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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON

V.

JOSE AYALA REYES

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AMENDED BRIEF OF APPELLANT

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## A. Assignments of Error

### Assignments of Error

1. The trial court erred by denying Mr. Ayala's motions to excuse jurors 14, 24, and 39 after they demonstrated actual racial bias.
2. The trial court erred by not honoring Mr. Ayala's Fifth Amendment rights and suppressing the July 8, 2016 interrogation of Mr. Ayala.
3. The trial court erred by not treating Accomplice to First Degree Murder and Conspiracy to Commit First Degree Murder as same criminal conduct.

### Issues Pertaining to Assignments of Error

1. Jurors 14, 24, and 39 expressed explicit and implicit animus towards Hispanics and members of the MS-13 gang and the defense motions to remove them for cause were denied, forcing the defense to use three of its preemptory challenges against the racially biased jurors.
  - a. Did the trial court error by denying the motions for cause and forcing the defense to use its limited preemptory challenges against the racially biased jurors?

- b. Should the denial of a motion for cause against racially biased jurors qualify as structural error and require automatic reversal?
2. Mr. Ayala, an illegal alien from El Salvador with an IQ of 79 who dropped out of school in the fifth grade to work in the fields, was subjected to nearly three hours of interrogation by a federal FBI agent who repeatedly made threats of deportation and promises to keep his statements secret to overcome his will.
- a. Should this Court review the trial court's findings of fact and conclusions of law de novo when the interrogation was recorded and there are no disputed facts?
  - b. Did the agent fail to scrupulously honor Mr. Ayala's Fifth Amendment right to remain silent when he repeatedly ignored his request to terminate questioning?
  - c. Should the interrogating agent's explicit promise of confidentiality in exchange for Mr. Ayala's statements be entitled to specific performance under fundamental principles of fairness?

- d. Did the agent's statements of confidentiality undercut the *Miranda* warning that anything he said would be used against him?
  - e. Did the federal agent's repeated threats and promises overcome Mr. Ayala's will and render his subsequent statements involuntary?
  - f. Was the erroneous admission of Mr. Ayala's statement harmless beyond a reasonable doubt?
3. Did the trial court err by holding accomplice to first degree murder and conspiracy to commit first degree murder are not same criminal conduct?

#### B. Statement of Facts

Jose Jonael Ayala Reyes<sup>1</sup> was born on September 20, 1983 in a poor area of El Salvador. Exhibit 1<sup>2</sup>, 2-4. He left school in the Fifth Grade in order to work in the fields. Exhibit 1, 4. He was raised by his mother and barely knew his father, who abandoned him when he was five years old. Exhibit 1, 3-4. He came to the United States in July of 2014. Exhibit 1, 3. Mr. Ayala's first language is Spanish and he speaks no other languages. Exhibit 6, 13. His English is confined to "Hi" and "My name

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<sup>1</sup> The record reflects several last names for the defendant, including Ayala, Reyes, Ayala-Reyes, and Ayala Reyes. For ease, this brief refers to him as Mr. Ayala.

<sup>2</sup> Exhibits 1, 6 & 7 refer to the exhibits admitted at Mr. Ayala's CrR 3.5 hearing. CP, 44. The number after the comma is the page number of the exhibit.

is Jose.” Exhibit 6, 12. He has an IQ of 79 +/- 3 and “functions in the low average range.” Exhibit 1, 6. When Mr. Ayala was evaluated for competency by Western State Hospital, he demonstrated no understanding of the American jurisprudence system and had to be educated regarding most court concepts, a process that “became rather time-consuming,” although Mr. Ayala was able to understand after “slow and repeated explanations of concepts.” Exhibit 1, 7. Mr. Ayala utilized the services of an interpreter throughout the court proceedings, including during the jury trial.

Mr. Ayala was charged by Second Amended Information with accomplice to first degree murder, conspiracy to commit first degree murder, and second degree murder. CP, 60. All three charges had a deadly weapon enhancement and an allegation that the crime was committed to gain an advantage in a criminal street gang pursuant to RCW 9.94A.535(3)(aa). CP, 60. The victim was the same in all three counts, Samuel Cruces Vazquez. At trial, Mr. Ayala was jointly tried with a co-defendant, Casar Chicas-Carballo. The jury convicted of all three counts, including the two enhancements. CP, 253, 256, 259.

At sentencing, the State moved to dismiss the second degree murder charge on double jeopardy grounds, which the trial court did. RP, 2332. Mr. Ayala argued the accomplice to first degree murder and

conspiracy to commit first degree murder charges constituted same criminal conduct. RP, 2345; CP, 287. The trial court declined to find same criminal conduct. RP, 2349. The court imposed a standard range sentence of 320 months for First Degree Murder consecutive to 240 months for Conspiracy to Commit First Degree Murder, plus two deadly weapon enhancements of 24 months each, for a total sentence of 608 months. CP, 302. The trial court declined to impose an exceptional sentence for the gang aggravator, although it acknowledged it could. RP, 2350. Mr. Ayala filed a timely notice of appeal. CP, 318.

1. Background Facts

On April 28, 2016 at 11:20 at night, Tacoma police were called out to investigate an injured person in an industrial section of the city. RP, 582, 588, 595. The area was dark, but reasonably well lit by street lights. RP, 596. When they arrived, police saw a man lying face down in the middle of the street, bleeding heavily and gasping for air to try and breathe. RP, 596. His face was very “dismembered” and his body had severe road rash, as if he had been run over or dragged by a vehicle. RP, 596. He was carrying a wallet with a California driver’s license identifying him as Samuel Cruces. RP, 708. Mr. Cruces never gained consciousness and died as a result of his injuries. RP, 597.

Based upon conflicting data, police were initially uncertain what they were investigating. RP, 623. Some of the evidence pointed towards a murder while other evidence pointed towards a hit-and-run traffic incident. RP, 623. As it turned out, both were correct. Police observed a parked SUV, still running, pressed up against another vehicle, with its driver's side door open. RP, 594. The driver's side was completely covered in blood. RP, 594. There was a blue latex glove inside the SUV. RP, 726. Between the two vehicles was a butterfly knife. RP, 603. Later, when the vehicle was inspected more carefully, investigators located a shoe wedged between the two vehicles. RP, 758. The butterfly knife, blue latex glove, and shoe were identified right away as key pieces of evidence and were analyzed for possible DNA. RP, 902. Blood on the butterfly knife matched Mr. Cruces' DNA. RP, 954.

A short distance away was a parked tractor-trailer vehicle with fresh paint transfer. RP, 608. It appeared that the SUV had side-swiped the tractor-trailer before reaching its final resting place. RP, 608. The parties agreed by stipulation that the driver of the tractor-trailer had parked the vehicle earlier in the day at 2:00 and it was unoccupied for all times relevant to the trial. RP, 732.

Sherina Leach was interviewed by police and reported that she was driving when she was suddenly confronted by a body in the middle of the

roadway. RP, 616. She was barely able to swerve to avoid the body. RP, 616. She returned to the body and positioned her vehicle so other cars would not run it over. RP, 616.

Another passerby was Braulio Yanez Campos. RP, 686. Mr. Campos did not initially stop, but came forward about three weeks later to report what he had seen. RP, 695. He said he was driving when he saw a person with a bloody face get out of his car, leaving the car door open, and signal for him to stop. RP, 689, 691, 696. Mr. Campos feared he might be mugged or something and chose not to stop. RP, 689. After he passed, he looked in his rear view mirror and saw that the person who tried to get him to stop was getting beat up by another person. RP, 690, 692. He did not see any weapons. RP, 692.

A nearby business, CenturyLink, had a security camera that captured part of the assault. RP, 924. At the beginning of the video a woman, later identified as Karina Flores, walks by. RP, 927. The video does not capture the actual assault, but Mr. Cruces' vehicle can be seen and there is some apparent activity going on inside the vehicle. RP, 934-35. Mr. Cruces then exits the vehicle, only to be run over by a passing car. RP, 1231. Neither the vehicle nor the driver who ran Mr. Cruces over was ever identified. RP, 1231.

