusionary rule requires suppression of evidence obtained from the invalid warrants.

The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search or seizure. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Therefore, evidence recovered from the phones, the phone accounts, and the Facebook accounts, and any fruits from those invalid warrants, must be suppressed. Such evidence is contained in Exhibits 32 (Sarmiento's Facebook messages with Contreras), 70 (photo of gun on HTC phone), 80 (Sarmiento's Facebook records), 81 (Sarmiento's phone messages), 82 (Facebook messages), 83A (Facebook messages), 84A (Youtube searches), 91/91A (Facebook messages), 96 (Facebook message) and 98 (summary of evidence).

"Admission of evidence obtained in violation of either the federal or state constitution is an error of constitutional magnitude." Keodara, 191 Wn. App. at 317. Such error "is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable

doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The State cannot overcome the presumption of prejudice here. The State relied heavily on evidence gathered from the warrants to secure the convictions. Exhibit 80 is the summary of evidence obtained from the phones and Facebook records. All of this was used against Sarmiento at trial. These records forged the link to between the shooting and Sarmiento as an accomplice to the shooting. The communications between Sarmiento and Contreras contained in Exhibit 34 were provided by Contreras to police and so are untainted. But the rest is tainted.

Absent the tainted evidence, the State's case was not otherwise so overwhelming that it necessarily led to a finding of guilt beyond a reasonable doubt. Gomez claimed Sarmiento confessed to setting up the shooting, but the credibility of this witness was subject to doubt. When police arrested Sarmiento, Gomez said nothing about a confession. RP 1333-34. It was not until two years later, on the eve of trial, that Gomez claimed that Sarmiento confessed to him. RP 1335, 1362-63. The delayed disclosure provided reason to doubt the veracity of Gomez's claim. See State v. Belgarde, 110 Wn.2d 504, 509, 755 P.2d 174 (1988) (delayed disclosure of supposed confession relevant to witness credibility); State v.

York, 50 Wn. App. 446, 457, 749 P.2d 683 (1987) (witness's credibility at issue due to delay in reporting incident). Further, Gomez listened to arguments of counsel in court and learned about the case before speaking with police, raising the question of whether he was basing his claim on what he learned as opposed to what Sarmiento told him. RP 1363. Zuniga, meanwhile, denied that Sarmiento planned the shooting. RP 1859, 1882, 1886, 1910.

Further, much of the gang evidence and its relation to the shooting derived from the phone and Facebook records. Ex. 98. The State cannot prove beyond a reasonable doubt that the jury would have found the gang aggravator in the absence of these records.

The evidence that should have been suppressed also provided fodder for the State's unlawful possession of firearm charge. The State argued phone and Facebook communications supported its claim that Sarmiento possessed a firearm. RP 1965-66, 2001-02. The State cannot prove beyond a reasonable doubt that the jury would have convicted Sarmiento of the firearm possession charge without that evidence. All the convictions, and the special gang verdicts, must be reversed.

- i. The argument related to the affidavits is preserved for review, but if not, then defense counsel was ineffective for failing to raise it.**

Defense counsel argued the warrants lacked probable cause and were overbroad. CP 52-59, 77-78; RP 40-47. Counsel did not make the precise argument that the affidavit could not be considered in determining the legality of the warrant because it was not incorporated into the warrant by reference. But "when the issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly articulated theories for the first time on appeal." Wilcox v. Basehore, 189 Wn. App. 63, 90, 356 P.3d 736, 750 (2015), aff'd, 187 Wn.2d 772, 389 P.3d 531 (2017). Even where a theory of suppression is not argued below, "it is not necessary to point out the precise defect in order to secure review of an alleged invasion of a constitutional right" where the defendant makes a general challenge to evidence at the suppression hearing. State v. Gallo, 20 Wn. App. 717, 724, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978). Established precedent shows the affidavit must not only be attached to the warrant but must also be incorporated into the warrant to be considered in assessing the validity of the warrant. Higgins, 136 Wn. App. at 92; Riley, 121 Wn.2d at 29. "Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent." Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

Even if the argument was not sufficiently raised below, manifest errors affecting a constitutional right may be raised for the first time on appeal under RAP 2.5(a)(3). Search and seizure challenges fall under the rubric of the rule. State v. Jones, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011), review denied, 173 Wn.2d 1009, 268 P.3d 941 (2012). Sarmiento's claim of error under the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution constitutes an issue of "constitutional magnitude." Id. at 360. An error is manifest if it has practical and identifiable consequences or causes actual prejudice to the defendant. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). The practical and identifiable consequence, and the actual prejudice to Sarmiento, is that evidence from the invalid warrants was admitted and used to convict him of the crimes.

