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

STATE OF WASHINGTON,

Respondent,

v.

D'MARCUS DEWITT GEORGE,

Appellant.

NO. 52216-1-II

STATE'S MOTION TO DISMISS PRP AS  
BEING TIME-BARRED

I. IDENTITY OF MOVING PARTY:

Respondent, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State respectfully requests this Court to dismiss petitioner's PRP as being time-barred pursuant to RCW 10.73.090, RCW 10.73.100, RAP 16.4(d), and RAP 16.8.1(b) or, in the alternative, set a new briefing schedule to allow the State to address the claims on the merits pursuant to RAP 18.8(a).

1 III. FACTS RELEVANT TO MOTION

2 Petitioner is restrained pursuant to a Judgment and Sentence entered in Pierce County  
3 Cause Number 05-1-00143-9. Appendix A. He was found guilty following retrial of murder  
4 in the second degree with a firearm enhancement. *Id.* He appealed claiming various errors.  
5 Appendix B. This Court rejected his claims and affirmed his conviction and sentence,  
6 however it "...remanded to the trial court to strike the language in [petitioner]'s judgment  
7 and sentence which refers to the jury's guilty verdict on count II, the felony murder charge."  
8 *Id.* at 1. This Court's mandate issued on June 28, 2017. Appendix C. The sentencing court  
9 subsequently entered an Order Correcting Judgment and Sentence on July 31, 2017.  
10 Appendix D. The order was filed *nunc pro tunc* to the sentencing date and defendant  
11 approved as to form and waived notice of presentation. *Id.* Petitioner subsequently filed a  
12 PRP on July 31, 2018, addressing many of the same allegations as in his direct appeal.  
13

14  
15 IV. GROUND FOR RELIEF AND ARGUMENT:

- 16 a. Petitioner's time-barred claims should be dismissed as the PRP was  
17 filed more than one year after his judgment and sentence became  
final and falls under the exception to the one year time-bar.

18 Rules of Appellate Procedure (RAP) 16.4(d) provides, in relevant part:

19 The appellate court will only grant relief by a personal restraint petition if  
20 other remedies which may be available to petitioner are inadequate under  
21 the circumstances and if such relief may be granted under RCW 10.73.090  
22 or .100.

23 RCW 10.73.090 creates a time-bar preventing a personal restraint petition from being  
24 filed more than one year after the judgment becomes final so long as the judgment is facially  
25 valid and rendered by a court of competent jurisdiction. RCW 10.73.090(1); *see also In re*  
*Toledo-Sotelo*, 176 Wn.2d 759, 764, 297 P.3d 51 (2013). For a judgment to be "invalid on

1 its face” the judgment and sentence “...evidences the invalidity without further elaboration.”  
2 ***In re Hemenway***, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). The one year time-bar is a  
3 mandatory rule. ***In re Greening***, 141 Wn.2d 687, 694-695, 9 P.3d 206 (2000) (internal  
4 citations omitted). There is no “good cause” or “ends of justice exception” to the time-bar.  
5 *Id.* If the judgment is facially valid and rendered by a court of competent jurisdiction, the  
6 only way a petitioner can avoid the one year time-bar is if an exception under RCW  
7 10.73.100 is met. RAP 16.8.1(b) states “the appellate court will dismiss the petition without  
8 requesting a response if it is clearly frivolous or clearly barred by RCW  
9 10.73.090 or RAP 16.4(d).”

10 Where only corrective changes are made to a judgment and sentence by a trial court  
11 on remand, there is nothing to review on appeal. ***State v. Kilgore***, 167 Wn.2d 28, 40, 216  
12 P.3d 393 (2009). When an appellate court order on remand is to simply correct the original  
13 judgment and sentence, the one year time-bar begins to run from either the denial of the  
14 United States Supreme Court to accept certiorari or one year after the mandate from our  
15 courts issues. ***Kilgore***, 167 Wn.2d at 41; ***In re Sorenson***, 200 Wn. App. 692, 701, 403 P.3d  
16 109 (2017). In ***Sorenson***, the case was remanded following direct appeal to correct  
17 scrivener’s errors in the judgment and sentence. ***Sorenson***, 200 Wn. App. at 694. This Court  
18 gave explicit directions to the sentencing court on what errors to fix and how to fix the errors.  
19 ***Sorenson***, 200 Wn. App. at 701-702. The sentencing court amended the scrivener’s errors  
20 without exercising any further discretion. ***Sorenson***, 200 Wn. App. at 694. The explicit  
21 wording of the opinion and remand gave the sentencing court no discretion whatsoever.  
22 ***Sorenson***, 200 Wn. App. at 701-702. Rather, they were bound by the opinion and ruling of  
23 this Court. *Id.* Thus, “...the trial court had no discretion in correcting Sorenson’s judgment  
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25

1 and sentence.” *Sorenson*, 200 Wn. App. at 703. He subsequently filed a PRP more than one  
2 year after the mandate from direct appeal issued. *Sorenson*, 200 Wn. App. at 694-695.  
3 Therefore, this Court held “...that Sorenson’s PRP is time-barred because he filed the PRP  
4 more than one year after the mandate was issued.” *Sorenson*, 200 Wn. App. at 703. Because  
5 the trial court had no discretion, the mandate was the date from which the time-bar began to  
6 run. *Id.*

7 Here, petitioner’s judgment and sentence became final on June 28, 2017, when this  
8 Court issued the mandate following his direct appeal. Appendix C. He did not file this  
9 petition until July 31, 2018. He does not provide a reason why he should be exempt from the  
10 one year time-bar, only that he timely filed his PRP. *See* PRP at 14-16. He is wrong. This  
11 Court stated in three separate places in its opinion in petitioner’s direct appeal how it was  
12 remanding to the trial court to strike language in the judgment and sentence related to Count  
13 II. Appendix B at 1, 20, 22. The trial court had no discretion on remand. The sentencing  
14 court could only strike language related to Count II. *Id.* This is exactly what the trial court  
15 did. Appendix D. It made no discretionary decisions or in any way took action which was  
16 not the explicit directions of this Court. Essentially, all the sentencing court did was correct  
17 a scrivener’s error. This is virtually identical to the issues in *Sorenson*. Petitioner did not file  
18 a direct appeal from the corrected sentence. As such, because the sentencing court had no  
19 discretion, the time-bar began to run from the date the mandate issued on June 28, 2017.  
20 This PRP was untimely filed over a year later on July 31, 2018. This court has the duty to  
21 dismiss a PRP without requesting a response from the State if it is clearly time-barred. RAP  
22 16.8.1(b). This PRP is clearly time-barred as it was filed more than one year after the  
23 mandate issued. Thus, petitioner’s PRP should be dismissed as time-barred.  
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b. In the alternative, this Court should set a new briefing scheduling to allow the State to address the claims on the merits.

RAP 18.8 provides, in pertinent part:

(a) **Generally.** The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice . . . .

