

NO. 33097-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

RUDOLFO SAMANIEGO,

Appellant.

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FILED  
DEC 11, 2015  
Court of Appeals  
Division III  
State of Washington

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

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APPELLANT'S OPENING BRIEF

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TRAVIS STEARNS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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## A. INTRODUCTION

When the police implied that if Rudolfo Samaniego confessed to their accusations, his girlfriend would be released and their child would be returned from State custody to her, he was compelled to incriminate himself. This involuntary statement was then exploited to prove he had delivered controlled substances to another person. It justified the search of his vehicle. It was the faulty foundation on which the State built a case of maintaining a drug dwelling.

At trial, Mr. Samaniego was denied the right to present his defense when the court precluded him from cross examining the State's witnesses. He was also denied his right to a fair trial by the singular and cumulative effect of the State's misconduct, including the disparagement of his counsel, the implication his lawyer was appointed, the suggestion he could not be acquitted without finding the State's witnesses were liars and by the trivialization of the burden of proof, comparing it to the likelihood a meteor could destroy the earth. Mr. Samaniego is entitled to a new trial.

Mr. Samaniego is also entitled to a new sentencing hearing because the trial court failed to consider that school zone enhancements may be run concurrently when it imposed consecutive enhancements.

## B. ASSIGNMENTS OF ERROR

1. The trial court did not file written findings of fact pursuant to CrR 3.5.
2. Statements elicited by the police were involuntary because of implied or explicit promises made to Mr. Samaniego in exchange for his statement.
3. The State presented insufficient evidence of maintaining a drug dwelling.
4. Mr. Samaniego's right to compulsory process was violated when the Court denied him the right to present a defense.
5. The State committed misconduct by disparaging the role of defense counsel.
6. The State committed misconduct by implying Mr. Samaniego was represented by appointed counsel.
7. The State committed misconduct by asking the jury to find State's witnesses were lying prior to acquitting Mr. Samaniego.
8. The State committed misconduct by trivializing the burden of proof.
9. The cumulative effect of the State's misconduct denied Mr. Samaniego his right to a fair trial.

10. The court committed legal error by failing to consider whether to impose two school zone enhancements consecutively or concurrently.

#### C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. After a suppression hearing is held, CrR 3.5 requires the court to set forth in writing the facts and conclusions as to whether a statement shall be admissible. Here, no written findings of fact were created. Does the failure of the trial court to enter written findings of fact and conclusions of law require remand for their entry?

2. A statement is involuntarily made where it is the result of an implied or express promise. Police officers told Mr. Samaniego his girlfriend would not be charged with a felony and would be released prior to him making his incriminating statement. He was then permitted to speak with her and watch her be released from custody. Should the trial court have found Mr. Samaniego's statement was involuntarily made because of this express or implied promise of leniency towards Mr. Samaniego's family?

3. To prove Mr. Samaniego was maintaining a drug dwelling, the State must establish the primary purpose of the dwelling is for drug activity which is of a continuing and recurring character, and that a

substantial purpose of maintaining the premises is for illegal activity. While controlled substances and other contraband were recovered from Mr. Samaniego's residence and Mr. Samaniego's statement included references to others having used drugs within a room, no witnesses testified that any transaction ever took place or that anyone other than a resident was ever seen using controlled substances. Substantial evidence established this was Mr. Samaniego's residence. Was the State's evidence insufficient to establish Mr. Samaniego maintained a dwelling for drug purposes?

4. The right to compulsory process includes the right to present a defense. Mr. Samaniego was prevented from presenting a defense where the court precluded him from impeaching the State's witnesses with a report commissioned by the Sunnyside Police Department and produced by the Washington State Association of Police Chiefs and Sheriffs which criticized the failure of officers within the department for failing to write reports regarding their arrests. Where an officer failed to write such a report, was Mr. Samaniego's right to compulsory process denied by the Court's refusal to allow Mr. Samaniego to impeach the State's witnesses with the report?

5. The singular and cumulative effect of prosecutorial misconduct denies an accused the right to a fair trial. Misconduct occurs where the State disparages defense counsel, implies defense counsel is appointed, asks the jury to determine State's witnesses are lying prior to issuing an acquittal, and trivializes the burden of proof. Was Mr. Samaniego's right to fair trial denied where such misconduct occurred?

6. Sentence enhancements imposed under RCW 69.50.435 may be run consecutively or concurrently to each other. The court believed it had no choice but to impose consecutive sentence enhancements. Is Mr. Samaniego entitled to a new sentencing hearing to determine whether his enhancements should be run concurrently or consecutively?