"If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). But here, all the facts necessary to adjudicate the claimed error are in the record. Either the warrants incorporate the affidavit or they don't. That question is determined by looking at the warrants. That is the only record needed to answer the question. This argument can be raised

for the first time on appeal because it is a manifest error of constitutional magnitude under RAP 2.5(a)(3).

If this Court disagrees, then it will be necessary to address an ineffective assistance of counsel claim. Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. The right is violated where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Deficient performance is that which falls below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). And only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Counsel has a duty to know the relevant law. Id. at 862. The relevant law is that the affidavit cannot cure any defects in a warrant when it is not incorporated into the warrant. Higgins, 136 Wn. App. at 92; Riley, 121 Wn.2d at 29. The performance of Sarmiento's attorney was deficient because he failed to advise the court of legal authority showing it could not take the affidavits into account in determining the legality of the warrants.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The trial court probably would have granted the suppression motion had it disregarded the affidavits and the error is otherwise prejudicial for the reasons set forth in section C.1.h., supra.

2. DEFENSE COUNSEL'S FAILURE TO REQUEST DEFENSE OF OTHERS INSTRUCTION DENIED SARMIENTO HIS RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

As stated earlier, Sarmiento had the Sixth Amendment right to effective assistance of counsel. Strickland, 466 U.S. at 685-87. His attorney's failure to request instruction on defense of others constitutes ineffective assistance of counsel because evidence supported such instruction, no legitimate tactic justified failing to seek instruction, and Sarmiento was prejudiced as a result. The murder, manslaughter and assault convictions must therefore be reversed.

Counsel's failure to find and apply legal authority relevant to a client's defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015). Moreover, a defendant is entitled to a jury instruction supporting his theory of the case when

supported by the evidence at trial. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). "Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003). Counsel's failure to request a necessary instruction can constitute ineffective assistance of counsel. Thomas, 109 Wn.2d at 229. When assessing counsel's failure to request a jury instruction, this Court determines whether (1) the defendant was entitled to the instruction, (2) failure to offer the instruction was a legitimate tactic, and (3) the defendant suffered prejudice. Powell, 150 Wn. App. at 154-158.

Defense counsel's failure to ensure that the State was required to prove beyond a reasonable doubt that Zuniga did not act in defense of Sarmiento was ineffective and denied Sarmiento a fair trial.

As Sarmiento was not the shooter, the State sought convictions for the murder/manslaughter and assault charges under an accomplice liability theory. To be legally accountable as an accomplice, Sarmiento "must be an accomplice to a *crime*." State v. Laico, 97 Wn. App. 759, 765, 987 P.2d 638 (1999). A person acting in lawful defense of another commits no crime. Thus, if Zuniga acted in lawful defense of Sarmiento, there was no crime committed to which Sarmiento would be an accomplice. Id. (applying this reasoning to self-defense).

Sarmiento was entitled to instruction on defense of others. In assessing whether instruction is warranted, the underlying facts must be viewed in the light most favorable to the defendant. State v. Westlund, 13 Wn. App. 460, 465, 536 P.2d 20 (1975). "[A]s long as the record contains substantial evidence which, if believed by a jury, would justify defendant's actions, the jury must be properly advised of the law of self-defense and defense of others." State v. Fischer, 23 Wn. App. 756, 758, 598 P.2d 742 (1979). There need only be some evidence admitted in the case from any source. State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983). The threshold burden of production is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The fact finder must determine, from the perspective of the one claiming the defense, whether there was a reasonable, subjective fear of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009).