When the coroner initially received the body, he believed Mr. Cruces died from a car accident. RP, 981. After law enforcement told him there was evidence of multiple stab wounds, he changed the inquiry into a possible homicide. RP, 981. An autopsy revealed eight stab wounds, probably with a knife. RP, 992. It is likely, however, that none of the stab wounds would have been fatal, assuming prompt medical care. RP, 999-1000. He also experienced severe blunt trauma injuries to the skull, vertebrae, and spinal cord just below the brain. RP, 1011-12. The blunt trauma to the head and neck was almost certainly fatal and he would not have survived even with prompt medical care. RP, 1013. The cause of death was multiple stab wounds and blunt force trauma consistent with being run over by a car. RP, 980.

Investigation determined that Mr. Cruces was employed at Elemental Pizza and had been at work most of the day on April 28. RP, 906. He clocked in at 11:10 a.m. and clocked out at 10:10 p.m. RP, 907. He had a friend that he worked with at Elemental Pizza named "Jose." RP, 897. On the night of the murder, Mr. Cruces received multiple calls and texts from phone number (253) 231-2738. RP, 909. Between 10:01 and 11:03, there are 17 texts messages to or from Mr. Cruces and (253) 231-2738. RP, 1086-87. (253) 231-2738 then called Mr. Cruces at 11:03 p.m. and they spoke for a little over five minutes. RP, 1081, 1087.

Investigation into that phone number on Facebook connected it with Jose Jonael Ayala Reyes, the appellant. RP, 916. Surveillance confirmed that Mr. Ayala was working at two different restaurants, Elemental Pizza and C.I. Shenanigans. RP, 784, 921.

On July 8, 2016 law enforcement contacted Mr. Ayala C.I. Shenanigans and he was taken into police custody. RP, 1142, 1146. The decision was made to have him interrogated by FBI agent Dan Brewer, mainly because Agent Brewer is fluent in Spanish, having spent two years living in Honduras as a church missionary. RP, 1144, 1339. Mr. Ayala was interviewed for about three hours. RP, 1145. By the end of the interview, Mr. Ayala admitted to participating, along with others, in the stabbing of Mr. Cruces, although he was unwilling to disclose the names of the other people involved. RP, 1149. He identified the butterfly knife as his, saying it was the knife he used to stab Mr. Cruces. RP, 1183-84. He submitted a buccal swab for DNA testing. RP, 1151. Based on DNA testing, Mr. Ayala was excluded as the contributor to the blue latex glove. RP, 1152. The shoe had a mixed DNA profile and attempts to match Mr. Ayala were inconclusive. RP, 1153.

At the time of the murder, Mr. Ayala was in a boyfriend/girlfriend relationship with Karina Flores. RP, 786, 1260. At the time of the murder, Ms. Flores was pregnant with his child. RP, 1573. Ms. Flores was also

interviewed on July 8, 2016. RP, 786. Ms. Flores disclosed the street names of other participants: Sombra, Tas and, later, Sicario. RP, 1150. Tacoma enlisted the aid of Los Angeles Police and identified Tas as possibly being Cesar Chicas-Carballo. RP, 1157. Ms. Flores later identified Cesar Chicas-Carballo as Tas after being shown a photo of him. RP, 1161. Tas has a tattoo of the Tasmanian Devil cartoon. RP, 1247. After a first attempt to identify Somba failed, Ms. Flores identified Somba as Juan Jose Gaitan Vasquez. RP, 1170. Sicario was identified as Edenilson Misael Alfaro. RP, 1180. The DNA profile of the blue glove matched Juan Jose Gaitan Vasquez. RP, 1179.

On July 11, 2016. Ms. Flores turned over some money transfer receipts to law enforcement RP, 791. The receipts indicated that Mr. Ayala wired money to Mr. Chicas-Carballo in California in the amounts of \$200, \$300, and \$260 on June 6, June 25, and July 7, 2016 respectively. RP, 1242-43.

Ms. Flores testified at trial on behalf of the State with the aid of a Spanish language interpreter. She was born in El Salvador and was 19 years old at the time of trial. RP, 1258. Ms. Flores testified she helped in the planning of the murder of Mr. Cruces. RP, 1268. She testified that all four participants, Mr. Ayala, Tas, Sombra, and Sicario were members of

the MS-13 gang<sup>3</sup>. RP, 1271. Mr. Ayala was sending money to California in order to support gang activity. RP, 1273-74. According to Ms. Flores, Mr. Cruces was killed so that Mr. Ayala could cement his membership in MS-13. RP, 1286. Mr. Ayala picked Mr. Cruces as the victim and Tas, Sombra, and Sicario came up from California to assist. RP, 1295-96. The day of the murder, while Ms. Flores cooked, the four men discussed how they were going to kill Mr. Cruces. RP, 1300-02. The original plan was for Mr. Ayala to get into the front seat and Sombra to get into the back seat and for Sombra to grab him by the hair and slit his throat. RP, 1578. Mr. Ayala and Sombra were chosen to do the actual killing because they were not yet official gang members, while Tas and Sicario were. RP, 1310. Before they left, everybody grabbed latex gloves to wear during the murder. RP, 1305-07. Ms. Flores was offered gloves, but she declined. RP, 1308. Mr. Ayala, Sombra, and Sicario were all armed with knives. RP, 1309. Eventually, the five of them left the apartment, purchased gas at a gas station, and proceeded to the location where the murder was planned. RP, 1548. The four men dropped Ms. Flores off and she walked home. RP, 1550. When they came back, she noticed a small amount of blood on the passenger side of the vehicle. RP, 1559. Mr. Ayala told her he and Sombra got into Mr. Cruces car and stabbed him in the neck and

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<sup>3</sup> MS-13, short for Mara Salvatrucha, is a gang formed in the 1980's and is primarily made up of people from Central America, particularly El Salvador. RP, 1787-89.

killed him. RP, 1576-77. During the assault, Mr. Cruces was saying he had children and asked not to be killed. RP, 1578. The next day, Mr. Ayala burned his clothes. RP, 1561. Mr. Ayala told her that his shoe got trapped underneath Mr. Cruces car and he left it at the scene. RP, 1564.

Ms. Flores was subjected to a lengthy cross-examination attacking her veracity. RP, 1819-1937. Much of the cross-examination juxtaposed her courtroom testimony with her July 8, 2016 police interview, pointing out scores of inconsistencies. RP, 1866. The trial court took a three hour recess in the middle of her cross-examination to allow her to read the transcript of her 2016 interview and refresh her memory. RP, 1861, 1866. Defense counsel took pains to demonstrate that for the majority of her 2016 interview, she denied any involvement with the murder. RP, 1824. When Ms. Flores was first asked whether she had spoken with people about the killing, her response was, “No. honestly, no.” RP, 1826. In fact, Ms. Flores repeatedly used the word “honestly” in her answers while denying any involvement. RP, 1824. She said she “honestly” did not speak with Jose Ayala about the killing, she “honestly” did not know what kind of car the other three men were driving, she “honestly” did not know what kind of shoes Jose Ayala wore, she “honestly” did not know anything about the murder, she “honestly” did not know why Jose Ayala would admit the shoe at the crime scene was his, and she “honestly” did

not know who Jose Ayala was afraid of, adding, “If I knew I would tell you.” RP, 1826-30. When asked why she repeatedly qualified her answers with the word “honestly” while telling falsehoods, she explained, “I just did not have to say the truth, ever.” RP, 1831.

## 2. CrR 3.5 Suppression Hearing

On June 26, 2018, the Court held a hearing pursuant to CrR 3.5 to determine the admissibility of Mr. Ayala’s July 8, 2016 statement. 35RP<sup>4</sup>, 58. The only witness at the hearing was Detective Gregory Rock. 35RP, 69. Mr. Ayala was contacted at C.I. Shenanigans and agreed to come to the police station for an interrogation. 35RP, 71-72. The interrogation was audio and video recorded. 35RP, 75. FBI Special Agent Dan Brewer conducted the interrogation in Spanish. 35RP, 76. Although Detective Rock was in the room, he did not participate in the interrogation because he does not speak Spanish. 35RP, 77. Detective Rock described his role as “sitting more or less like a bump on a log.” 35RP, 77. Detective Rock observed Agent Brewer review a *Miranda* rights form with Mr. Ayala and saw Mr. Ayala sign it. 35RP, 78; Exhibit 7. The interrogation lasted for two-and-a-half to three hours and was broken up into three segments with short breaks between. 35RP, 79. A transcript of the interrogation appears in the record at Exhibit 6.