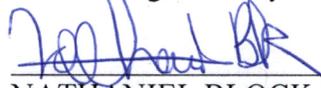
The State’s response to the PRP is currently due on December 4, 2018. If the Court finds that the one year time-bar has been met, the State asks this Court to issue a new briefing schedule pursuant to RAP 16.8(a).

V. CONCLUSION:

For the above stated reasons, the State respectfully requests that this Court dismiss the PRP as being time-barred or, in the alternative, set a new briefing schedule to allow the State to address the claims on the merits.

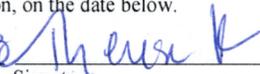
DATED: November 20, 2018.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



NATHANIEL BLOCK  
Deputy Prosecuting Attorney  
WSB # 53939

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail and/or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/20/18   
Date Signature

## **APPENDIX “A”**



05-1-00143-9 43317179 JDSWCD 09-22-14



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 05-1-00143-9

vs

DMARCUS DEWITT GEORGE,

Defendant.

WARRANT OF COMMITMENT

- 1)  County Jail
- 2)  Dept. of Corrections
- 3)  Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

X 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

*September 19, 2014*

Dated: ~~4-19-14~~ \_\_\_\_\_

By direction of the Honorable

*[Signature]*  
\_\_\_\_\_  
JUDGE  
KEVIN STOCK

CLERK

By: *[Signature]*  
\_\_\_\_\_  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

SEP 22 2014  
Date \_\_\_\_\_ By *[Signature]* Deputy

STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

KEVIN STOCK, Clerk

By: \_\_\_\_\_ Deputy

dlc





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-00143-9

vs

JUDGMENT AND SENTENCE (FJS)

DMARCUS DEWITT GEORGE

Defendant.

- Prison
- RCW 9.94A.712/9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline  Mandatory  Discretionary

SID: WA22034454  
 DOB: 02/09/84

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 09/04/14 by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	MURDER 2 (D4)	9A.01.010 9.94A.310 9.94A.510 9.94A.370 9.94A.530 9A.32.050(1)(a)	FASE	06/21/04	PCSD 041730972

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Harm, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the SECOND AMENDED Information

- A special verdict/finding for use of firearm was returned on Count(s) I RCW 9.94A.602, 9.94A.533.  
 Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):  
 Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	UFGS LESS 40 GRAMS	05/17/04	PIERCE, WA	12/23/03	A	MISD
2	UPOF UNDER 21 YOA	05/17/04	PIERCE, WA	12/23/03	A	MISD

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XIV	123-220 MONTHS	60 MONTH FASE	183-280 MONTHS	LIFE

- 2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:  
 within  below the standard range for Count(s) \_\_\_\_\_  
 above the standard range for Count(s) \_\_\_\_\_  
 The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.  
 Aggravating factors were  stipulated by the defendant,  found by the court after the defendant waived jury trial,  found by jury by special interrogatory.  
Findings of fact and conclusions of law are attached in Appendix 2.4.  Jury's special interrogatory is attached. The Prosecuting Attorney  did  did not recommend a similar sentence.

- 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):
- \_\_\_\_\_

- The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:
- \_\_\_\_\_

2.6  **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9A.1.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

other: \_\_\_\_\_

The court decided the defendant  should  should not register as a felony firearm offender.

**III. JUDGMENT**

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2  The court DISMISSES without prejudice Count II, the guilty verdict for Murder 2° w/FASE, ~~the defendant is found NOT GUILTY of Counts~~ on double jeopardy grounds given the conviction for Count I.

**IV. SENTENCE AND ORDER**

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN \$ ~~500.00~~ Restitution to: ~~\_\_\_\_\_~~

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ \_\_\_\_\_ Court-Appointed Attorney Fees and Defense Costs

FRC \$ 110.00 ~~200.00~~ Criminal Filing Fee

FCM \$ \_\_\_\_\_ Fine

EXT \$ \_\_\_\_\_ Extradition Costs

**OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)**

\$ 3675.96 Other Costs for: Extradition Costs

\$ \_\_\_\_\_ Other Costs for: \_\_\_\_\_

\$4385.96 ~~500.00~~ TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for 10/17/14

RESTITUTION. Order Attached

**JUDGMENT AND SENTENCE (JS)**

(Felony) (7/2007) Page 3 of 11

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

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ Per DOC per month commencing Per DOC. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

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

[ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_ for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT  
The defendant shall not have contact with family of Isaiah Clark (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.


4.4a [ ] All property is hereby forfeited

[ ] Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

175 months on Count I \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No I \_\_\_\_\_ months on Count No \_\_\_\_\_  
\_\_\_\_\_ months on Count No \_\_\_\_\_ months on Count No \_\_\_\_\_  
\_\_\_\_\_ months on Count No \_\_\_\_\_ months on Count No \_\_\_\_\_

Sentence enhancements in Count I shall run  
[ ] concurrent [ ] consecutive to each other.  
Sentence enhancements in Count I shall be served  
 flat time [ ] subject to earned good time credit

Actual number of months of total confinement ordered is: 235 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: \_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: ~~XXXXXXXXXX~~

credit for time served since 3.28.08 (arrested out of state)

4.6 [ ] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

COMMUNITY CUSTODY (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for: ~~36~~ 48 months for Count I

Count(s) \_\_\_\_\_ 36 months for Serious Violent Offenses

Count(s) \_\_\_\_\_ 18 months for Violent Offenses

Count(s) \_\_\_\_\_ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

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

Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

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

[ ] consume no alcohol.

have no contact with: see § 4.3

remain  within  outside of a specified geographical boundary, to wit: per DOC

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[ ] participate in the following crime-related treatment or counseling services: \_\_\_\_\_

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse

[ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] comply with the following crime-related prohibitions: \_\_\_\_\_

[ ] Other conditions: \_\_\_\_\_

[ ] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

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

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [ ] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): XOOG
- 5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.
- 5.7 **SEX AND KIDNAPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.  
N/A
- 5.8 [ ] The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 9.19.14

JUDGE  
Print name

*[Signature]*  
RONALD E. CULPEPPER

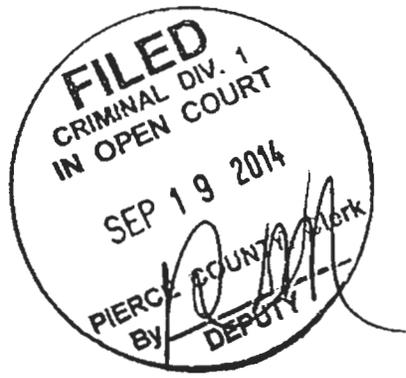
*[Signature]*  
Deputy Prosecuting Attorney  
Print name: Jesse Williams  
WSB # 35543

