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 (SAG) (AMENDED).

Alberto Colt, Sarmiento
Prose (SAG) (Amended)
Clallam Bay Corrections
Center (Imu), FD02, Doc#
406372. 1830 Eagle Crest way
Clallam Bay, WA 98326

A. ASSIGNMENTS OF ERROR

1. Sarmiento hereby incorporates Counsel's assignment of error into his (SAG), See Br. of Appellant pg 1; Assignment of error no. 1.

2. Assignment of error no. 2 is also incorporated herein, see Br. of Appellant pg 1; no. 2.

3. Assignment of error no. 3 is also incorporated herein, see Br. of Appellant pg 1; no. 3.

4. Assignment of error no. 4 is also incorporated herein, see Br. of Appellant pg 1; no. 4.

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

6. Sarmiento recieved ineffective assistance of counsel due to counsel's failure to argue the affidavits could not be used to cure defects in the warrants.

ASSIGNMENTS OF ERROR

7. Cumulative error deprived Sarmiento of his constitutional due process right to a fair trial.

8. When a conviction violates double jeopardy principals it must be wholly vacated.

Issues Pertaining to Assignments of Error

1. Sarmiento hereby incorporates issue, no. 1, from Br. of Appellant, into his (SAG). see Br. of Appellant pg. 1, issue 1.

2. Issue pertained to error, no. 2, is also incorporated herein, see Br. of Appellant pg. 2.

3. Issue pertained to error, no. 3, is also incorporated herein, see Br. of Appellant pg. 2.

4. Issue pertained to error, no. 4, is also incorporated herein, see Br. of Appellant pg. 2.

5. Police obtained warrants permitting them to search through cell phones, phone accounts, and Facebook accounts, including information unrelated to the one felony alleged 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 1, section 7?

6. Under established law, an affidavit not incorporated into the warrant cannot be used to cure defects in the warrant. This argum-

ent is preserved for review, but if this Court disagrees, was counsel ineffective in failing to make the argument below?

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

8. Whether this court finds enough compelling factors to reinstate the manslaughter upon retrial?

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR

Issues Pertaining To Assignments of Error

B STATEMENT OF THE CASE

C ARGUMENT

1. See, Br. of Appellant, section "i".
   a. (same).
   b. (same).
   c. (same).
   D. (same).
   E. (same).
   F. (same).
   G. (same).
   H. (same).
   I. (same).
2. See, Br. of Appellant, section "ii".
   a. (same).
   b. (same).
   c. (same).
   D. (same).
3. See, Br. of Appellant, section "ii".
4. ARGUMENT CONTINUATION . . . . . NEWLY ARTICULATED THEORIES CAN BE CONSIDERED FOR THE FIRST TIME ON APPEAL 6

a. THE SEARCH WARRANTS ARE OVERBROAD, REQUIRING SUPPRESSION OF EVIDENCE OBTAINED FROM THEM. 11

TABLE OF CONTENTS

Page

b. The trial court proclaimed the warrants "perfectly appropriate" and perfunctorily denied Sarmiento's suppression motion. 12

C. The trial court's ruling is reviewed de novo. 13

D. Overbroad warrants are constitutionally defective. 14

E. The affidavit incorporated to support the finding of supplemental probable cause for the single crime, also listed additional subsections, denominated crimes and others for which the affiant believed he found probable cause. 18

F. The face of the warrant application only listed one crime, (RCW 9A.32.030), on which the search warrant was based. One of the problem's, is the affidavit incorporated herein, that supported the supplemental probable cause, was not present at the time of the executed search. 21

G. First Amendment heightened standard Vs. First Amendment disqualifications/ unprotected. 26

TABLE OF CONTENTS

Page

H. The exclusionary rule requires suppression of evidence obtained from invalid warrants 33

5. The argument related to the affidavits is preserved for review, but if not, then counsel was ineffective for failing to raise it. 37

6. CUMULATIVE ERROR DEPRIVED SARMIENTO OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL 40

7. WHEN A CONVICTION VIOLATES DOUBLE JEOPARDY PRINCIPALS IT MUST BE WHOLLY VACATED 41

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984).

State v. Hughes, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009).

In re Pers. Restraint of Strandy, 171 Wn.2d 817, (2011).

In re Pers. Restraint of Jackson, Wash. App. LEXIS 413, (2016).

In re Pers. Restraint of Phasey, Wash. App. LEXIS 1147, (2018).

State v. Womac, 160 Wn.2d 643, 650-51, 100 P.3d 40 (2007).