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<sup>4</sup> 35RP refers to the June 26, 2018 transcript of Court Reporter Karla Thomas. The CrR 3.5 hearing begins on page 58.

The defense argued, based upon the interrogation transcript, that Mr. Ayala did not understand or validly waive his *Miranda* rights. 35RP, 97-98. Mr. Ayala repeatedly indicated he did not want to talk to the officers. 35RP, 99. He was subjected to threats in the form of being deported back to El Salvador. 35RP, 101. Mr. Ayala's will was overborne and his statement was coerced. 35RP, 108. He argued "his age, his physical condition, mental abilities, . . . education, maturity, emotional state, physical state, police tactics" all indicated his will was overborne. 35RP, 96-97.

The interrogation begins with Agent Brewer introducing himself and explaining he learned Spanish while living in Honduras and El Salvador. Exhibit 6, 3. He then explains that he works for the Federal Bureau of Investigation, an organization that investigates cases on a federal level. Exhibit 6, 6. He then reads Mr. Ayala his *Miranda* warnings. Exhibit 6, 7. Agent Brewer told Mr. Ayala that the *Miranda* warnings were just a "formality." Exhibit 6, 5. He then stated, "This is where you sign, and I sign here. . . That is our formality." Mr. Ayala responded, "Oh well, I don't know what you are talking about, but yes." Exhibit 6, 10. Mr. Ayala then printed the word "Joneal" on the form, in a barely legible script, not on the signature line, but underneath it, as shown below. Exhibit 7.

Do you voluntarily wish to answer questions now?	
Firma/Signature <i>JONES</i>	
Firma del Testigo/WITNESS' SIGNATURE <i>C. Rock</i>	
.E	Nombre Completo del Testigo/Titulo/WITNESS' COMPLETE NAME/TITLE

After confirming his first name, Agent Brewer then stated, “Uh the truth is that... uh, in the last months we have heard a lot of things about a friend of yours. And you know who that is, right?” Mr. Ayala responded, “Yes. It was mentioned to me. Samuel.” Agent Brewer then changed the subject, saying, “Samuel. Yes. And, and before speaking about him and that, most of all, I want to find out and I want to know a little about, about you and what you do here... how long you’ve been here in the States.” Exhibit 6, 11. Samuel would not be mentioned again for another 46 pages of transcript. Exhibit 6, 57.

Mr. Ayala related that he came to the United States illegally in 2014 and was caught in Tucson, Arizona where he spent three months in custody. Exhibit 6,16-17. He completed only the fifth grade and then he moved to Honduras to work in the fields. Exhibit 6, 20-21. He stated he does not have the ability to “write very much.” Exhibit 6, 76.

When the discussion returned to Samuel, Mr. Ayala acknowledged knowing him and hearing he had been killed. Exhibit 6, 56-57. Agent Brewer and Mr. Ayala then discussed various things the agent had heard about Samuel. Mr. Ayala said he did not know any details about how he died. Exhibit 6, 68.

Agent Brewer then changed the subject to what “problems” Mr. Ayala has. Exhibit 6, 80. These problems include being here “without being a citizen,” being unable to travel easily, and paying his stepfather \$500 per month on a restaurant income. Exhibit 6, 80-81.

After Mr. Ayala again denied any knowledge of how Samuel died, Agent Brewer confronted him for the first time, saying, “I know, and you know, that the night Samuel died, you were there in the street.” Exhibit 6, 86. Mr. Ayala again denied any involvement, saying he was at home asleep. Exhibit 6, 86.

Agent Brewer said, “The worst thing you can do right now is lie to us.” Exhibit 6, 88. He then said, “The thing is, we already know, and, uh, I am giving you the opportunity, Jonael, to tell the truth and, and... and listen to me clearly. You have arrived in this country, and life is difficult. I know that. You have a, a girl, and you haven’t even seen her. You haven’t seen her.” Exhibit 6, 88. Agent Brewer then mentioned being sent back to El Salvador, “You/they are left out on the street. And you don’t want that.

You don't want to go...go back to where you are from, to El Salvador, because it's awful there." Exhibit 6, 89.

Agent Brewer then accused Mr. Ayala of lying to him and confronted him with the phone records. "So, Jonael, when I asked you, I asked you, have you talked to him outside of work? We have... we know that you have spoken to him, that you used to speak to him. A lot. On the phone. And you aren't going to lie to me, because we have the records, we have the... the papers that say your number, his number, your number, his number, besides work. So, you have lied to me one time, and I don't, I don't want you to lie to me anymore. I am going to give you the opportunity... I gave you... but now, you have to tell the truth. And do you know why? Because you are here in the United States... ...and you don't believe that. Here in the United States, we can help people who want help. But if you continue to lie to me and the detective, you are not going to have help. And today you can leave here with this weight off your chest and feel free again. But you have to walk with us like this, explaining what happened. Because I imagine that every time you go by that street... [W]hen you were there that night, you saw what was going on, and unfortunately, here you are trying to tell me no, no, no, no; when the fact is that we know. WE have the record that you spoke with him many times,

this same day. You lied to me. What if we start again, and tell me the truth... did you talk outside of work?" Exhibit 6, 89-90.

At that point, Mr. Ayala attempted to stop the interrogation by saying, "I don't have anything to say." Exhibit 6, 92.

Agent Brewer responded, "Nothing?" Mr. Ayala said, "I already told you what it is." Exhibit 6, 92.

Agent Brewer continued to confront Mr. Ayala with the phone records, accusing him of lying, for several pages, when the following occurred:

- You shouldn't start your life like this. What if... if we help you? You are here in the country with laws that are not the same as in your country. Here you have the option of receiving help. Where were you going this night? Because you were not sleeping. Because a person can't sleep and call at the same time.
- Okay. I can't say anything.
- I can't say anything.
- Why?
- Because.
- What happens to you if you, you tell us?
- I can't say anything.
- Hey, we... it's, that is the second time that I tell you... what, what were you doing this night, right?

Exhibit 6, 96.

Agent Brewer continued, "And we know even more... but now I'm going to give you the ch—chance to tell. Here, we leave here. We are not going to tell anyone that, that you know what happened. No one. I know it is hard. You have a, a little baby." Exhibit 6, 97-98. "Here, I'm going to

explain to you how it works here in the United States. Would you let—let me? All right? Here in the States... one of the things that is very important is that you talk to the police, is for the person to show remorse and—and sadness over something that happened. That, that helps. That helps you a lot.” Exhibit 6, 98-99.

Agent Brewer then confronted him again with the phone records, prompting Mr. Ayala to say, “I can’t tell you anything.” Exhibit 6, 100.

Agent Brewer again suggested that he needed to answer his questions in order to avoid being deported to El Salvador. “But like from one person, from one human being to another, I’m telling you...it’s important to tell the law here, the truth. It’s different from El Salvador, dude. I know how things work there. Because think it over carefully. If you are involved in some problem there, do you want to go back there?” Mr. Ayala answered, “I don’t want to go back to my homeland.” Exhibit 6, 101

Agent Brewer then tried a different tact, suggesting that only a monster would kill Samuel and he knew Mr. Ayala was not a monster, just someone who made a mistake, because monsters are people who “cut people’s heads off and hurt people’s families.” Exhibit 6, 102-04. Mr. Ayala responded, “I am afraid of... I’m not going to say anything.” Exhibit 6, 104.

Agent Brewer then said, "I'm telling you, you can trust me. About anything, about what you are afraid of, I won't tell anyone. Today, the truth is, we can explain what happened, what you saw, and then... my coworker here and I are not going to look to say that 'Joniel told us.'" Exhibit 6,104

For the next few pages, Agent Brewer returned to several themes, including that Mr. Ayala is not a monster and he is obviously afraid of something. Agent Brewer then decided to "start again," saying, "Nothing... I am never going to lie to you. I am never going to lie to you. In your country, that doesn't happen. The police... I lie to you and take you somewhere and then... it's horrible. That's not here. We give you some coffee, calm." Exhibit 6, 111-12.