Under WPIC 16.02,¹⁸ defense counsel's instruction in relation to the charged murder and manslaughter would have provided:

¹⁸ Justifiable Homicide—Defense of Self and Others, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (4th Ed); see State v. McCreven, 170 Wn. App. 444, 467, 284 P.3d 793 (2012) ("where the State charges a defendant with second degree felony murder under RCW 9A.36.021(1)(c), assault with a deadly weapon, a self-defense instruction may be reasonably patterned after WPIC 16.02").

It is a defense to a charge of murder and manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of any person in the slayer's presence or company when:

1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to inflict death or great personal injury;

2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Under WPIC 17.02, defense counsel's instruction for the first degree assault charges would have differed in relation to the level of harm feared: "The use of or attempt to use force upon or toward the person of another is lawful when used or attempted by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary."¹⁹

¹⁹ WPIC 17.02 Lawful Force—Defense of Self, Others, Property, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th Ed) ("Use this instruction for any charge other than homicide or attempted homicide.).

There is "some evidence" supporting defense of another. Zuniga testified that he shot at the three men because he believed they were SSP gang members with whom he had an earlier altercation. RP 1816-17. Gamez corroborated Zuniga's testimony on this point. Zuniga had been in a shootout with the SSP gang the week before. RP 1076, 1180-81. The van that pulled into the parking lot that night was blue. RP 1882, 1910. According to Contreras, the van driven by the SSP gang was also blue. RP 1857-58. From Zuniga's perspective, the men he took to be gang members that previously shot at him had arrived and were now surrounding his friend. RP 1817, 1822-23, 1829 1910-11, 1935, 1950; Ex. 100. Zuniga testified he was scared and shot to protect Sarmiento from harm. RP 1831, 1917, 1920. Zuniga did not testify that he saw any of the men with a firearm but, given that he thought they were the same gang members that had shot at him earlier, a reasonable inference from his perspective is that they were so armed. The law permits Zuniga to act on appearances, even if it turns out he was mistaken as to the extent of the danger. McCullum, 98 Wn.2d at 489; WPIC 17.04 (pattern instruction for acting on appearances). Looked at in the light most favorable to the defense, the evidence allowed the jury to find Zuniga subjectively and objectively feared Sarmiento was in danger of not only injury but also great personal injury.

Moreover, even an ordinary striking with the hands and fists can support self-defense or defense of another based on fear of great personal injury. State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980) ("It is well within the realm of common experience that 'an ordinary striking with the hands or fists' might inflict [great personal injury], depending upon the size, strength, age, and numerous other factors of the individuals involved."); State v. Walker, 136 Wn.2d 767, 774-75, 966 P.2d 883 (1998) ("while a simple battery cannot justify the taking of a human life . . . if the facts of a particular case show a reasonable person in the defendant's shoes could have reasonably believed that great bodily harm would result from the battery, then the use of deadly force may have been reasonable despite the victim's being unarmed.").

Zuniga acknowledged shooting at the three men as they ran away. RP 1830, 1926. But whether that fact is a reason to reject a reasonable use of force claim is a jury question. From Zuniga's perspective, he was shooting at people he believed to be rival gang members from the same gang that he was involved in a shootout with a week before. The inference is that this same gang would be armed in confronting Sarmiento. A person running away with a gun remains a threat. It doesn't take much effort to shoot a gun while running off. The danger still exists.

There was no legitimate tactical reason for defense counsel not to request defense of others instructions that were supported by evidence. The focus of the defense was that Zuniga thought he was shooting at gang members to protect Sarmiento. RP 2013-14, 2021-23, 2031-33. Without instruction on defense of others, the defense was impotent. Instruction on defense of others was crucial because evidence that Zuniga lawfully acted to protect Sarmiento rebutted the State's argument that Sarmiento acted as an accomplice to the charged crimes. The jury heard evidence that supported defense of another instruction, but without the instruction authorizing the jury to consider the evidence for this purpose, the defense was unavailable for the jury to consider. See Kruger, 116 Wn. App. at 694-95 ("Even if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent.).