*[Signature]*  
Attorney for Defendant  
Print name: Barbara Corey  
WSB # 11778

*[Signature]*  
Defendant  
Print name: \_\_\_\_\_

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: *[Signature]*



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**CERTIFICATE OF CLERK**

CAUSE NUMBER of this case: 05-1-00143-9

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

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF COURT REPORTER**

CourtSmart

Court Reporter

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- ~~sex offense~~ Murder 2<sup>o</sup> -/FASE
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: \_\_\_\_\_

per DOC

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: see §4.3

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; \_\_\_\_\_

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: \_\_\_\_\_

**IDENTIFICATION OF DEFENDANT**

SID No. WA22034454  
(If no SID take fingerprint card for State Patrol)

Date of Birth 02/09/84

FBI No. 394811DC6

Local ID No. 20033582016

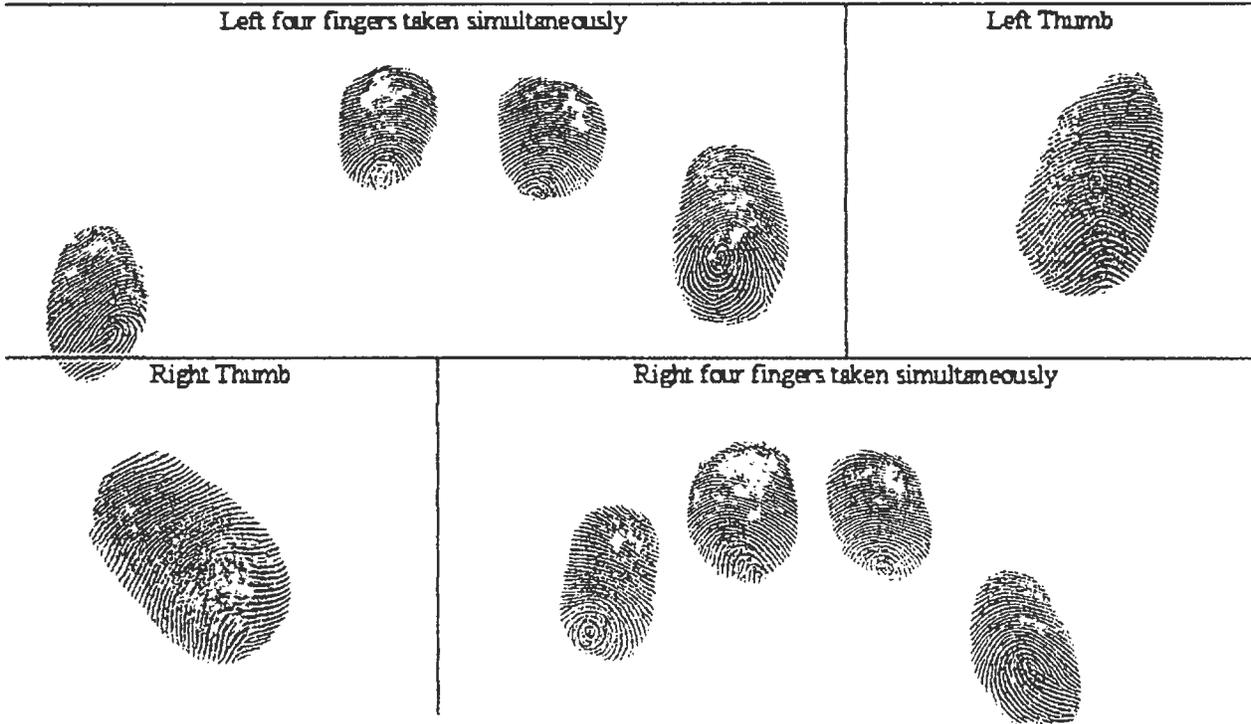
PCN No. 540562920

Other

Alias name, SSN, DOB: \_\_\_\_\_

<b>Race:</b>					<b>Ethnicity:</b>		<b>Sex:</b>
<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/> Black/African-American	<input type="checkbox"/> Caucasian	<input type="checkbox"/> Hispanic	<input checked="" type="checkbox"/> Male			
<input type="checkbox"/> Native American	<input type="checkbox"/> Other :	<input checked="" type="checkbox"/> Non-Hispanic	<input type="checkbox"/> Female				

**FINGERPRINTS**



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, Debra M. Korman Dated: 09.19.14

DEFENDANT'S SIGNATURE: \_\_\_\_\_

DEFENDANT'S ADDRESS: \_\_\_\_\_



05-1-00143-9 49675640 ORCJS 08-02-17



**SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

**STATE OF WASHINGTON,**

**Plaintiff,**

**CAUSE NO. 05-1-00143-9**

**vs.**

**DMARCUS DEWITT GEORGE,**

**MOTION AND ORDER CORRECTING  
JUDGMENT AND SENTENCE**

**Defendant.**

**CLERKS ACTION REQUIRED**

**PCN: 540562920**

**THIS MATTER coming on regularly for hearing before the above-entitled court on the Motion of the Deputy Prosecuting Attorney for Pierce County, Washington, for an order correcting Judgment and Sentence heretofore granted the above-named defendant on September 19, 2014, pursuant to defendant's plea of guilty to the charge(s) of MURDER IN THE SECOND DEGREE; MURDER IN THE SECOND DEGREE, as follows:**

**1) That Page 3 of the Judgment and Sentence, 3.2 reflects "The court dismisses without prejudice Count II, the guilty verdict for Murder 2 with FASE, on double jeopardy grounds given the conviction for Count I" and that language should be stricken;**

**2) That all other terms and conditions of the Judgment and Sentence are to remain in full force and effect as if set forth in full herein; and the court being in all things duly advised, Now, Therefore, It is hereby**

**ORDERED, ADJUDGED and DECREED that the Judgment and Sentence granted the defendant on September 19, 2014, be and the same is hereby corrected as follows:**

1) Page 3 of the Judgment and Sentence, 3.2 is corrected as follows:

a) "The court dismisses without prejudice Count II, the guilty verdict for Murder 2 with FASE, on double jeopardy grounds given the conviction for Count I" is deleted.

2) All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein. IT IS FURTHER

ORDERED that the Clerk of the Court shall attach a copy of this order to the judgment filed on September 19, 2014 so that any one obtaining a certified copy of the judgment will also obtain a copy of this order.

DONE IN OPEN COURT this 31 day July, 2017. NUNC PRO TUNC to September 19, 2014.

*Karena Kirkendoll*

JUDGE/COMMISSIONER

KARENA KIRKENDOLL

Presented by:

*J. Williams*

JESSE WILLIAMS  
Deputy Prosecuting Attorney  
WSB# 35543

Approved as to form and Notice  
Of Presentation Waived:

*approved via e-mail date July 25, 2017*

BARBARA L. COREY  
Attorney for Defendant  
WSB# 11778

dlc



State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the  
aforementioned court do hereby certify that this foregoing instrument is  
a true and correct copy of the original now on file in my office.  
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said  
Court this 20 day of November, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: November 20, 2018 10:05 AM



**Instructions to recipient:** If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,

enter **SerialID: 0CA4C558-9A7C-4799-9FBB593F9C7668D5**.