State v. Turner, 169 Wn.2d 448, 238 P.3d 461 ; 2010 Wash. LEXIS 705 NO. 81626-3, (consolidated with) NO. 82336-7.

FEDERAL CASES

Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

Bail v. United States, 470 U.S. 856, 864-65, 105 S.Ct 1668, 84 L.Ed.2d 740 (1985).

Jones v. Thomas, 491 U.S. 376, 384 n.3, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989); Morris v. Mathews, 475 U.S. 237, 246-47, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986)).

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Davenport, 519 F.3d 940, 948 (9th cir. 2008).

United States v. Silvers, 90 F.3d 95, 99 (4th cir. 1996).

Smith v. Franks, NO. C09-1455-JLR-BAT, 2010 WL 816147, at *2. 2010 U.S. Dist. LEXIS 22714, at *6 (W.D. Wash. Mar. 8, 2010).

B. STATEMENT OF THE CASE

The STATEMENT OF THE CASE will not be repeated as it is already written in counsel's Brief, see Brief of Appellant pgs 3-17.

4. ARGUMENT CONTINUATION...

NEWLY ARTICULATED THEORIES CAN BE CONSIDERED FOR THE FIRST TIME ON APPEAL

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 validness of the warrant for denominated crimes, subsections and others because it was not incorporated into the warrant at the time of the search 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. Grillo, 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 the evidence from the incorporated affidavit outside of the search warrant was admitted and used to convict him of additional subsections, denominated crimes and others.

"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 search warrant incorporated the affidavit at the time of the search with the additional subsections, denominated crimes and others or not. That question is determined by looking at the first search warrant. 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).

Second the broad reference to 031 allowed the officers to seek evidence to point Sarmiento, as if he had acted as an Accomplice with premeditated intent and Conspired to commit Extreme indifference murder.

Third, the warrants are so overbroad and so lacking in specifity that they Controvene the particular requirement and Constute unlawful general warrants.

a. 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 1, section 7 of the Washington Constitution. First, there was no probable cause to seize and search the phones, phone accounts, and Facebook accounts against Sarmiento because there was (1) no Accomplice liability statute and (2) no criminal conspiracy statute referenced in neither of the warrants. The warrants do not establish a nexus between the felony and these locations.

b. 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 (joing 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.

C. 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).

D. 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 person's or things to be seized." Article 1, 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, 14, 413 P.3d 1049 (2018), reversed on other grounds by 438 P.3d 528 (2019) (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 particular-

ity requirement is unsatisfied. Higgs, 177 Wn. App. at 426.

Therefore, a warrant can be over-broad "either because it fails to describe with particularity items for which probable cause does not exist." State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003) (foot 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; "The appellate court follows washington precedent." see state v. Corriero, 2019 Wash. App. LEXIS 978.

"The Washington supreme court recently directed the court of appeals to remand for further proceedings to allow the trial court to determine whether the state may proceed with the prosecution without the suppressed evidence. id.

E. The affidavit incorporated to support the finding of Supplemental probable cause for the single crime, also listed additional subsections, denominated crimes and others for which the affiant believed he found probable cause. CP 31-33.

1. Incorporation of the Affidavit

The instant case presents a unique issue with respect to the incorporation of the affidavit ouside of the search warrant. The application for the search warrant in this case stated:

THE STATE OF WASHINGTON TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

Comes now Detective Greg Rock #171, of the Tacoma Police Department, being first duly sworn, under oath, deposes and says that:

That on November 2nd, 2015, to the present in Pierce County, Washington, a felony, to-wit: Murder 1st Degree RCW 9A.32.030 was committed

by the act, procurement or omission of another, and that the following evidence is necessary to the investigation and/or prosecution of the said offense, to wit:

1) Records containing the following information on **Facebook User Profiles** from **October 1st, 2015, to November 5th, 2015:**

https://www.facebook.com/beto.sarmiento.146?fref=ts

Facebook ID: 1571648413043 17

1. User Expanded Subscriber Content (Know 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 sent and deleted messages if any

It is also requested to utilize email as a communication and/or evidence, (if any is disc-

overed to be available), delivery method if this is in the common practice of the listed communication company. These communications, if any, should be directed to Gregory.Rock@cityoftacoma.org, who upon the court's examination of the supporting affidavit/complaint is the affiant and one of the investigating officers.

This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty buisness days of reciept, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply.

The listed items are material to the investigation or prosecution of the above described felony for the following reasons: The above listed items 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 this crime.