Sarmiento suffered prejudice. Prejudice in this context means a reasonable probability that the trial outcome would have differed had jurors been instructed on defense of others. A "reasonable probability" is one sufficient to undermine confidence in the outcome. Powell, 150 Wn. App. at 153. Had the jury been correctly instructed, the jury may have determined that Zuniga acted in lawful defense of another, which means Zuniga committed no crime, and Sarmiento could not be found guilty as an accomplice to Zuniga's shooting.

3. CUMULATIVE ERROR DEPRIVED SARMIENTO OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every defendant in a criminal case has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

An accumulation of errors affected the outcome and produced an unfair trial in Sarmiento's case. These errors include (1) failure to suppress evidence due to constitutionally invalid warrants (section C.1., supra); (2) ineffective assistance of counsel in not arguing the affidavit must be disregarded in assessing the validity of the warrants (section C.1.h., supra); and (3) ineffective assistance in failing to request defense of others instruction (section C.2., supra).

4. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL FIREARM POSSESSION.

The State failed to prove the possession element of the firearm possession charge. The conviction must be reversed.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

To convict Sarmiento of second degree unlawful possession of a firearm, the State needed to prove he "knowingly had a firearm in his possession or control." CP 241 (to-convict instruction); see also RCW 9A.10.040(2)(a) (defining crime); State v. Hartzell, 156 Wn. App. 918, 944, 237 P.3d 928 (2010) (possession must be knowing).

Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008). Constructive possession means the defendant has dominion and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013).

Looked at in the light most favorable to the State, the evidence does not establish Sarmiento possessed the firearm. In contrast with the other counts, the State did not advance an accomplice liability theory for the firearm count. The jury was not instructed that it could find Sarmiento guilty as an accomplice for this count. CP 241. The State argued to the jury that Sarmiento himself possessed the firearm, advancing actual and constructive possession theories. RP 1965-66, 2001-02.

Sarmiento shared a photo of the gun on his phone eight days before the shooting, told another "we" have a gun like a Glock three days before the shooting, and Zuniga messaged on Facebook that he, Martinez and Sarmiento were going to the woods to "try out the bangers" three days before the shooting. Ex. 98 at 3; Ex. 70; RP 1279. The State thus argued Sarmiento had "actual possession at various points." RP 1965. But there is only one point that matters under the law of the case doctrine. The to-convict instruction pinpointed the date of possession as on or about November 2, the day of the shooting. CP 241.

The law of the case doctrine refers to the "rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, Wash. Prac., Judgments § 380, at 56 (4th ed. 1986)). The State assumes

the burden of proving otherwise unnecessary elements if they are included in the to-convict instruction. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Under the law of the case doctrine, the State is required to prove the temporal component of the to-convict instruction. State v. Jennings, 33910-6-III, 2018 WL 3199556, at *6 (unpublished),²⁰ review denied, 428 P.3d 1187 (2018) (citing State v. Jensen, 125 Wn. App. 319, 325-26, 104 P.3d 717 (2005)). The conviction will be reversed due to insufficient evidence if the State does not prove the offense was committed on the date set forth in the to-convict instruction. Id. The to-convict instruction here fixes the date of offense as on or about November 2, 2015. CP 241. Any possession on dates other than on or about November 2 must be disregarded in determining sufficiency of evidence under the law of the case doctrine.

On November 2, Martinez pulled out a gun at Gamez's house and passed it to Zuniga, who looked at it and passed it back. RP 1009, 1013-15. Sarmiento was there and saw the gun. RP 1020. But actual possession requires physical custody. George, 146 Wn. App. at 919. Gamez testified that Sarmiento never held the gun. RP 1080. Zuniga testified he did not see Sarmiento in possession of a firearm that evening.

²⁰ GR 14.1(a) permits citation to unpublished opinions as persuasive authority.

RP 1080, 1810-11. On the other hand, Zuniga earlier told detectives that he was pretty sure everybody touched gun at Gamez's house, including Sarmiento. RP 1876-77. But no detail was elicited showing the touching was anything more than a momentary handling. "Actual possession means physical custody of an item but does not include 'passing control which is only a momentary handling.'" State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014) (Stephens, J., dissenting)²¹ (quoting Callahan, 77 Wn.2d at 29). "Passing" is "the act of one that passes" or "having a brief duration." Davis, 182 Wn.2d at 237 n.3 (quoting Webster's Third New Int'l Dictionary 1651 (2002)).