At page 123, Mr Ayala made his first incriminating admission, admitting he called Samuel to pick him up for a beer and he got into Samuel's car with him. Exhibit 6, 123. From there he continued to make admissions. "Well, I was with him, but I don't know who did that to him. Exhibit 6, 129. He left his shoe behind because it fell off. Exhibit 6, 135. The trial court admitted the statement and signed Findings of Fact and Conclusions of Law. CP, 49.

### 3. Jury Selection

There were three jurors in this case for whom the defense's motion to excuse the jurors for cause was denied: 14, 24, and 39. All three motions should have been granted. The defense used three of their preemptory challenges to remove the biased jurors. CP, 329. The defense exhausted all of their joint preemptory challenges, but each defendant had an individual preemptory challenge that went unused. CP, 329.

#### a. Juror 14

Juror 14 began individual questioning by expressing concerns about gang members. RP, 178. He stated that he would "struggle to have pity or understanding towards a gang member regardless of race." RP, 179-80. He said, "I don't care what their heritage is, if you're involved in a group that is in my mind inherently dangerous or violent, it almost feels like my mind is set in that regard." RP, 180. When the prosecutor asked him a leading question whether he could "compartmentalize" his feelings and decide the case based upon the evidence and court's instructions, he answered, "I'm going to say yes with the caveat that, again, it's still there, but I believe that I could do that. I would give it my best shot." RP, 183.

Juror 14 also described a recent conversation he had with his wife, a victim of sexual assault, where she said, "Boy, if I am ever on a jury, they will never let me on there." I said, "Well, why?" So she recounted

her experience, and she said, “They’re guilty. I could not see it any other way, given my experience.” RP, 185. He then added she used “rougher language than that.” RP, 185.

Juror 14 also expressed concern for the safety of himself and his family, saying, “If there’s violence involved, I have to be honest that crept into my mind if there is a guilty verdict and if revenge is a part of that culture. Yeah, I’m concerned. I would be concerned for my wife and for the rest of my family members.” RP, 189. Defense counsel followed up by asking him, “Is that likely to have an impact on your fear and safety and the safety of your family?” Juror 14 answered, “Yeah.” Question: “Is that likely to have an impact on your decision making ability in this trial?” Answer: “I have to be honest. I would have to say yes.” RP, 190.

The defense moved to excuse Juror 14 for cause. RP, 198. The trial court denied the motion. RP, 199.

b. Juror 24

Juror 24 also expressed strong opinions about gangs, but his opinions had a decidedly racial bent. He started out saying he had a “very negative opinion of MS-13 or of any gang” from the news, saying, “I think it would be pretty tough for me to be totally fair on that just what I know of gangs.” RP, 213. When asked if he could have an open mind in the case, he answered, “That’s a tough one, because everything that I’ve ever

associated with gangs is pretty negative, like I said. I could certainly try. I have always thought of myself as a pretty fair person.” RP, 217.

Juror 24 also expressed a view, a “cultural thing,” that “Hispanic males like to fight.” RP, 220. Asked where he developed this belief, he answered, “I grew up in Arizona, so I was around Hispanics and they kind of had a reputation for that. And I’ve married a Hispanic. My wife is a Pacific Islander, and they kind of have the same reputation. That’s where I get that from. I don’t have experience. I have never fought a Hispanic. That was kind of a thing everybody knew. They like to fight.” RP, 220. He was then asked the following hypothetical:

Q. Here's how I want to ask this. I'm asking that you not answer this with your brain. I want you to answer with your heart. You've got a Caucasian who is on the stand. I'm never going to fault anybody for what they say. All I can do is say thank you for being candid. You've got a Caucasian on the stand who is not a gang member. He's to be presumed innocent. There's a murder allegation like there is in this case. He's to be presumed innocent. You've got an issue of a Hispanic male who's alleged to be part of a gang. He's on the witness stand or he's to be presumed innocent. Is it a bit easier before you get off the dime, before you hear word one, is it a bit easier to presume the Caucasian non gang member male innocent than it is the alternative?

A. Can you say that, the last bit of your question, one more time?

Q. Is it easier to presume a Caucasian non gang member innocent, presumed innocent in contrast to a Hispanic gang member knowing nothing else about the case?

A. I would say yes.

Q. Okay. Thank you for your candor. I appreciate that. Let's talk about that for a moment. If it's easier to presume one person innocent than the other, does that mean that there is perhaps a lesser of a presumption for a person who is a Hispanic male gang member, lesser presumption of innocence than maybe somebody of another race who is not a gang member?

A. No.

Q. Those are two separate things?

A. Correct.

Q. So more difficult as it may be, you still think you can meet that constitutional standard of presuming somebody innocent?

A. I think I can.

Q. Any concern about the burden that's on the State of Washington of proof beyond a reasonable doubt? Would it be easier to hold the state to its burden against a white non gang member defendant than a Hispanic gang member defendant?

A. Can you say that again?

Q. Do you think it would be easier to hold the state -- do you understand the state has the burden of proof beyond a reasonable doubt? They are the people that have to prove it.

A. Correct.

Q. We don't. Forgive me for standing up. My knee hurts. We don't have to do anything. We can sit here and play cards, and if he doesn't satisfy the burden, then there's an acquittal, right? You heard that.

A. I think.

Q. Do you think it would be easier to hold the state to that burden if there were a white non gang member defendant than a Hispanic gang member defendant?

A. I think it would be easier, yeah.

Q. Does that mean there is a different burden for those two groups?

A. No, I think it's the same.

RP, 221-23.

Juror 24 expressed that his negative views of MS-13 were influenced in part by the comments he had heard from President Trump in three or four of his speeches. RP, 225. He also expressed that he would tend to believe a police officer over an average citizen. RP, 226.

The defense challenged Juror 24 for cause. RP, 295. The trial court denied the motion. RP, 298.

c. Juror 39

Juror 39 works as a surveillance technician at the Capital Campus in Olympia and frequently works with local law enforcement, including the State Patrol, Olympia Police, and Thurston County Sheriff's Office. RP, 258. He has 25 years of experience working as an "investigator." RP, 263. Due to this experience, he believed it would affect his ability to apply the presumption of innocence. RP, 264-66.

In his capacity as an investigator, he had read intelligence related materials on a variety of groups, including MS-13, in preparation for their "First Amendment rallies." RP, 259. He related one experience where he was involved in "running the camera system" and "scanning the crowds" during a rally. RP, 260. There was concern leading up to the rally because

MS-13 and counter-protesters are prone to “a lot of violent type of activity.” RP, 260. There had been two such rallies, one “last May,” and one in March. RP, 267. What stood out to him was the “type of clothing they were wearing.” RP, 260. His experiences would cause him to “pigeon hole” people. RP, 264.

Regarding surveillance systems, Juror 39 expressed skepticism whether he could fairly evaluate “camera-type evidence,” saying, “Putting aside that experience and skill level and things like that, and not accepting just what was presented in court. It’s really difficult for me that say I would be able to put aside the experiences that I’ve had from the past and just focus on what’s presented in court.” RP, 262.

The defense challenged Juror 39 for cause. RP, 298. Even the prosecutor conceded, “I agree that some of his answers would lead you to believe that he couldn't be fair because his bias was too strong.” RP, 299. The trial court denied the motion. RP, 300.

### C. Argument

1. The Court should reverse Mr. Ayala’s conviction because he was forced to exercise his preemptory challenges on jurors with a demonstrated racial bias.
  - a. The trial court erred by not excusing Jurors 14, 24, and 39 for cause.

The trial court erroneously denied defense motions to excuse three jurors for cause. Juror 14 expressed strong opinions about gang violence

and that his fears for the safety of himself and his family would “likely have an impact on [his] decision making ability.” Juror 14 also indirectly communicated, based upon a conversation with his wife, that everyone who is pending trial is guilty.

Juror 24 also expressed strong negative views of gangs, but with a decidedly racial bent. He believes based upon his childhood experiences that Hispanics “like to fight.” He repeatedly stated that he would have difficulty applying the presumption of innocence to a Hispanic person accused of being a gang member and stated he would not have the same difficulty with a Caucasian person.

Juror 39 expressed concerns about his ability to apply the presumption of innocence to a person who is accused of being a gang member, saying that, based upon his experience as a law enforcement investigator, he would likely “pigeon hole” gang members as prone to violence. What stood out to him the most with MS-13 gang members and other people is the “type of clothing” they wear.