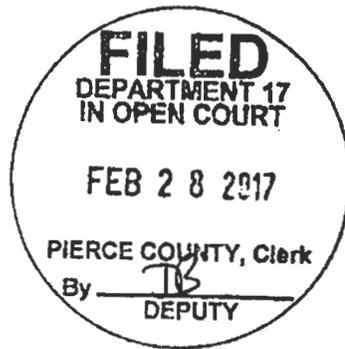
This document contains 16 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

## **APPENDIX “B”**

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05-1-00143-9 48803703 CPOPN 03-02-17



Filed  
Washington State  
Court of Appeals  
Division Two

February 22, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

05-1-00143-9

No. 46705-4-II

STATE OF WASHINGTON,

Respondent,

UNPUBLISHED OPINION

v.

DMARCUS D. GEORGE,

Appellant.

SUTTON, J. — A jury found Dmarcus George guilty of two counts of second degree murder for the death of Isaiah Clark. The trial court dismissed the jury’s guilty verdict on the felony murder charge and sentenced George to a standard range sentence. George appeals, arguing that (1) repeated instances of evidentiary irregularities and prosecutorial misconduct deprived him of a fair trial, (2) the trial court violated double jeopardy by only dismissing the felony murder conviction conditionally, and (3) the case should be remanded to allow George to seek an exceptional sentence downward based on his youth at the time of the crime. We affirm George’s conviction and sentence for second degree murder but remand to the trial court to strike the language in George’s judgment and sentence which refers to the jury’s guilty verdict on count II, the felony murder charge.

**FACTS**

**I. BACKGROUND**

On June 21, 2004, George, Fred McGrew, and Tamrah Dickson arrived at a gas station in Tacoma. George was asleep in the backseat of the car. While McGrew was trying to get gas, he

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was confronted by Rickie Millender. When Millender confronted McGrew, Dickson woke George. Millender's friend, Clark, was with Millender at the gas station. George shot Clark four times. Clark died of his injuries.

George fled the state. Four years later, George was arrested and extradited to Washington. The State charged George with one count of first degree premeditated murder and one count of second degree felony murder. Both counts included a firearm enhancement. At George's first trial, the trial court denied his motion to instruct the jury on self-defense. *State v. George*, 161 Wn. App. 86, 92-93, 249 P.3d 202 (2011). A jury found George guilty of the lesser included offense of first degree manslaughter and second degree felony murder. *George*, 161 Wn. App. at 94. George appealed. *George*, 161 Wn. App. at 94. This court reversed the trial court's ruling to not instruct the jury on self-defense and remanded the case for a new trial. *George*, 161 Wn. App. at 101-02.

On September 6, 2012, the State filed an amended information charging George with one count of second degree intentional murder (count I) and one count of second degree felony murder (count II). Both counts included a firearm enhancement. Prior to George's second trial, the trial court also ruled that George's first trial would be referred to as a "prior hearing" rather than a "prior trial." Verbatim Report of Proceedings (VRP) (Aug. 19, 2014) at 5.

## II. CURRENT JURY TRIAL

George's second trial began in August 2014. Laura Devereaux, who witnessed the shooting, testified that when she arrived at the gas station she observed McGrew and Millender being loud, but she was not concerned. The verbal confrontation began to escalate, but there was no physical altercation. Then Devereaux heard a gunshot and saw a man later identified as Clark

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“hit the ground.” VRP (Aug. 14, 2014) at 623. Devereaux ran into the gas station to tell the attendant to call the police. When she came back outside, a man and woman were standing over Clark’s body going through his pockets. Devereaux did not see either of them take anything from the pockets.

Monica Johnson, who witnessed the shooting, testified that when she arrived at the gas station, she could hear individuals arguing near a Cutlass. As Johnson was walking into the store, she walked by a man, later identified as Clark, standing off to the side and she asked what was happening. Clark just shrugged. Johnson walked into the store to pay for her gas and noticed that the arguing was escalating. As the arguing got louder, Johnson saw a man get out of the Cutlass and pull a gun. Johnson identified George as the man she saw exit the Cutlass. Almost immediately after exiting the car, George began shooting Clark.

Johnson testified that she would never forget the look on George’s face when he shot Clark.

The State asked what the look was and the following exchange took place:

[JOHNSON]: It was a very menacing, very –

Ms. Corey: Objection, Your Honor, to that opinion, conclusion.

The Court: Well, overruled.

Ms. Corey: It’s improper demeanor testimony.

Court: Overruled.

So, the question again was?

[STATE]: You said the look on the defendant’s face was menacing?

[JOHNSON]: Yes.

Ms. Corey: Your Honor, I’m going to object. This is testimony that is outside of case law.

[STATE]: You’re Honor, I’m going to –

Court: Overruled. So, the question is what, Mr. Williams?

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[STATE]: You said you saw the defendant's face and he had a menacing look on his face?

[JOHNSON]: Yes.

[STATE]: Can you help us understand what you mean by that?

[JOHNSON]: There was no fear on the face. It was more – it was just a nonchalant. It was – it was a monster. It was nonchalant, like it was nothing to it. I'll never forget it.

Ms. Corey: Objection, Your Honor. I ask that these descriptions be stricken.

Court: Well, overruled. You can certainly cross-examine her about this.

VRP (Aug. 19, 2014) at 63-64. Johnson also testified that, right before Clark was shot, he was not doing anything except standing near the car.

At the trial court's next recess, George moved for a mistrial based on Johnson's comments, specifically that Johnson called George a "monster." VRP (Aug. 19, 2014) at 80. Although the trial court noted that the specific use of the word "monster" was unfortunate, the trial court also ruled that the answer was not responsive to the question. The trial court denied George's motion for a mistrial.

Later during Johnson's testimony, the State asked Johnson to refresh her memory with transcripts from an interview she gave in the original investigation. Specifically, the State asked Johnson to review a page of the transcript to refresh her memory as to what was said by a man she saw rummaging through Clark's pockets after he was shot. Johnson responded:

I recall, after reading the statement I gave the next day, that he had also said, "This is the same guys who shot my home boys a certain time ago, a week ago," or to that effect.

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VRP (Aug. 19, 2014) at 94. The trial court immediately dismissed the jury. The trial court clarified that the statement the witness gave was actually on a different page than the State had asked Johnson to review.

George moved for another mistrial arguing that the statement was improper ER 404(b) evidence that was too prejudicial to be cured without a new trial. The State responded that it would agree to a stipulation that there was no evidence that George had participated in any shooting before June 21, 2004. The trial court denied George's motion for a mistrial. Instead, the trial court gave the jury the following curative instruction:

Now, you are to disregard the last statement of Ms. Johnson. Statements made by others in the presence of a witness and repeated by that witness may be inaccurate. There is no evidence that Dmarcus George participated in any shooting that occurred prior to June 21st, 2004.