#### D. STATEMENT OF THE CASE

Rudolfo Samaniego was originally charged with one count of possession of a controlled substance with the intent to deliver. CP 4.<sup>1</sup> The State later amended the charges when Mr. Samaniego decided to exercise his constitutional right to a trial, adding a charge of delivery of

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<sup>1</sup> The record consists of nine volumes, with sequential pagination. Counsel will refer to the transcript by volume number, followed by page number. *E.g.*, 1 RP 9.

a controlled substance, and maintaining a drug dwelling. CP 5-6. The State also newly charged sentencing enhancements, alleging the destructive and foreseeable impact on persons other than the victim with regard to count one (RCW 9.94A.535 (3)(r)) and school zone violations with regard to all three counts (RCW 69.50.435; 9.94A.533(6)). *Id.* At trial, the State only pursued the school zone enhancements on counts one and two. It did not pursue destructive and foreseeable impact on persons other than the victim enhancement.

The court held a suppression hearing to determine whether statements had been voluntarily made. 1 RP 19.<sup>2</sup> While the police officers denied making explicit promises Mr. Samaniego's girlfriend Melissa Cochran would be released and his child returned to her, the officers did acknowledge she was in custody. 1 RP 35. He was told that his claiming ownership in the drugs found within his hotel room would result in the police only charging his girlfriend with reckless endangerment, which would result in her release on a summons. 1 RP 37. The officers admitted that he was then taken out of the interrogation

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<sup>2</sup> While Mr. Samaniego has assigned error to the failure to enter written findings of fact and conclusions of law with respect to the suppression of his statement, this brief relies upon the court's oral findings. Mr. Samaniego respectfully reserves the right to supplement his brief if findings are inconsistent with the oral ruling or appear tailored to respond to Mr. Samaniego's brief. *State v. Smith*, 68 Wn.App. 201, 209–10, 842 P.2d 494 (1992).

room, where he was allowed to have contact with his girlfriend and witness her release from the police station. 1 RP 77. It was after he was able to speak to and console his girlfriend that he signed the statement forms and completed his statement. *Id.*

Mr. Samaniego's first trial commenced on July 22, 2014. 2 RP 234. The jury was unable to reach a verdict and a mistrial was declared. 4 RP 673. Mr. Samaniego's second trial commenced on November 3, 2014. 5 RP 696.

At trial, the State elicited testimony to prove Mr. Samaniego maintained a drug dwelling in the hotel room where he resided, along with his girlfriend and child. Clothing, children's toys and diapers were all seen within the hotel room establishing it as Mr. Samaniego's family's residence when the State executed a search warrant of the room. 2 RP 143. Methamphetamines were also recovered within the hotel room, along with other evidence indicative of drug use. 6 RP 964. The State alleged traffic patterns consistent with street level drug dealing, but no witnesses testified they had seen a transaction take place in the hotel room. 6 RP 890. Mr. Samaniego's statement included an admission people had purchased drugs within his hotel room and

had smoked them there. 6 RP 964. His girlfriend was believed to have smoked methamphetamines in their room prior to her arrest. 6 RP 894.

A primary issue at trial was the credibility of the State's witnesses. 8 RP 1219, 7 RP 1116. Mr. Samaniego was charged with delivery of a controlled substance to an unknown person when Det. Gusby claimed to witness a transaction between Mr. Samaniego and this second person. 6 RP 959. While this unknown person was not arrested, the State claimed Mr. Samaniego admitted to the delivery. 6 RP 966. Further, while Mr. Samaniego was convicted of maintaining a drug dwelling, no witness testified to ever having seen a transaction or drug activity take place in Mr. Samaniego's hotel room, except by Ms. Cochran, who lived in the room. 6 RP 890. Again, police officers testified Mr. Samaniego admitted to them that he had sold drugs to persons who had smoked in his room. 6 RP 914.

In challenging the State's evidence, Mr. Samaniego sought to impeach a Sunnyside Police officer with a report created by the Washington State Association of Police Chiefs and Sheriffs (WASPC) titled "Loaned Executive Management Assistance Program Review of the Sunnyside Police Department." 6 RP 946. This report focused on the deficiencies of the department because many officers had failed to

produce necessary paperwork to ensure full and fair prosecutions. 6 RP 947. This report was relevant because part of the arrest and investigation team was a Sunnyside police officer who had failed to write a report. 6 RP 947. Not wanting to “open a can of worms,” the court denied Mr. Samaniego’s motion to impeach the witness with this report. 6 RP 949.