Each of these three jurors evidenced actual bias and should have been dismissed by the trial court. For one of the jurors, Juror 24, the bias was based upon explicit racial views about Hispanics, saying Hispanics “like to fight” and he would apply the presumption of innocence differently for Hispanics than Caucasians. While the racial bias of Jurors

14 and 39 was less explicit, they also evidenced racial bias. Juror 39 expressed a concern for applying the presumption of innocence to MS-13 members based upon their tendency towards violence and the “types of clothing” they wear. Referencing the types of clothing worn by a largely Latino gang is a “dog whistle” for racist views. While Juror 14 tried to distance his views from race, he also showed implicit racial bias by referencing violence and revenge in “that culture.” In sum, all three jurors demonstrated actual bias based upon explicit or implied racial views and should have been excused for cause by the trial court.

The defense was given six general preemptory challenges for the panel, not including alternates. Each of the two defendants was also given one additional preemptory challenge. The defense used three of their six general preemptory challenges to remove Jurors 14, 24, and 39. CP, 329. The defense exhausted all six of its joint preemptory challenges, but failed to exercise its one defendant-specific preemptory challenges.

- b. The failure of the trial court to excuse jurors with demonstrated racial bias prejudiced Mr. Ayala’s right to a fair trial, constitutes structural error, and requires automatic reversal.

When a trial court erroneously refuses to excuse a biased juror for cause and the bias is racially based, forcing the defense to have to use a preemptory challenge, reversal should be automatic. The failure to excuse a racially biased juror is the type of structural error that requires reversal

even absent a showing of prejudice pursuant to article 1, section 21 of the Washington Constitution.

Structural errors are those which create defects affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself and are not subject to harmless error. *State v. Wise*, 148 Wn.App. 425, 439, 200 P.3d 266 (2009), *reversed on other grounds*, *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012). Examples of structural errors include the absence of counsel for a criminal defendant, a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and admission of a defendant's coerced statements or confessions. *Wise*, 148 Wn.App. at 439. The Washington Supreme Court held that public trial violations are structural error automatically reversible under article 1, section 22. *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012).

Washington has a long and complex history addressing when reversal is required after a trial court erroneously refuses to excuse a biased juror, forcing the defense to exercise a preemptory challenge. Historically, when a trial court erroneously denied a motion to strike a juror for cause, forcing the defense to use a preemptory challenge on that juror, this would be automatic grounds for reversal, but only when the defense utilized all of its preemptory challenges. In *State v. Parnell*, 77

Wn.2d 503, 508, 463 P.2d 134 (1969), the Supreme Court summarized the longstanding rule in Washington that “refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury.” This rule dates back to earliest days of statehood. *State v. Rutten*, 13 Wn. 203, 43 P. 30 (1895) (“If the court wrongfully compelled him to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted.”)

In 2001, however, the Washington Supreme Court reconsidered the *Parnell* rules and held that if a judge improperly denied a motion for cause, but the juror was subsequently excused through the use of a peremptory challenge, the defendant cannot show prejudice sufficient to merit a reversal. *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001), adopting the reasoning of *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). *Fire* is a 5-4 decision that abrogates (the dissent says “overrules sub silencio”) prior Washington precedent. In *Fire*, Juror 8’s strongly expressed views about “baby rapers” were such that it would influence his ability to make a determination of

guilt or innocence. The Court of Appeals held that it was a manifest abuse of discretion to deny a motion to excuse for cause under these circumstances. *State v. Fire*, 100 Wn.App. 722, 998 P.2d 362 (2000). The Supreme Court reversed. The Supreme Court did not question the conclusion that Juror 8 should have been excused for cause, but instead concentrated on the appropriate remedy, summarizing the issue as follows, “At issue in this case is whether the trial court abused its discretion in denying a challenge for cause to Juror No. 8 and whether, *without a further showing of prejudice*, reversal is the remedy for a trial court's error in not dismissing a potential juror for cause where the defendant later uses a peremptory challenge to remove that juror and exhausts his remaining challenges before the final selection of the jury.” *Fire*, 145 Wn.2d at 157 (emphasis added). The Court does not discuss what the facts might be required for the “further showing of prejudice.”

Justice Alexander concurred with the bare 5-4 majority in *Fire*. Justice Alexander would have held that “*unless a defendant can show prejudice*, the mere fact that one uses his or her peremptory challenge to cure a wrongfully denied for-cause challenge does not establish a constitutional violation.” *Fire*, 145 Wn.2d at 167 (Justice Alexander, concurring) (emphasis added).

In Mr. Ayala's case, he exercised all of his joint preemptory challenges, but did not exercise his one individual preemptory challenge. His case, therefore, does not fall directly into the *Parnell* line of cases. But under the existing case law, this Court should conclude that when a trial court erroneously fails to excuse jurors for demonstrated racial bias, forcing the defense to exercise its preemptory challenges against those jurors, it is structural error under article 1, section 21 and *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), regardless of whether all preemptory challenges were used. It is worth noting that the Court in *Fire* explicitly declined to analyze that case under article 1, section 21 because the parties had not briefed the issues pursuant to *Gunwall*. See *Fire* at 163-64.

Unlike the biased jurors in *Fire* and *Parnell*, whose bias was related to the nature of the charge, the three biased jurors in Mr. Ayala's trial demonstrated both explicit and implicit racial bias that should have resulted in their removal by the trial court without forcing the defense to use three of their preemptory challenges on them. It is completely unacceptable for a trial court to allow explicit and implicit bias to fester in a criminal courtroom and force the defense to exercise half of its preemptory challenges on such jurors. This Court should conclude that racial bias is different than other forms of bias and that the failure to excuse a racially biased juror undermines the fundamental integrity of the

court proceeding and constitutes the “further showing of prejudice” referenced in *Fire*, regardless of whether the defense exercises all of its preemptory challenges.

The six *Gunwall* factors to be considered are: (1) The textual language of the State Constitution; (2) Significant differences in the texts of parallel provisions of the federal and state constitutions; (3) State constitutional and common law history; (4) Preexisting state law; (5) Differences in structure between the federal and state constitutions; (6) Matters of particular state interest or local concern.

Regarding the first and second *Gunwall* factors, the textual language of article 1, section 21 is strongly worded and materially different from the United States Constitution. Washington has a long history of applying article 1, section 21 strictly when a trial court erroneously refuses to excuse a biased juror, at least in the context when the defense exercises all of its preemptory challenges. Article 1, section 21 holds, “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record.” This language, particularly the language that requires the right to jury trial “remain inviolate” differs significantly from the Sixth Amendment of the United States Constitution, which does not contain such language. It is this “inviolate” language which has caused the

Washington Supreme Court to repeatedly recognize that article 1, section 21 provides greater protection of the right to trial by jury than the federal constitution. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003); *City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (“the right to trial by jury which was kept ‘inviolable’ by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789.”)

The third *Gunwall* factor, state constitutional and common law history, supports reading the state constitution more broadly than the federal constitution. Washington Territory, established in 1854, recognized the right to an impartial jury from its first session laws.<sup>5</sup> Article XII, section 101 required issues of fact to be decided by a jury of twelve persons. Article XII, section 102 gave the defense and prosecution the right to exercise six preemptory challenges in felony cases. Article XII, section 105 required the trial court to excuse jurors for cause when necessary to protect the “substantial rights of the defendant.” Article XII, section 107 required the jury to be sworn to “well and truly try the case. . . according to the evidence.” In the earliest cases after statehood, the Supreme Court repeatedly chastised trial judges for failing to excuse

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<sup>5</sup> <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1854pam1.pdf>

biased jurors. *State v. Patterson*, 183 Wn. 239, 244, 48 P.2d 193 (1935); *McMahon v. Carlisle-Pennell Lumber Co.*, 135 Wn. 27, 30, 236 P. 797 (1925); *State v. Stentz*, 30 Wn. 134, 147, 70 P.241 (1902); *State v. Rutter*, 13 Wn. 203, 43 P. 30 (1895); *State v. Wilcox*, 11 Wn. 215, 39 P. 368 (1895); *State v. Murphy*, 9 Wn. 204, 37 P. 420 (1894). In sum, Washington common law has always required that biased jurors be removed by the trial court when necessary to protect the defendant's rights and the defendant has an additional right to exercise preemptory challenges.