VRP (Aug. 19, 2014) at 116.

Michael Clark,<sup>1</sup> Isaiah Clark's older brother, testified that, on the day of the shooting, Clark's friend Millender came to his mother's house and told him that Clark had been shot. During cross-examination, George asked what Millender's demeanor was when he arrived at the house. Michael responded, "He was upset, saying that he shot him like their other friend who had been shot before." VRP (Aug. 19, 2014) at 163. The State objected and asked the trial court to strike the response. The trial court agreed and instructed the jury to disregard the statement.

At trial, George testified that, when Dickson woke him up, she was scared and concerned Millender was going to do something to McGrew. George saw Millender confront McGrew and began exiting the car. George intended to try to diffuse the situation, but Clark began approaching

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<sup>1</sup> We refer to Michael Clark by his first name for clarity. We intend no disrespect.

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the car. George testified that Clark made “a gesture with his hand around his waist and at the time I perceived he had a weapon, so I stopped.” VRP (Aug. 28, 2014) at 70. Then, when George saw McGrew start to get in the car, George turned around to get in the backseat. As George bent down to get in the car, Clark hit him in the back of the head. George testified that “[i]t felt like he hit me with a piece of metal.” VRP (Aug. 28, 2014) at 78. And, because he already believed that Clark had a weapon, George believed Clark had hit him with a gun. At that point, George testified that he believed he was going to die, so he reached for his firearm and shot Clark multiple times.

During cross-examination, the State had George read portions of his testimony from the first trial.<sup>2</sup> Before introducing the specific statements George made, the State asked if George understood how serious the stakes were at the time he made the statements. George objected and the State asked to be heard outside the presence of the jury. The State informed the trial court that it wanted to inform the jury that George had testified at a prior trial so that the jury would understand that the stakes were just as high when George made his original statement as they were at the current trial. George objected. The trial court sustained the objection and explained that the prior trial would be referred to as a proceeding or hearing, and that the rules for how to refer to the prior trial would not be changed at this late stage of the trial.

The State questioned George about whether he had made previous statements about seeing Clark with a gun and the following exchange took place:

[STATE]: I’m going to read the question [from the 2009 transcript]. Please read the answer you gave. “And you don’t see a gun or any weapon in [Clark’s] hand?” Your response, please?

[GEORGE]: “I didn’t see one, but I did – like I wasn’t trying to look. I didn’t know if he had one. I didn’t know.”

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<sup>2</sup> The testimony was admitted as a statement of party opponent.

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[STATE]: So, again, this would have been another opportune time for you to say that you saw him making a motion with his waistband or that when he punched you, you thought it was a gun that he clubbed you with or that when you were in the car struggling, you thought you saw a gun?

[GEORGE]: I believe I did say that he hit m[e] with a hard object, but I left out everything about – I never said that I seen (sic) a gun. It appeared to me that he had a gun.

[STATE]: Is that what you said there?

[GEORGE]: No. This is what I've always said. I never said that I seen (sic) a gun. It appeared that he had a gun.

[STATE]: And, again, going back to your answer from 2009 –

[GEORGE]: I understand –

[STATE]: -- when you were asked if you saw a gun or any weapon in [Clark's] hand, your response was: "I didn't see one, but I didn't, like I wasn't trying to look. I didn't know if he had one. I didn't know."

That's your response, correct?

[GEORGE]: That's what it – that's what it says, sir.

VRP (Aug. 28, 2014) at 126-27.

Later, when George testified that he reached for his weapon because it appeared to him that Clark had a gun, the State asked, "[T]his is the weapon you didn't mention at the prior trial, right?" VRP (Aug. 28, 2014) at 129-30. The trial court asked the State to rephrase the question. The State then asked, "The weapon you're saying he had, now that you're saying he had, you didn't say that at the prior trial?" VRP (Aug. 28, 2014) at 130. George objected and asked to make a motion outside the presence of the jury based on "deliberate misconduct." VRP (Aug. 28, 2014) at 130. The trial court overruled the objection and informed George that it would hear the motion later.

The State's cross-examination of George concluded without further incident and the trial court excused the jury to hear George's motion. George moved for a mistrial and sanctions against the State based on the State's reference to the prior trial. The State apologized for using the word

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“trial” and claimed it was “a slip of the tongue in the heat of questioning.” VRP (Aug. 28, 2014) at 143. The trial court determined that the prosecutor’s reference to the prior trial did not constitute deliberate misconduct and asked George for a proposed remedy. George responded that the only remedy was a mistrial because the entire trial strategy would have been different if he had known that the jury was going to be informed that there was a prior trial.

The trial court denied the motion for a mistrial because it did not believe the prosecutor’s statement constituted deliberate misconduct. However, the trial court invited George to propose any curative instructions that he believed would be helpful. George suggested that the trial court provide the jury with “a list of all the witnesses and a list of – they’ve heard many references to transcripts and statements – is that we give them a list, with regard to the transcripts, the date of the transcripts, whether the questions were asked on direct or cross or redirect or recross so that they know.” VRP (Aug. 28, 2014) at 150. The trial court declined to give the instruction because it would be “extraordinarily difficult to draft and would be extremely confusing to the jury.” VRP (Aug. 28, 2014) at 152. George declined to propose any other remedy short of a mistrial, which the trial court again denied.

### III. CLOSING ARGUMENT

During closing argument, the prosecutor focused on the differences between George’s 2009 trial testimony and his current testimony—specifically, the prosecutor focused on George’s current testimony that Clarke was armed with a gun. George objected to these references twice during the prosecutor’s argument, and the trial court held a sidebar on each occasion. After the prosecutor finished his closing argument, the trial court excused the jury. George again moved for a mistrial based on his prior objections made during the prosecutor’s closing argument.

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George argued that the prosecutor's arguments, that George did not raise self-defense in the prior court hearing, constituted deliberate misconduct. The trial court stated:

I did not understand [the prosecutor] to say self-defense wasn't raised as an issue before. [W]hat he said was very important things were at stake in 2009 and there was no testimony about Clark having a gun. That's what I understood him to say.

VRP (Sept. 2, 2014) at 105. The trial court denied the motion for a mistrial. After obtaining a transcript and the prosecutor's PowerPoint, George renewed the motion because he argued that the prosecutor had falsely argued to the jury that George had left out "the most important fact" in his 2009 testimony and that his 2009 testimony "was not self-defense." VRP (Sept. 2, 2014) at 113.

The trial court reiterated its understanding of the State's argument:

Well, I don't think he was stating that [George did not claim self-defense in 2009]. He was stating that the facts in 2009 didn't establish self-defense and he's saying he thinks your client then fabricated a story about the gun to try to get a better claim in self-defense. That's my understanding of his argument. Maybe I'm wrong. Whether the jury believes that, it's up to them.