Sarmiento was near the gun that night. While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to contraband is insufficient to show possession. Davis, 182 Wn.2d at 234; Chouinard, 169 Wn. App. at 899. Even mere proximity combined with evidence of momentary handling is insufficient to show constructive possession. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990) (sitting next to cocaine and momentary handling of cocaine insufficient to show possession).

²¹ The dissenting opinion in Davis, which garnered five votes, is actually the majority decision on the sufficiency of evidence issue. Davis, 182 Wn.2d at 224.

Sarmiento knew the gun was present in Gamez's house. But proximity to contraband and knowledge of its presence is insufficient to establish constructive possession. George, 146 Wn. App. at 923; Chouinard, 169 Wn. App. at 899, 903. The State argued Sarmiento, though he did not carry the gun, constructively possessed it because he had the ability to take actual possession; he "set up an ambush" with his "little posse." RP 1965-66. It is true that "exclusive control is not necessary to establish constructive possession, but mere proximity to the contraband is insufficient." State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). While the ability to reduce an object to actual possession may be one aspect of dominion and control, it is only one factor among others that must be considered. Chouinard, 169 Wn. App. at 899.

It has been held "where the owner/operator of a vehicle has dominion and control of a vehicle and knows a firearm is inside the vehicle, there is sufficient evidence of constructive possession of a firearm for the crime of unlawfully possessing a firearm." State v. Turner, 103 Wn. App. 515, 518, 13 P.3d 234 (2000). After leaving Gamez's house, Sarmiento drove his truck with Zuniga and Martinez inside, so he had dominion and control over the vehicle. RP 1812-13. But the knowledge requirement remains unmet. Zuniga agreed with the prosecutor during cross examination that Sarmiento watched everything Martinez did in the

truck. RP 1877. He clarified on redirect that Martinez handed Zuniga the gun outside the truck when they stopped at BJ's Bingo in Fife, at which point Sarmiento was on the other side of the truck. RP 1912. He did not remember if Sarmiento was looking. RP 1912. The evidence does not establish Sarmiento knew Zuniga had the gun inside the truck. Nor does evidence show Sarmiento knew Martinez brought the gun in the truck in the first place. There was no testimony on the point. Possession must be knowing. Hartzell, 156 Wn. App. at 944. The possession element cannot be met in the absence of such knowledge. Turner, 103 Wn. App. at 518.

Moreover, cases such as Turner find sufficient evidence where the gun was not in anyone's actual possession. See Turner, 103 Wn. App. at 518, 521 (rifle found on backseat of defendant's vehicle); State v. Echeverria, 85 Wn. App. 777, 780, 783, 934 P.2d 1214 (1997) (firearm found sticking out of driver's seat of vehicle, where defendant was driver); State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010) (defendant was the owner, driver, and sole occupant of the truck in which the firearm was found in a bag beside the driver's seat). In Sarmiento's case, the gun was actually possessed by others that night inside the truck. In the absence of authority showing constructive possession under these circumstances, the evidence is insufficient to prove the possession element.

Even if the law of the case doctrine does not apply and evidence of the firearm from before November 2 could be considered in addressing sufficiency of the evidence, such evidence fails to establish the possession element. Taking a photo of a gun, referring to it as "our gun" and using the collective pronoun "we" in referring to having the gun does not show actual possession. Ex. 98 at 3. There was no evidence of who took the photo and who was present when the photo was taken. Sarmiento certainly had the ability to exert control over the photo of the gun, but he cannot be found guilty for possessing a photo. There is no evidence that Sarmiento actually went to the woods with Zuniga. Assuming the evidence permitted an inference that he did, there is no evidence of what Sarmiento actually did when he got there in relation to the firearm.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Further, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). It is speculation that Sarmiento had the gun in his physical custody or had dominion and control over the gun during this time period because details are lacking about the extent of his control over the firearm.

Sarmiento's conviction must be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction).

D. CONCLUSION

For the reasons stated, Sarmiento requests reversal of the convictions.

DATED this 27th day of November 2019

Respectfully Submitted,

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