The fifth factor will always weigh in favor of broader protections. *Gunwall* at 66. This is true because the federal constitution is a grant of authority and the state constitution is a limitation on authority.

The sixth *Gunwall* factor is whether the issue is one of local concern. For this factor, courts look primarily to whether there appears to be a need for national uniformity. *Gunwall* at 62. Since the *Martinez-Salazar* decision, each of the individual states has had to decide whether to apply the case or apply pre-existing state law. While many of the states have followed the lead of the United States Supreme Court, many other states have declined to follow it, either choosing to follow preexisting case law or due to local statutes and court rules. *Shane v. Commonwealth of Kentucky*, 243 SW.3d 226 (Ky. 2007); *Browning v. State of Oklahoma*,

134 P.3d 816 (Ok. 2006); *State of Louisiana v. Ball*, 824 So.2d 1089, 1102 (La. 2002); *Brown v. Commonwealth of Virginia*, 33 Va.App. 296, 533 SE.2d 4 (2000). There is no need for national uniformity.

The fourth *Gunwall* factor, preexisting case law, is probably the most important of the six factors. In the context of Mr. Ayala's case, this factor can be subdivided into two categories: preexisting case law regarding general bias and preexisting case law regarding racial bias.

As noted above, the rule in Washington that reversal is required when a defendant is required to exhaust his preemptory challenges on jurors that should have been excused for cause has been the rule since the earliest days of statehood. *State v. Patterson*, 183 Wn. 239, 244, 48 P.2d 193 (1935); *McMahon v. Carlisle-Pennell Lumber Co.*, 135 Wn. 27, 30, 236 P. 797 (1925); *State v. Stentz*, 30 Wn. 134, 147, 70 P.241 (1902); *State v. Rutten*, 13 Wn. 203, 43 P. 30 (1895); *State v. Wilcox*, 11 Wn. 215, 39 P. 368 (1895); *State v. Murphy*, 9 Wn. 204, 37 P. 420 (1894); See, also, *State v. Moody* 7 Wash. 395, 35 P. 132 (1893) (affirming conviction because defendant failed to exhaust his preemptory challenges).

The first of these cases to reverse a conviction, *State v. Murphy*, explicitly cited article 1, section 21 of the Washington Constitution in explaining the need to reverse. *Murphy* at 214. *State v. Stentz* also explicitly cited article 1, section 21. *Stentz* at 142. *Rutten* and *Wilcox* both

rest on the “constitutional right” to an impartial jury and cite *Murphy* for support. Therefore, within the first thirteen years of statehood, the Washington Supreme Court reversed four cases for violation of the right to an impartial jury by either explicitly or implicitly citing to article 1, section 21. Preexisting case law supports applying the state constitution more broadly than the federal constitution in cases with demonstrated general bias.

But Mr. Ayala’s case raises an additional, and more fundamental, concern than the generalized right to have biased jurors excused by the trial court. The Washington Supreme Court over the past twenty years has made a concentrated and diligent effort to eradicate racial bias in the courtroom. Put simply: when it comes to applying procedural safeguards to constitutional rights in a criminal trial, race is different.

Washington has a strong public interest in eradicating racial bias in the courtroom. “Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.” *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013). The failure to excuse a racially biased juror affects the fundamental fairness of the trial and the integrity of the justice system as a whole in the same way that removing a minority juror without cause does, that is, the “very integrity of the courts is jeopardized when a prosecutor’s discrimination invites

cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 841, 425 P.3d 807 (2018), quoting *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). As one Court put it when analyzing a similar issue, "The issue is actually simple: Can a trial be called fair and the jury impartial if the method of arriving at a qualified jury is not?" *Shane v. Commonwealth of Kentucky*, 243 SW.3d 226, 340 (Ky. 2007).

The recently passed GR 37 demonstrates that this state has determined that a trial cannot be called fair if the method of arriving at a qualified jury is tainted by the sanctioning of implicit bias through the use of racial stereotypes and prejudices. While GR 37 is concerned with improper removal of potential jurors based on race, the public policy that prompted this Court to pass GR 37 should apply with just as much force, if not more, the failure to remove racially biased jurors. GR 37 gives a non-exhaustive list of reasons that have historically been used to perpetuate exclusion of minority jurors: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. These stereotypes based on race are no longer allowed as a reason to strike a juror because they unfairly exclude jurors of color. Additionally, the allowance of such stereotypes by the

court infects the entire trial process with the appearance that such implicit bias is acceptable in our system of justice.

A review of the case law in a variety of areas over the past decade reveals that Washington treats racial prejudice differently than other forms of prejudice and in ways that the United States Supreme Court does not. Potential sources for this distinction are the Washington Constitution, the Equal Protection Clause, the Due Process Clause, and general principles of fairness. But regardless of its source, it cannot be questioned that the failure of a trial court to proactively eradicate racial bias from its courtroom has more often than not resulted in reversal, regardless of prejudice to the defendant's factual presentation.

There are multiple Washington cases over the past decade where the requisite showing of prejudice to the case is eliminated entirely or substantially reduced when racial bias is alleged. In *Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), the Supreme Court held that a single use of an alleged racially motivated preemptory challenge is sufficient to invoke *Batson* protections. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Court noted it has "broad discretion to alter the *Batson* framework to more adequately recognize and defend the goals of equal protection." Abrogating the old rule of affording broad discretion to the trial courts, the Court said, "To ensure a robust

equal protection guaranty, we now limit that discretion and adopt the bright-line *Rhone* rule. We hold that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury.” *Erickson* at 733-34, citing *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010).

In *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), the Supreme Court found racially based prosecutorial misconduct where the prosecutor appealed to racial bias during the evidentiary portion of the case and again in closing argument. The Court abrogated the normal prosecutorial misconduct standard that reversal is required only where “there is a substantial likelihood the misconduct affected the jury’s verdict” in favor of a far more strict standard requiring reversal where the misconduct invokes race “unless it appears beyond a reasonable doubt that the misconduct did not affect the jury’s verdict”. Compare *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) with *Monday* at 680.

In *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2018), the issue was racially motivated juror misconduct. The Supreme Court abrogated the normal rule that jury deliberations are secret, holding that an evidentiary hearing is required when the alleged misconduct involves racial bias. The Court noted, “Unlike isolated incidents of juror misbehavior, racial bias is a common and pervasive evil that causes

systemic harm to the administration of justice. Also unlike other types of juror misconduct, racial bias is uniquely difficult to identify. Due to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so. Meanwhile, implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness. Given these unique concerns, courts must carefully control the inquiry when it has been alleged that racial bias was a factor in a jury's verdict." 444 P.3d at 1178.

In *State v. E.J.J.*, 183 Wn.2d 497, 354 P.3d 815 (2015) the Supreme Court granted review and reversed an obstructing conviction despite the fact it presented "a well-settled point of law regarding sufficiency of the evidence to sustain a conviction." *E.J.J.* at 509 (Chief Justice Madsen, concurring). As Chief Justice Madsen explained, the reason the Court granted review was to address the fact that "the obstructing statute [is] used disproportionately to arrest people of color." Noting the Court unanimously reversed the conviction, Chief Justice Madsen (joined by two other Justices and Justice Gonzalez in part) would have gone further because "our system of justice cannot condone disparate treatment of the people we serve, based on race, through the use of obstruction statutes." *E.J.J.* at 509 (Chief Justice Madsen, concurring).

Finally, the Supreme Court recently ruled unconstitutional a facially neutral statute that had been repeatedly upheld against a variety of challenges for nearly 40 years because it was being applied in an “arbitrary and racially biased manner.” *State v. Gregory*, 192 Wn.2d 1, 5, 427 P.3d 621 (2018) (striking down Washington’s death penalty statute).

The *Erickson*, *Monday*, *Berhe*, *E.J.J.*, and *Gregory* cases, as well as the passage of GR 37, viewed collectively, signal a clear trend by the Supreme Court to treat racial bias in the courtroom as different from other forms of bias. Trial courts have an affirmative duty to proactively eliminate the “common and pervasive evil of racial bias” and no place is it more important to the goal of removing this “cause[] of systemic harm to the administration of justice” than ensuring the excusal for cause of jurors who have exhibited racial bias. This Court should find that a court’s failure to remove a racially biased juror constitutes structural error and requires reversal, regardless of whether the defense exercised all its preemptory challenges.