VRP (Sept. 2, 2014) at 109-10. The trial court did not change its ruling on the motion for a mistrial. However, the trial court explicitly told George's counsel that she could tell the jury that George had testified in 2009 that he acted in self-defense. But the trial court also told defense counsel that she could not inform the jury that the prior conviction had been reversed because the prior trial court had denied George's instruction on self-defense and thus, the jury had not considered the claim of self-defense at the prior trial.

George also objected several times during the prosecutor's rebuttal closing argument. First, he objected because the prosecutor improperly argued about George's prior behavior with violence and being armed, which George argued was improper ER 404(b) evidence. Second, he

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objected because he believed that the prosecutor misstated evidence regarding George's testimony at trial. Third, George objected because he believed the prosecutor misstated the law on self-defense. Fourth, George objected based on the prosecutor's misstatement of the evidence. The trial court overruled all these objections.

After the prosecutor finished his rebuttal closing argument, George moved for a fifth mistrial based on his prior objections to the rebuttal closing argument. The trial court made the following ruling:

I do not think that [the State] intentionally . . . or negligently misstated the law. The law is in the instructions. The jurors are told that. There are different inferences that could be made. [The State] is entitled to argue the inferences she thinks are made. You're entitled to argue the inferences you think can be made from the evidence. There may be more than one potential inference. So, again, I'm going to deny the motion for a mistrial.

VRP (Sept. 3, 2014) at 183. The trial court also reminded George that the jury was instructed that the law was given to them in the written instructions, not in the attorney's argument.

#### IV. VERDICT AND SENTENCING

The jury found George guilty of both counts of second degree murder. The jury also found that George was armed with a firearm at the time of the commission of the crime. The trial court entered judgment on the jury's verdict for count I. The judgment and sentence also states:

The court DISMISSES without prejudice Count II, the guilty verdict for Murder 2 [degree] w/FASE, on double jeopardy grounds given the conviction for Count I.

Clerk's Papers at 380. The State recommended a sentence at the high-end of the standard sentencing range. George asked that the trial court impose a low-end sentence. The trial court imposed a mid-range sentence of 175 months and the 60-month firearm sentencing enhancement. George appeals.

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ANALYSIS

First, George appeals his conviction for second degree murder arguing that he was denied a fair trial based on repeated instances of prosecutorial misconduct and improperly admitted prejudicial evidence. Second, George argues that the trial court violated double jeopardy by entering judgment on both counts of second degree murder. Third, George argues that he is entitled to a new sentencing hearing so that he can ask the trial court for an exceptional sentence downward based on his youth at the time of the shooting.<sup>3</sup>

We affirm George’s conviction because George has failed to establish any prejudicial error that deprived him of a fair trial. And George waived his challenge to his sentence by failing to request an exceptional sentence downward at his sentencing hearing. However, the trial court violated double jeopardy by referencing the verdict for count II in the judgment and sentence. Accordingly, we affirm George’s conviction and sentence, but remand to the trial court to strike the reference to the jury’s verdict on count II in the judgment and sentence.

I. FAIR TRIAL

George claims that

the scope, magnitude and complete pervasiveness of all of the misconduct and prejudicial evidence was so corrosive and complete that it ensured that no jurors could possibly have fairly determined the only real issue in the case - whether the prosecution met its burden of proving, beyond a reasonable doubt, that George did not act with self-defense.

<sup>3</sup> George also argues that the trial court improperly instructed the jury as to the standard for self-defense as it relates to count II—felony murder. But George does not contend that the trial court improperly instructed the jury on the standard for self-defense on count I—intentional murder. Because we hold that George’s conviction on count II must be dismissed, we do not address George’s claim that the jury instructions for count II were erroneous.

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Br. of Appellant at 24-25. Essentially, George argues that the cumulative error doctrine requires a reversal of his conviction. However, he does so without individually analyzing the merit of each individual alleged error. Contrary to George's assertion that, "[t]he facts regarding these issues are woven throughout trial and do not summarize neatly into categories, so the entire trial and all those errors must be reviewed at once," the alleged errors in this case are readily ascertainable and can be analyzed individually. Br. of Appellant at 10.

The errors here are either evidentiary irregularities or alleged instances of prosecutorial misconduct. Before turning to George's allegation of cumulative error, we address the merits of each alleged error individually to determine whether an error or misconduct occurred and the extent of the prejudice caused by the error or misconduct. Such an inquiry is necessary to determine whether the cumulative error doctrine applies and whether the cumulative errors in this case, if any, require reversal.

## II. TRIAL IRREGULARITIES

During trial, George made several motions for a mistrial based on trial irregularities that occurred during testimony. Specifically, George argues that three specific trial irregularities support his cumulative error argument: (1) Johnson's testimony that George looked like a "monster" when he shot Clarke; (2) Johnson's testimony that someone at the gas station stated George and McGrew were the "same guys who shot my home boys"; and (3) Michael's testimony Millender told him Clark was shot "like their other friend who had been shot before." Johnson's testimony that George looked like a monster was not an error; however, the other two comments were errors and will be considered when evaluating his cumulative error argument.

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A. "MONSTER" DESCRIPTION

George argues that Johnson's description of George as a "monster" was an evidentiary error. George objected to the comment and asked that it be stricken from the record, but the trial court overruled the objection. George argues that the comment was prejudicial within the context of the entire trial. Because George has not established that the trial court improperly overruled his objection to the "monster" comment, he has failed to demonstrate an error that supports his cumulative error argument.

B. "SAME GUYS WHO SHOT MY HOME BOYS"

George also argues that Johnson's testimony that someone stated, "This is the same guys who shot my home boys a certain time ago, a week ago," supports his argument that there was cumulative error. VRP (Aug. 19, 2014) at 94. Here, there is no dispute that the trial court properly determined that the comment was improper. Although the individual prejudice caused by this error was cured by an instruction to the jury; because the statement was improper we will consider it when evaluating George's cumulative error argument.

C. "Shot Him Like Their Other Friend Who Had Been Shot Before"

George also argues that Michael's testimony that Millender told him Clark was shot "like their other friend who had been shot before," was improper and prejudicial. VRP (Aug. 19, 2014) at 163. The statement was improper because the State objected to Michael's testimony and the trial court sustained the objection. Because the statement was improper, we will consider it when evaluating George's cumulative error argument.

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III. PROSECUTORIAL MISCONDUCT

George also relies on seven alleged incidents of prosecutorial misconduct to support his cumulative error argument. A defendant alleging prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We will reverse for prosecutorial misconduct when there is a substantial likelihood that the misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 760. If a defendant fails to object to improper comments at trial, fails to request a curative instruction, or fails to move for a mistrial, we will not reverse unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct. *Emery*, 174 Wn.2d at 760-61. Before determining whether any of the alleged incidents of prosecutorial misconduct support George's cumulative error argument, we must determine which, if any, alleged incidents were actually improper.