E. The face of the warrant application only listed one crime, (RCW 9A.32.030), on which the search warrant was based. One of the problem's, is the affidavit incorporated herein, that supported the supplemental probable cause, was not present at the time of the executed search. CP 144-147; 147 at 1-3; now see CP 33, 6-7; see also State v. Higgins, 136 Wn. App. at 93.

> Was the warrant in this specific form valid for a search of evidence pertaining to subsections, denominated crimes and others, as opposed to be valid only with respect to evidence of Murder in the First Degree (RCW 9A.32.030)?

More specifically, the general reference to evidence of murder in the 1st degree under RCW 9A.32.030 authorized seizure of items for which there was no probable cause. RCW 9A.32.030(1) contains 3 different means to commit 1st degree murder, a class A felony. Here, the state

had probable cause to search the cell-phone and Facebook media for evidence, under RCW 9A.32.030(1)(a) or in other words (Evidence which would have lead to the shooter, used only against the shooter), absent both mechanism's i.e, the Accomplice liability statute RCW 9A.08.020, the criminal conspiracy statute 9A.28.040 and subsections (3)(a)(ii), and (1)(3)(a) specified in turn order of both underlined statutes supra.

The broad reference to section .030 allowed the officers to seek evidence of 3 theorys, (1) that sarmiento acted with premeditated intent as an accomplice, CP 4, 15-22, (2) that sarmiento conspired with others to commit Extreme indifference Murder and (3) that sarmiento acted as an Accomplice to Felony Murder. CP 28, 1-3, 6-7. (see first RCW 9A.32.030(1)(a) cp 1, 17-18 then see, RCW 9A.32.030(1)(b), last see RCW 9A.32.050(1)(b) and other denominated offenses within the underlined supra.

Sarmiento asserts that RCW 9A.32.030 (1)(c) is an enumerated felony within RCW 9A.32.050 (1)(b), In other word's RCW 9A.32.030(1)(c), is listed inside RCW 9A.32.050(1)(b). See also cp. 137. at 5; 138 at. (same 9). Therefore a range of evidence bearing on Zuniga's, Martinez's, Salinas, Gomez and other's state of mind and actions within the .031 broad Section referenced went explored and used to convict Sarmiento. Nonetheless Sarmiento's private lawful non-physical information protected under the First Amendment[1], See RCW 9.41.010 (firearm); RCW 9.94A.530 (invoked provision); RCW 9.94A.553(3)(aa) (aggravator); RCW 9.94A.030 (criminal street gang). cp. 27-30.

Sarmiento asserts that the incorporated affidavit is insufficient to search for evidence of subsection (1)(a), (1)(b) and (1)(c) of .031. e.g., (1) Insufficient on Accomplice liability Evidence and (2) Insufficient on criminal conspiracy Evidence.

[1] See discussion infra on pg 26.

Finally all denominated crimes thereafter there after see cp 27, 23-4; 28, 1-11; 28, 12-24; 29, 1-13; 30, 1-12 and others listed within. 031 are invalid on the face of the warrant. cp 142, 20-23; see Higgins 136 Wn. App. at 93; "Tony honors, Responsibility and fault 17 (1999)).

The search warrant could have only been said to be valid for evidence with respect to (RCW 9A.32.030) (1)(a), But not for complicity or criminal conspiracy. In sum the language in the first search warrant only authorized exploration of evidence which should have only lead to the apprehension of the Shooter of the felony alleged. However if the incorporated affidavit would have been attached and referenced with suitable word's at the time of the search. With either the Accomplice liability statute or criminal conspiracy statute attached as a way of mechanism. Then the warrant would have been valid. In short RCW 9A.32.030(1)(a), (1)(b) and (1)(c) does describe a class A

Felony here, if there is a finding of Accomplice liability or criminal conspiracy at the time of the search.

Another good example of the explained is found in: United states V. Abboud (2006, CA6 Ohio), 438 F.3d at 569; and United states V. Guitterez, 983 F. supp. at 918) ("as a result, the search warrant was only valid for evidence with respect to 18 U.S.C. § 13.44.") id. at 569, see, Abboud.

The court in Abboud addressed the system of laws with respect to incorporation of an affidavit into a search warrant. "A search warrant almost exclusively addresses the particularity or probable cause requirement of a search warrant." id. at 569; see also United states V. Watkins, 179 F.3d 489, 494 (6th cir. 1999) (incorporation of an affidavit to provide sufficient particularity of a place searched); and United states V. Blakeney, 942 F.2d 1001, 1029 (6th cir 1991) (incorporation of affidavit to provide probable cause).