Mr. Samaniego moved to dismiss his trial for prosecutorial misconduct. Knowing Mr. Samaniego had appointed counsel, prosecutor Quinten Scott Bowman nevertheless asked Mr. Samaniego’s investigator how he got paid. 7 RP 1054. This question was objected to and the Court sustained the objection. *Id.* Mr. Bowman then disparaged defense counsel in his closing argument, concluding his initial closing by telling the jury “Now, this is Mr. Therrien-Power's turn to tell you why I'm wrong in all the important ways, but I'll be back with you in a couple minutes.” 7 RP 1115. He continued his disparagement as he began his rebuttal by stating “Ladies and gentlemen, let's have a little instructional session on twisting facts and taking things out of context.” 9 RP 1242. His argument described defense counsel’s closing as “an interesting argument from a rhetorical perspective.” 9 RP 1128. His final remarks to the jury were that defense counsel’s closing was

“exaggeration and misconstrual of the testimony.” 9 RP 1129. Finally, he expressed his personal opinion that reasonable doubt is like a meteor which “could come out of the blue and wipe us all out right here as we sit.” 7 RP 1102.

Mr. Samaniego was found guilty of all three charges, with school zone enhancements found with regard to counts one and two. 7 RP 1158. At sentencing, Mr. Samaniego requested that the school zone enhancements be run concurrently. 7 RP 1194. The Court stated “I believe under the law that they [the protected zone sentencing enhancements] do have to be served consecutively.” 7 RP 1203. Based upon this misunderstanding of the law, the court imposed a sentence of 88 months. 7 RP 1205.

#### E. ARGUMENT

**1. Remand is required for written entry of the court’s findings of fact and conclusions of law regarding suppression of Mr. Samaniego’s statement.**

CrR 3.5(c) states the “court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.” The appropriate remedy for failure to file written findings is to remand for entry of such findings.

Should the findings be tailored *See Smith*, 68 Wn.App. at 209–10 (when reviewing court remands for entry of findings after appellant files opening brief, court must examine any claim that court tailored findings in response to the defendant's appeal). This Court should remand this matter for entry of written findings of fact and conclusions of law.

**2. Mr. Samaniego's statements must be suppressed as involuntarily made.**

*a. An express or implied promise used to coerce a statement makes it involuntary.*

The Fifth Amendment to the United States Constitution states that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The Washington State Constitution states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” Const. art. I, § 9. The determination of whether statements made during custodial interrogation are admissible is made upon an inquiry into the totality of the circumstances. *Fare v. Michael C.*, 442 U.S. 707, 724–25, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Miranda v. Arizona*, 384 U.S. 436, 475–77, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant's ability to resist the pressure are important to the question of whether a statement is voluntary and therefore admissible. *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008) (citing *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir.2005)). A "confession is coerced or involuntary if 'the defendant's will was overborne at the time he confessed.'" *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir.2005) (citing *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963)); see also *United States v. Leon Guerrero*, 847 F.2d 1363, 1365 (9th Cir.1988) (an inculpatory statement is voluntary "only when it is the product of a rational intellect and a free will").

A court will suppress a statement where the totality of the circumstances demonstrate that the confession was coerced by an express or implied promise or by the exertion of any improper influence. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The test is whether the interrogator resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculcate himself.

*United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir.1995), *vacated on other grounds*, 517 U.S. 1231, 116 S.Ct. 1873, 135 L.Ed.2d 169 (1996), *adhered to on remand*, 124 F.3d 205 (7th Cir.1997).

Express or implied promises made with regard to a person's family may result in an involuntary confession. In *Lynumn*, 372 U.S. at 534, the Supreme Court reversed a defendant's conviction on the ground that her confession was coerced where the confession was made only after the police had told the defendant "that state financial aid for her infant children would be cut off and her children taken from her if she did not 'cooperate'." In some cases, appealing to a defendant's moral obligation to his or her family as leverage to coerce may be unconstitutional. *Ortiz v. Uribe*, 671 F.3d 863, 872 (9th Cir.2011). In *Haynes v. Washington*, 373 U.S. 503, 514, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963), the Supreme Court reversed the defendant's conviction because his confession was coerced where the defendant was denied an opportunity to call his wife or attorney and told he would not be have contact with them until he confessed. In *United States v. Tingle*, 658 F.2d 1332, 1333 (9th Cir.1981), the Ninth Circuit reversed the defendant's conviction because her confession was coerced where the defendant was held in the back of a police car, questioned by two

officers for an hour and told she would not see her two year old son “for a while.”

*b. The police made compelling promises Mr. Samaniego’s girlfriend would be released and his child returned to her if he confessed.*

Prior to trial, Mr. Samaniego moved to suppress his statement as coerced. Dets. Tucker and Gusby testified for the State and Mr. Samaniego testified on his own behalf. Det. Tucker testified that Mr. Samaniego was questioned while in police custody in a holding cell at the Sunnyside Police Department. 1 RP 24. This room has metal tables and eyehooks so people can be handcuffed to the table. *Id.* Mr. Samaniego was handcuffed during the interrogation. 1 RP 25.