A. REFERENCE TO PRIOR TRIAL

George alleges that the prosecutor engaged in misconduct by referring to the prior trial as a trial during George's testimony rather than a prior hearing. We agree. The trial court expressly instructed the attorneys to refer to the prior trial as a prior hearing. And the trial court reminded the prosecutor of this ruling during George's cross-examination. Despite this, the prosecutor referred to the prior trial as a trial two more times, directly violating the trial court's order. Although the trial court found that the prosecutor did not act deliberately, the prosecutor's reference to the prior trial as a trial, in direct violation of the trial court's order, was improper. Accordingly, the prosecutor's reference to the prior trial as a trial is an error that we will consider when evaluating George's cumulative error argument.

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**B. CLOSING ARGUMENT REGARDING CONFLICTS WITH 2009 TESTIMONY**

George also argues that the prosecutor committed misconduct during closing argument by misstating the facts regarding George's 2009 testimony. During closing argument, prosecutors have wide latitude to argue all reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Here, the prosecutor's arguments were based on the properly admitted statements that George made in 2009. The prosecutor did not misstate the evidence presented at trial, therefore, the argument was not improper. Accordingly, the prosecutor's argument regarding the differences between George's current testimony and his 2009 testimony is not an error that supports George's cumulative error argument.

**C. STATEMENT/SLIDE THAT GEORGE DID NOT ARGUE SELF-DEFENSE IN 2009**

Similarly, George argues that the prosecutor improperly stated that George did not argue self-defense in 2009 by using a slide which stated "2009  $\neq$  self-defense." Br. of Appellant at 20. However, the prosecutor was not stating that George never raised self-defense in 2009. Instead, the prosecutor was arguing that George's testimony in 2009 was insufficient to establish a claim of self-defense. This was a reasonable argument based on the evidence that was admitted at trial and was not improper. Accordingly, the prosecutor's slide and corresponding statement, that George's testimony in 2009 did not equal self-defense, is not an error that supports George's cumulative error argument.

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D. STATEMENT THAT "WE DON'T CARE WHAT THE DEFENDANT SAYS"

George argues that the prosecutor misstated the law regarding self-defense when he argued that "we don't care what the defendant says." Br. of Appellant at 26. Because self-defense has both an objective and subjective element, the prosecutor did not misstate the law in his closing argument. Self-defense has both subjective and objective components. *George*, 161 Wn. App. at 96. The subjective component requires viewing the facts from the defendant's point of view. *George*, 161 Wn. App. at 96. The objective component requires determining what a reasonably prudent person would have done in the circumstances. *George*, 161 Wn. App. at 96. Because both components must be satisfied, the subjective component is immaterial if the objective component is not satisfied. *See George*, 161 Wn. App. at 96.

Here, the prosecutor was arguing that, because a reasonable person would not have used deadly force in this situation, the jury did not need to consider whether George subjectively believed deadly force was appropriate. In other words, the prosecutor was arguing that because George failed to prove one component of self-defense, the jury did not need to consider the other component. This argument was reasonable within the context of the evidence presented at trial and was not improper. Accordingly, there was no error that supports George's cumulative error argument.

E. ARGUMENT THAT CLARK MUST HAVE HAD A GUN TO ESTABLISH SELF-DEFENSE

George also argues that the prosecutor misstated the law in rebuttal argument by arguing to the jury that George could not establish a self-defense claim unless Clark had a gun at the time of the shooting. Although George is correct in stating that the law does not require George to prove that Clark had a gun in order to establish a self-defense claim, the prosecutor was not arguing

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that the law required George to prove Clark had a gun. Rather the prosecutor was arguing that, based on the specific facts of the case, the facts would not support a self-defense claim unless Clarke had a gun. This argument is based on reasonable inferences drawn from the evidence presented at trial, therefore, it was not improper. The prosecutor's rebuttal argument that George could not establish a self-defense claim without proving Clark had a gun was not an error and this portion of the prosecutor's rebuttal argument does not support George's cumulative error argument.

F. ARGUMENT THAT GEORGE WAS USED TO GETTING SHOT AT

George argues that the prosecutor improperly presented ER 404(b) propensity evidence to the jury during rebuttal argument. Specifically, George argues that the prosecutor told the jury that George had been in several dangerous situations with McGrew and was used to being shot at. It is improper for a prosecutor to urge to jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012), *remanded*, 2016 WL 7104032 (2016). However, this was not new propensity evidence that the prosecutor was trying to present during closing argument. Instead, it was argument based on evidence that was properly admitted during trial. Accordingly, the prosecutor's argument was not improper and this portion of the prosecutor's rebuttal argument does not support George's cumulative error argument.

G. USE OF "MONSTER" COMMENT IN CLOSING

Finally, George argues that the prosecutor committed misconduct by referring to Johnson's "monster" comment in closing argument, and by highlighting the comment on a slide during the argument. But this evidence was admitted at trial. And as explained above, George has provided no basis for establishing that the "monster" comment was improperly admitted evidence. The

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prosecutor referred to a specific piece of evidence in closing argument which is not improper. George has provided no alternative explanation for why the prosecutor's argument based on evidence admitted at trial would be improper. Accordingly, the prosecutor's references to Johnson's "monster" comment were not improper and this is not an error that can support George's cumulative error argument.

#### IV. CUMULATIVE ERROR

George alleges that the combined effect of the alleged prosecutor misconduct and improper evidence deprived him of a fair trial under the cumulative error doctrine. "The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *cert. denied*, 135 S. Ct. 1702 (2015). To support a cumulative error claim, the appellant must demonstrate multiple errors. *Cross*, 180 Wn.2d at 690-91.

After reviewing all of George's alleged evidentiary errors and instances of prosecutorial misconduct, we have determined that he has only identified three errors that will be considered in his cumulative error argument: (1) Johnson's spontaneous and nonresponsive statement that someone stated Clark was shot by the "same guys who shot my home boys;" (2) Michael's spontaneous and nonresponsive statement that "they shot him like their other friend who was shot before;" and (3) the prosecutor's reference to the prior trial. Even considered together, these three errors did not deprive George of his right to a fair trial.

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The prejudice caused by the two spontaneous, nonresponsive witness statements resulted in the implication that George had been involved with other shootings. However, in addition to being instructed to disregard the improper statements, the jury was specifically instructed that there was no evidence that George had participated in shootings prior to shooting Clark. While multiple evidentiary errors may cause cumulative error because collectively the prejudice is too great for the jury to disregard, here, the specific prejudice caused by the errors was cured by an explicit jury instruction. Accordingly, the two comments, even when taken together, did not cause an enduring prejudice that denied George a fair trial.

In contrast to the evidentiary errors, the prosecutor's improper reference to the prior trial allegedly prejudiced George's trial strategy and preparation rather than directly prejudicing the jury. However, George has not explained, either at trial or on appeal, what specific prejudice was caused by the prosecutor's reference to the prior trial. Therefore, even though the prosecutor's direct violation of a court order was improper, it did not cause prejudice that requires reversal.