2. The trial court erred by not suppressing Mr. Ayala’s July 8, 2016 statement to FBI Agent Brewer.

- a. Standard of Review

Mr. Ayala’s Fifth Amendment right to remain silent was violated by the interrogation techniques of Agent Dan Brewer. This Court reviews

findings of fact for whether they are supported by substantial evidence and conclusions of law de novo. *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999). In this case, the only facts are those contained in the transcript at Exhibit 6. The only witness at the CrR 3.5 hearing was Detective Rock who, although he was present at the time of the interrogation, was not able to participate because he does not speak Spanish. Agent Brewer did not testify at the hearing. Detective Rock admitted he was nothing more than a “bump on a log” while Agent Brewer conducted the entire interrogation in Spanish. There are, therefore, no contested facts for this Court to review. On the other hand, this Court should review the trial court’s conclusions of law de novo. The uncontested facts in this case, reviewed de novo, require this Court to suppress Mr. Ayala’s statements.

- b. Mr. Ayala’s repeated invocations to remain silent were not scrupulously honored as required by *Mosley*.

When a suspect invokes his right to remain silent, the Fifth Amendment of the United States Constitution requires that the police “scrupulously honor” the request and cease questioning. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Normally, this requires police “immediately cease[] the interrogation, resume[] questioning only after the passage of a significant period of time

and the provision of a fresh set of warnings, and restrict[] the second interrogation to a crime that had not been a subject of the earlier interrogation.” *Mosley* at 106. Washington Courts have interpreted the *Mosely* case as setting forth a four-pronged analysis. Whether a defendant validly waives his previously asserted right to remain silent depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning, (2) whether the police continued interrogating the defendant before obtaining a waiver, (3) whether the police coerced the defendant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary. *State v. Brown*, 158 Wn.App. 49, 240 P.3d 1175 (2010), citing *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). In *Brown*, the Court concluded that officers had scrupulously honored the defendants expressed desire to remain silent when they contacted him two hours later, re-advised him of his *Miranda* warnings, and obtained a written waiver of his *Miranda* rights.

In this case, five separate times Mr. Ayala’s request stop the questioning was ignored. He said, “I don't have anything to say.” Exhibit 6, 92. Twice on page 96, he tried to stop the questioning, saying, “I can’t say anything.” Exhibit 6, 96. Then again, he said, “I can’t tell you anything.” Exhibit 6, 100. Finally, he said, “I am afraid of.. I’m not going to say anything.” Exhibit 6, 104. The statements are not equivocal but

repeated attempts to not say “anything.” The failure to scrupulously honor Mr. Ayala’s repeated requests to terminate questioning violated his rights under *Miranda* and *Mosley*.

In *State v. Piatnitsky*, 180 Wn.2d 407, 325 P.3d 167 (2014), the Court held that the statement “I don’t want to talk right now” but that he would “write it down” was an equivocal invocation of his right to remain silent. Mr. Ayala’s repeated statements that he did not have “anything to say” and “I’m not going to say anything” are not equivocal, but unambiguous attempts to stop the questioning. Agent Brewer did not scrupulously honor his right to remain silent and the trial court erred by concluding otherwise.

- c. Agent Brewer’s explicit promise of confidentiality in exchange for Mr. Ayala’s statements is entitled to specific performance.

Whether a pretrial statement is admissible is judged by the totality of the circumstances. *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008). When a defendant alleges his will was overcome by the interrogation techniques of the officer, such as an explicit or implicit promise, Courts “must then apply the totality of the circumstances test and determine whether the defendant’s will was overcome by the promise, i.e., there must be a direct causal relationship between the promise and the confession.” *Unga* at 101-02. Psychological ploys, such as telling a suspect that

honesty is the best policy or that being honest will help him may factor in to whether the defendant's will was overcome. In *Unga*, the officer used a variety of psychological ploys, including telling the suspect that he would not be charged with graffiti, in order to get the suspect to confess to stealing and vandalizing a car. The defendant was charged and convicted of vehicle prowl and taking a motor vehicle without owner's permission.

The Court first concluded that fundamental due process required the vehicle prowl charge be dismissed. The State conceded, and the Court accepted the concession, that the officer's promise not to charge him with the graffiti required dismissal of the vehicle prowl. *Unga* at 107.

Although the Court did not use the phrase, its analysis was essentially one of specific performance.

The Court then held that the promise to not charge him with the graffiti did not overcome his will as to the taking a motor vehicle charge. The Court noted he was properly *Mirandized*, and, although he was a juvenile, he was a street wise juvenile, the interrogation was short (about 30 minutes), the officer did not use a threatening tone, raise his voice, badger, attempted to intimidate him, or subject him to lengthy, prolonged questioning, nor to repeated rounds of questioning. There is no evidence that he was deprived of any necessities such as food, sleep, or bathroom

facilities. Under the totality of the circumstances, the officer did not overcome his will.

With these general principles in mind, this Court should find that Mr. Ayala's statement to Agent Brewer should have been suppressed. Agent Brewer twice told Mr. Ayala that anything he said to him would be kept confidential and not used against him. The first time, he said, "We are not going to tell anyone that, that you know what happened. No one. " Exhibit 6, 97-98. Later, he said, "I'm telling you, you can trust me. About anything, about what you are afraid of, I won't tell anyone. Today, the truth is, we can explain what happened, what you saw, and then... my coworker here and I are not going to look to say that 'Joniel told us.'" Exhibit 6,104.

Under principles of fairness as set out in *Unga*, Mr. Ayala is entitled to specific performance. Agent Brewer promised he would not tell anyone – no one – what Mr. Ayala told him. Later, he assured him he could trust him and no one, neither his coworker nor himself, would tell anyone, "Joniel told us." Just as Mr. Unga was entitled to specific performance of the officer's promise ("You won't be charged for the graffiti"), under principles of fairness, Mr. Ayala should be entitled to specific performance ("I won't tell anyone – no one – what you tell me.") Not only did Agent Brewer tell others what Mr. Ayala told him, he

testified in open court under oath what he told him in total contravention of his explicit promise to keep his statements confidential. Agent Brewer did not follow through with his promise to keep Mr. Ayala's statements confidential and that violated his right to fundamental fairness.

- d. Agent Brewer's statements of confidentiality undercut the *Miranda* warnings previously provided.

The standard *Miranda* warning given to Mr. Ayala, as with almost all suspects, states, "Any statement that I do make either oral or written, can be used as evidence against me in a court of law." Exhibit 7. When an officer attempts to undercut this warning by promising not to use the statements against the defendant, the subsequent statement is involuntary. *United States v. Lall*, 607 F.3d 1277 (11<sup>th</sup> Cir. 2010), citing *Hart v. Attorney General of Florida*, 323 F.3d 884 (11<sup>th</sup> Cir. 2003). In *Lall*, after the officer read *Miranda* warnings, he told the suspect he was not going to pursue charges against him. In *Hart*, the officer told the suspect "honesty wouldn't hurt him." In both cases, the Eleventh Circuit held the officer's statements undercut the *Miranda* statement that "anything they say can be used against them" and suppressed.

Mr. Ayala was first told that anything he said would be used against him, and then he was told nothing he said would be repeated to anyone. The latter statements undercut the former and render the entire

statement involuntary. The trial court erred by not suppressing the statement.

- e. Agent Brewer made explicit threats and promises to Mr. Ayala statements that overcame his will.

Judged by the totality of circumstance, Mr. Ayala's statement to Agent Brewer was not freely and voluntarily given and should have been suppressed by the trial court. He interrogated him for nearly three hours, broken up into three rounds of questioning. When Agent Brewer read Mr. Ayala the *Miranda* rights form, he minimized the importance of the rights, referring to them as a "formality." When Agent Brewer told Mr. Ayala where to sign the *Miranda* form, he again told him, "That is our formality." Mr. Ayala's "signature," an illegible printing of his first name on the wrong line of the form, is indicative of a largely illiterate person who dropped out of school in the fifth grade to work in the fields of Central America.