The court in Abboud did not address whether an affidavit incorporation for the purpose of supporting probable cause of a single violation may also be incorporated to establish probable cause for additional violations not listed on the face of the warrant but for which the affiant professes probable cause. id (same).[2]

G. First Amendment heightened standard vs. First Amendment disqualifications/unprotected.

Sarmiento asserts that all the data extracted from the phones, Facebook accounts. Are well protected under the 1st Amendment right to Association and such data is not illicit. see Black's Law Dictionary, 10th Edition: illicit is defined as "illegal or improper."

Sarmiento asserts that the warrant failed to differentiate between items subject to seizure and those that were not. (cp

[2] The dearth of case law on this point in all liklihood stems from the fact that law enforcement officer's customarily list on the face of the search warrant all of the violations for which they seek evidence.

146, 18-21, co-conspirator limitation); (quoting state v. higgins, 136 Wn. App. at 99). Although a general reference to the 1st degree murder statute along with a co-conspirator limitation was present. Sarmiento contends and articulates, that without an Accomplice liability or criminal conspiracy statute mechanism physically attached. e.g., It's pretty much, like going to the store with a grocery list of only lemon's listed on the paper, but, then not finding any. And buying limes instead, but the list clearly list's only lemons. However limes can be okay, but without such specific instructions physically attached of, if not buy limes, You just soured your relationship by failure to follow directions. (Emphasis Mine); see also United states v. Towne, 997 F.2d at 547, (9th Cir.)

Similar here when applying the described, let us look at the statute listed on the first warrant. see cp 142, 19-23, 46-48; or simply see RCW 9A.32.030.

Unlike chambers and Reid here, this case did not involve, (1) No illicit drugs i.e, chambers and (2) No child pornography i.e, Reid. The data presented at trial was electronic lawful information protected under the 1st Amendment, requireing a higher degree of heightened standard. see state v. chambers, 88 Wn. App. 640, 644-646. 945 P.2d 1172 (1997) (quoting carlton v. state, 418 So.2d 449, 450 (Fla. Dist. ct. App. 1982)). "A lesser degree of precision may satisfy the particularity requirement when a warrant authorizes the search for contrabrand or inherently illicit property." id. child pornography is not protected by the first Amendment. New York

v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed. 1113 (1982).

Although the warrant here listed the murder in the 1st degree statute and limited the search to co-conspirator language. cp 146, 18-21. The warrant failed to attach an incorporated affidavit with either (1) the Accomplice liability statute or (2) a criminal conspiracy statute. cp 144-147. Therefore rendering the co-conspirator limitation and evidence sought as innocuous. The broad reference to RCW 9A.32.030, allowed the police to search for innocuos items, not pertaining to the felony alleged. cp 144, 10-12. The face of the warrant only allowed for the actual search of evidence that would have lead to the apprehension of only the shooter. cp 144, 25.

Moreover personal property of, (1) Facebook gang pictures, (2) Personal text messages, (3) Private Facebook messages and (4) Personal pictures are not "illegal or improper." see Br. of Appellant pg 45.; "For purposes of a search warrant for property protected by the First Amendment, the requirement of the Fourth Amendment that the warrant particularily describes the things to be seized takes on special importance and must be followed with scrulptulous exactitude." State V. Perrone, 119 Wn. 2d at 548, n. 5. (1992). Police noted that the Facebook was open to the public for anyone who might want to view it, in the affidavit. cp 146, 15-16. There fore with such statement made, you would assume, they specify at least any public imagery being sought with precision of the alleged crime. However not the case, they choose to reference a broad statute i.e, RCW 9A.32.030,

an unsupported limitation by law and any and all language. With again only buy lemons e.g. see pg 27).

The failure to suppress was prejudicial. There was conflicting evidence about whether it was just suppose to be a fist fight or a planned shooting. While Gomez testified that Sarmiento confessed to him going over there to kill, he admitted to not telling the police anything 2 years prior. Zuniga the shooter testified to the contrary it was not an ambush. To bolster the later version, the state relied heavily on the tainted evidence, such as all data extracted from the phones, facebook accounts etc. Thus, the state cannot show beyond a reasonable doubt that the jury would have reached the same verdict without the seized evidence. See state v. Gulay, 104 Wn. 2d 412, 425, 705 P.2d 1182 (1985) ("A constitutional error is harmless if the appellate court is convinced

beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." (citing State v. Stephens, 93 Wn. 2d 186, 190-91, 607 P. 2d 369 ((1980)). The convictions must be reversed.