Based on the three alleged instances that we have determined were errors, George was not denied a fair trial. Accordingly, his cumulative error argument fails and we affirm his second degree murder conviction for count I—intentional murder.

#### V. DOUBLE JEOPARDY

George argues that the trial court violated double jeopardy by entering judgment on both count I—intentional murder and count II—felony murder. We review double jeopardy claims de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). Double jeopardy protects a defendant from receiving multiple punishments for the same offense. U.S. CONST. amend. V; *State v. Trujillo*, 112 Wn. App. 390, 409, 49 P.3d 935 (2002). “Therefore, where the jury returns

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a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.” *Trujillo*, 112 Wn. App. at 411.

Further, a trial court may violate double jeopardy by “conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” *State v. Turner*, 169 Wn.2d 448; 464, 238 P.3d 461 (2010). In *Turner*, our Supreme Court specifically directed:

To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

169 Wn.2d at 464-65.

Here, the trial court violated the directive in *Turner* by referring to the guilty verdict on count II in George’s judgment and sentence. Accordingly, we remand to the trial court to strike the language in George’s judgment and sentence which refers to the jury’s guilty verdict on count II.<sup>4</sup>

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<sup>4</sup> George also notes that the State mentioned both jury verdicts in its sentencing recommendations. In *Turner*, in addition to ordering the trial court to enter a corrected judgment and sentence, our Supreme Court ordered the trial court to “redact all references to any validity or import attributable to the vacated lesser conviction.” 169 Wn.2d at 466. Because we remand to the trial court to remove the references to the jury’s verdict on count II, we do not address this argument further.

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## VI. SENTENCING

Finally, George argues that, if we decline to reverse his conviction, we should remand to the trial court for resentencing to allow George to seek an exceptional sentence downward based on his youth at the time of the shooting. George relies on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), to argue that George is now entitled to use his youth at the time of the shooting to request an exceptional sentence downward. In *O'Dell*, our Supreme Court held that the trial court erred by refusing to consider an exceptional sentence downward based on its belief that it was prohibited from considering whether youth diminished the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. 183 Wn.2d at 696. Although George argues that his youth should be a factor to consider in evaluating his culpability, he has waived his challenge to his standard range sentence by failing to request an exceptional sentence downward at the time of sentencing. Therefore, we affirm George's standard range sentence.

Generally, a sentence within the standard sentence range for an offense may not be appealed. RCW 9.94A.585. Our courts have recognized an exception to this general rule in cases in which a defendant has requested an exceptional sentence, but the trial court imposed a standard range sentence based on its belief that it did not have the authority to grant an exceptional sentence. See *O'Dell*, 183 Wn.2d at 697. However, unlike the counsel in *O'Dell*, George did not ask the trial court to impose an exceptional sentence downward at sentencing. Therefore, George has failed to demonstrate that his standard range sentence is appealable.

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We affirm George's conviction and sentence for second degree murder but remand to the trial court to strike the language in George's judgment and sentence which refers to the jury's guilty verdict on count II, the felony murder charge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

*Sutton, J.*

SUTTON, J.

We concur:

*Biggs, C.J.*

BIGGS, C.J.

*Maxa, J.*

MAXA, J.

## **APPENDIX "C"**

August 10 2017 3:21 PM

KEVIN STOCK  
COUNTY CLERK  
NO: 05-1-00143-9

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DMARCUS DEWITT GEORGE,

Appellant.

No. 46705-4-II

MANDATE

Pierce County Cause No.  
05-1-00143-9

**Court Action Required**

The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on February 22, 2017 became the decision terminating review of this court of the above entitled case on June 28, 2017. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court at  
Tacoma, this 5<sup>th</sup> day of July, 2017.

A handwritten signature in black ink, appearing to read "Derek M. Byrne".

Derek M. Byrne  
Clerk of the Court of Appeals,  
State of Washington, Div. II

CASE #: 46705-4-II  
State of Washington, Respondent v. Dmarcus George, Appellant  
Mandate – Page 2

Hon. Ronald Culpepper

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## **APPENDIX “D”**



05-1-00143-9 49675640 ORCJS 08-02-17



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-00143-9

vs.

DMARCUS DEWITT GEORGE,

MOTION AND ORDER CORRECTING  
JUDGMENT AND SENTENCE

Defendant.

**CLERKS ACTION REQUIRED**

PCN: 540562920

THIS MATTER coming on regularly for hearing before the above-entitled court on the Motion of the Deputy Prosecuting Attorney for Pierce County, Washington, for an order correcting Judgment and Sentence heretofore granted the above-named defendant on September 19, 2014, pursuant to defendant's plea of guilty to the charge(s) of MURDER IN THE SECOND DEGREE; MURDER IN THE SECOND DEGREE, as follows:

1) That Page 3 of the Judgment and Sentence, 3.2 reflects "The court dismisses without prejudice Count II, the guilty verdict for Murder 2 with FASE, on double jeopardy grounds given the conviction for Count I" and that language should be stricken;

2) That all other terms and conditions of the Judgment and Sentence are to remain in full force and effect as if set forth in full herein; and the court being in all things duly advised, Now, Therefore, It is hereby

ORDERED, ADJUDGED and DECREED that the Judgment and Sentence granted the defendant on September 19, 2014, be and the same is hereby corrected as follows:

1) Page 3 of the Judgment and Sentence, 3.2 is corrected as follows:

a) "The court dismisses without prejudice Count II, the guilty verdict for Murder 2 with FASE, on double jeopardy grounds given the conviction for Count I" is deleted.

2) All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein. IT IS FURTHER

ORDERED that the Clerk of the Court shall attach a copy of this order to the judgment filed on September 19, 2014 so that any one obtaining a certified copy of the judgment will also obtain a copy of this order.

DONE IN OPEN COURT this 31 day July, 2017. NUNC PRO TUNC to September 19, 2014.

*Karena Kirkendoll*

JUDGE/COMMISSIONER

KARENA KIRKENDOLL

Presented by:

*Jesse Williams*

JESSE WILLIAMS

Deputy Prosecuting Attorney

WSB# 35543

Approved as to form and Notice  
Of Presentation Waived:

*approved via e-mail date July 25, 2017*

BARBARA L. COREY

Attorney for Defendant

WSB# 11778

dlc



State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the  
aforementioned court do hereby certify that this foregoing instrument is  
a true and correct copy of the original now on file in my office.  
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said  
Court this 20 day of November, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: November 20, 2018 10:05 AM



**Instructions to recipient:** If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,  
enter **SerialID: F54ACA91-D576-43DC-95123A7EA86E6D9A**.

This document contains 2 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

**PIERCE COUNTY PROSECUTING ATTORNEY**

**November 20, 2018 - 12:21 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52216-1  
**Appellate Court Case Title:** In re the Personal Restraint Petition of Dmarcus Dewitt George  
**Superior Court Case Number:** 05-1-00143-9

**The following documents have been uploaded:**

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