Seven months after Mr. Ayala "signed" the *Miranda* form, he was evaluated by Western State Hospital. Western State Hospital found he had has an IQ of 79 and "functions in the low average range." Mr. Ayala demonstrated no understanding of the American jurisprudence system and had to be educated regarding most court concepts, a process that "became rather time-consuming," although Mr. Ayala was able to understand after

“slow and repeated explanations of concepts.” Given the experiences of Western State Hospital, it is extremely doubtful Mr. Ayala had any concept of the meaning of, or importance of, the rights form he signed on July 8, 2016.

Agent Brewer tried to ingratiate himself to Mr. Ayala by telling him he once lived in Central America and knew Honduras and El Salvador really well. He represented himself, not as a state agent, but as a federal agent who investigates federal crimes. He then used his federal status and knowledge of El Salvador, including how dangerous its gangs are, to repeatedly threaten to have Mr. Ayala deported if he did not confess. He emphasized how dangerous it is to live in Central America and how Mr. Ayala would not want to return to his homeland, a place populated by monsters who “cut people’s heads off and hurt people’s families.” Agent Brewer downplayed Mr. Ayala’s role, saying he was not a monster, but simply made a mistake.

Agent Brewer repeatedly accused Mr. Ayala of lying, saying how he would not receive leniency from the courts unless he showed remorse, a psychological ploy that affects voluntariness. Agent Brewer repeatedly assured Mr. Ayala that what he said would be kept confidential.

Judged by the totality of the circumstances, this Court should conclude that Mr. Ayala’s will was overborne and the statement is involuntary.

f. The erroneous admission of Mr. Ayala's statement was not harmless beyond a reasonable doubt.

When an involuntary statement has been admitted at trial, reversal is required unless the error is harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). In this case, there can be little doubt that the error in this case is not harmless beyond a reasonable doubt.

The evidence in this case implicating Mr. Ayala in the murder, not including his statement, can be roughly divided into three categories: the phone evidence, the three items of physical evidence recovered from the scene, and the testimony of Ms. Flores.<sup>6</sup>

Mr. Cruces' phone provided strong evidence that Mr. Cruces communicated with Mr. Ayala shortly before the murder. There were 17 text messages and one phone call, the latter occurring about 10 minutes before the murder. While this evidence was certainly sufficient to make Mr. Ayala a person of interest, it is not sufficient to prove he committed murder.

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<sup>6</sup> Although the jury also heard a custodial statement provided to law enforcement by Mr. Chicas-Carballo, that statement was redacted pursuant to *Bruton* to exclude any reference to Mr. Ayala and the jury was instructed they could not consider it as evidence against Mr. Ayala. CP, 220. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The police identified three key pieces of physical evidence from the crime scene. The first was a butterfly knife. Although Mr. Ayala in his statement admitted the knife belonged to him, the only DNA found on the knife was blood belonging to Mr. Cruces. The second piece of physical evidence was a blue latex glove. The only DNA found on the glove belonged to Juan Jose Gaitan Vasquez. The third piece of physical evidence was the shoe that was left at the crime scene, presumably by one of the murderers. Although Mr. Ayala admitted it was his shoe, the DNA testing was inconclusive.

Finally, there was the testimony of Ms. Flores. Ms. Flores' testimony, if believed, was clearly strong evidence of Mr. Ayala's guilt. But the key is that her testimony had to be believed. Ms. Flores gave a lengthy statement on July 8, 2016 where she repeatedly and "honestly" stated she knew nothing about the murder who was involved or how it happened. Her trial testimony frequently conflicted with her pretrial statements. She apparently did not feel compelled by her courtroom oath to tell the complete truth, telling the jury, "I just did not have to say the truth, ever." RP, 1831.

The phone evidence, physical evidence, and testimony of Ms. Flores, taken together or separately, were certainly enough to cast suspicion on Mr. Ayala. But it cannot be said that the erroneous

admission of Mr. Ayala's statement was harmless beyond a reasonable doubt. Reversal is required.

3. The trial court erred by not treating accomplice to first degree murder and conspiracy to commit first degree murder as same criminal conduct.

Mr. Ayala was convicted and sentenced to accomplice to first degree murder and conspiracy to commit first degree murder. The Washington Supreme Court has held that committing a crime as an accomplice and conspiracy to commit the same crime does not constitute double jeopardy. *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995). But the two offenses do constitute same criminal conduct. *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998).

Same criminal conduct means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1). Serious violent offenses are to be sentenced consecutively unless they constitute "separate and distinct criminal conduct." RCW 9.94A.589(2). The Supreme Court has interpreted "separate and distinct criminal conduct" to mean the same thing as "same criminal conduct." *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999). Separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single,

uninterrupted criminal episode over a short period of time. *State v. Young*, 97 Wn.App. 235, 984 P.2d 1050 (1999)

In *Deharo*, the defendant was convicted of conspiracy to deliver a controlled substance and possession with intent to deliver. The Court held that the two offenses were committed at the same time and place with the same victim. The Court further held that the criminal intent was the same, saying, “[I]t makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later.” *Deharo* at 859.

In this case, the sole victim of both the accomplice to first degree murder and conspiracy to commit first degree murder is Samuel Cruces Vazquez. The time and place was on April 28, 2016 in Tacoma, Washington. The trial court, in making its ruling, emphasized that the “conspiracy continued even after the execution occurred where Mr. Ayala Reyes is sending money to Mr. Chicas-Carballo in California as part of his tribute to the gang.” EP, 2349. But both the Second Amended Information and the “to convict” jury instructions charge a single date, April 28, 2016, and not a range of dates. CP, 60, 230, 234.

The sole objective intent of both the murder and the murder conspiracy was to kill Mr. Vazquez, from the moment the agreement was

hatched until the crime was completed. The accomplice liability jury instruction defined an accomplice as, in relevant part, someone who “(1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or *agrees to aid* another person in the commission of the crime.” CP, 223 (emphasis added). The jury instructions further defined a conspirator as, in relevant part, someone who “*agrees* with one or more persons to engage in or cause the performance of” first degree murder. CP, 232 (emphasis added). The criminal objective of a person who “agrees to aid” another person in the murder and “agrees. . . to engage” with another person to commit a murder is identical. All four criteria for same criminal conduct exist and the trial court erred by sentencing Mr. Ayala to consecutive sentences.

#### D. Conclusion

This Court should reverse and remand for a new trial. At the subsequent trial, Mr. Ayala’s pretrial statement should be suppressed. In the alternative, he should be resentenced to concurrent time under Washington’s same criminal conduct statute.

DATED this 15<sup>th</sup> day of November, 2019.



Thomas E. Weaver, WSBA #22488  
Attorney for Defendant/Appellant

**THE LAW OFFICE OF THOMAS E. WEAVER**

**November 15, 2019 - 3:18 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53161-5  
**Appellate Court Case Title:** State of Washington, Respondent v. Jose Jonael Ayala Reyes, Appellant  
**Superior Court Case Number:** 16-1-02804-9

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

STATE OF WASHINGTON, ) Court of Appeals No.: 53161-5-II  
 )  
Plaintiff/Respondent, ) DECLARATION OF SERVICE  
 )  
vs. )  
 )  
JOSE JONAE AYALA REYES, )  
 )  
Defendant/Appellant. )

STATE OF WASHINGTON )  
 )  
COUNTY OF KITSAP )

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On November 15, 2019, I e-filed the Motion to File Amended Brief of Appellant, and the Amended Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated copies of said documents to be sent through the Court of Appeals transmittal system to: Michelle Hyer of the Pierce County Prosecuting Attorney's Office via email to [PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us), to Kristie Barham of the Peirce County Prosecuting Attorney's office via email to [kristie.barham@piercecountywa.gov](mailto:kristie.barham@piercecountywa.gov), and to Philip Buri via email to [philip@burifunston.com](mailto:philip@burifunston.com).

On November 15, 2019, I deposited into the U.S. Mail, first class, postage prepaid, true and correct copies of the Motion to File Amended Brief of Appellant, and the Amended Brief of Appellant to the defendant:

Jose Jonael Ayala Reyes, DOC #413606  
Washington State Penitentiary  
1313 N 13 Avenue  
Walla Walla, WA 99362

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is  
2 true and correct.

3 DATED: November 15, 2019, at Bremerton, Washington.

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5 \_\_\_\_\_  
6 Alisha Freeman

**THE LAW OFFICE OF THOMAS E. WEAVER**

**November 15, 2019 - 3:18 PM**

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