H. The exclusionary rule requires suppression of evidence obtained from 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, 259, 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 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 mess-

ages), 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 Sarmie...

into at trial. These records forged a link between the shooting and sarmiento as an accomplice and as a co-conspirator to the shooting. The communications between sarmiento and contreras contained in Exhibit 34 were provided by contreras to police and so could be said to be untainted as far as the evidence focused on the felony alleged. Not Accomplice or co-conspirator means.

Absent the complicity and co-conspirator 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, all of the evidence based on Accomplice liability and co-conspirator along with the gang evidence in relation to the shooting derived from the phone and Facebook records. Ex. 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

1 (Facebook messages), 96 (Facebook message) and 98 (summary of evidence). The state cannot prove beyond a reasonable doubt that the jury would have found the Accomplice liability, Co-Conspirator allegations, denominated crimes and others below, absent the invalid warrants. The state cannot prove beyond a a reasonable doubt that the jury would have convicted Sarmiento of all the alleged because the warrants had no Accomplice liability or criminal conspiracy mechanism offsoned, on the face of the warrants. All of the convictions, i.e, subsections, denominated crimes and others below. 031, must be reversed and vacated.

Must be Suppressed.

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

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 1 § 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. Kyllo, 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 921;

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

66. 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.

7. WHEN A CONVICTION VIOLATES DOUBLE JEOPARDY PRINCIPALS IT MUST BE WHOLLY VACATED

Sarmiento seeks relief from his convictions for second degree felony murder and first degree manslaughter. He contends, that the convictions violate double jeopardy and that the matter must be remanded with directions "to vacate the lesser offense." State v. Hughes, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009) (discussing factors for determining lesser offense); (In re Pers. Restraint of Strandy, 171 Wn.2d 817, (2011); (In re Pers. Restraint of Jackson, Wash. App. LEXIS 413, (2016); (In re Pers. Restraint of Phasey, Wash. App. LEXIS 1147, (2018).

Multiple convictions and punishments for the same offense imposed in the same proceeding violate the Fifth

Amendment prohibition against double jeopardy. U.S. Const. amend V, Ball v. United states, 470 U.S. 856, 864-65, 105 S. ct. 1668, 84 L. Ed. 2d 740 (1985), Turner, 169 Wn. 2d at 454-55, State v. Womac, 160 Wn. 2d 643, 650-51, 100 P. 3d 40 (2007). When a conviction violates double jeopardy principals it must be wholly vacated. Turner, 169 Wn. 2d at [*820] 466; Womac, 160 Wn. 2d at 658.

a. should this court remand with directions that the superior court vacate [the defendant's] conviction on the Manslaughter or the Murder 2?

Sarmiento asserts that in the event the felony murder is reversed on direct or collateral review, on grounds affecting only the greater

offense then reinstatement for the man-
slaughter is not barred. (quoting Ball
v. United states, 470 U.S. 856, 865, 105
S.ct. 1668, 84 L.Ed.2d 740 at 306 (1985);
(see, e.g., Jones v. Thomas, 491 U.S. 376,
384 n.3, 109 S.ct. 2522, 105 L.Ed.2d 322
(1989); (citing Morris v. Mathews, 475
U.S. 237, 246-47, 106 S.ct. 1032, 89 L.Ed.
2d 187 (1986)); Morris, 475 U.S. at 247);
(United states v. Davenport, 519 F.3d 940,
948 (9th cir. 2008) (remanding with directions
that "the district court vacate [the d-
efendant's] conviction on one of two
count's, allowing it to be reinstated wi-
thout prejudice if his other conviction
should be overturned on direct or collate-
ral review"); (United states v. silvers,
90 F.3d 95, 99 (4th cir. 1996); (smith v. Fra-
ker, No. C09-1455-JLR-BAT, 2010 WL 816
147, at *2. 2010 U.S. Dist. LEXIS 22714, at
*6 (W.D. Wash. Mar. 8, 2010) ("The Double
Jeopardy clause imposes no limitat-

ions on the state . . . to reinstate a conviction which was vacated solely to prevent double punishment for the same crime" (citing Rutledge, 517 U.S. 292)). CP 333.

This matter must be reversed and remanded with directions of the latter, or as befits this Honorable court.

CONCLUSION

For those reasons stated, sarmiento respectfully request reversal and remand of his convictions

Dated this 12th day of July 2019.

Respectfully submitted by,
ALBERTO COLT-SARMIENTO
x Alberto Colt-S
Prose (SAG)
Clallam Bay Corrections Center (Imu), FD02, Doc # 406372. 1830 Eagle crest Way clallam Bay, WA 98326