While Mr. Samaniego was being questioned, his girlfriend, Ms. Cochran, was detained in another holding cell in the police station. 1 RP 32. She was in custody for the drugs which had been found in the room where she was arrested. 1 RP 33. Mr. Samaniego’s child had been put into the care of Washington State Child Protective Services. *Id.* Before making his statement, Mr. Samaniego was told that his girlfriend was in custody and that his child was in the care of CPS. 1 RP 35. Mr. Samaniego was told this “up front” before any interrogation took place. 1 RP 46.

Mr. Samaniego was also informed by Det. Tucker that with “[h]im claiming ownership to the drugs I located, the only crime I had at that point on Ms. Cochran was the reckless endangerment of her child.” 1 RP 35. Det. Cochran told Mr. Samaniego that “based on him claiming ownership to the drugs that Ms. Cochran now was only facing misdemeanor charges, and chances were that I was just going to release her on a summons.” 1 RP 37.

After Mr. Samaniego confessed to possessing the drugs in the hotel room, he was escorted to the bathroom by Det. Tucker. 1 RP 37. As he was returned to the holding cell to continue his confession, Det. Tucker escorted him past Ms. Cochran, who was being released. 1 RP 37. Mr. Samaniego and Ms. Cochran hugged and Mr. Samaniego watched her leave through a side exit. 1 RP 38. Mr. Samaniego completed his statement. *Id.*

Mr. Samaniego also testified at the suppression hearing. He confirmed that he was told his girlfriend was in custody and that his child had been taken to CPS. 1 RP 74. He said he was told he would be able to “go home that day” if he agreed to work with the drug task force, an offer he declined. 1 RP 75. He testified that if he confessed to the crimes, they would let Ms. Cochran and his son go. 1 RP 77. He

told the police he would not sign a statement until he saw Ms. Cochran leave. *Id.* He confirmed that Det. Tucker then took him into the hallway where he was able to hug Ms. Cochran and watch her leave. *Id.* It was after this that he signed the form. *Id.*

There are no written findings of fact but the trial court denied Mr. Samaniego's motion to suppress in its oral ruling. 1 RP 96. The court determined that the issue of whether the confession was voluntary was a credibility question. 9 RP 1232. The court found there had not been any promises or threats made. 9 RP 1235.

*c. Mr. Samaniego's statement must be suppressed because it was the result of improper police promises.*

While the credibility of witnesses is best left to the trier of fact, this court should analyze whether the facts make out an express or implied promise which induced Mr. Samaniego to confess. Here, the express and implied promises that can be derived from the testimony are clear: if Mr. Samaniego confessed to the allegations, his family would be set free. The fact that this actually happened makes clear that Mr. Samaniego's understanding of the express or implied promises made to him was not misguided.

The conduct of law enforcement officers in exerting pressure and the ability to resist the pressure are important to the question of whether a statement is voluntary. *Unga*, 165 Wn.2d at 101. Here, the officers had considerable power to exert pressure upon Mr. Samaniego. His girlfriend had been arrested in a room full of “rancid smoke” where methamphetamines had been found. 1 RP 47. Should both he and Ms. Cochran find themselves arrested, the likelihood of the State continuing to keep their child in dependency was not remote. With his admissions, he was able to avoid Mr. Cochran’s confinement and his child’s dependency.

While the detectives denied making an express promise to Mr. Samaniego, the implied promise is corroborated but the facts of what happened at the Sunnyside Police Department. While the State may characterize the contact between Mr. Samaniego and Ms. Cochran as simply two persons passing each other, it is easy to appreciate the psychological impact of witnessing the police fulfill their promise that Ms. Cochran would be released by letting Mr. Samaniego watch her leave the police station. For whatever reason this encounter took place, its impact on Mr. Samaniego was clear from both his testimony and the Det. Tucker’s. After Mr. Samaniego witnessed his girlfriend being

released from the police station, Mr. Samaniego completed his statement. Whether the promise made to Mr. Samaniego was express as his testified or implied through the actions of the police is inconsequential. The result is the same: it rendered this confession involuntary.

This Court should have concerns in cases where there are clear indications of involuntary confessions. Voluntary false confessions occur for many reasons, including the desire to protect someone else. Pamela S. Pimentel, Andrea Arndorfer, Lindsay C. Malloy, *Taking the Blame for Someone Else's Wrongdoing: The Effects of Age and Reciprocity*, 39 Law & Hum. Behav. 219 (2015). False confessions run the great risk of contaminating how jurors evaluate other evidence. Lisa Hasel & Saul Kassin, *On the presumption of evidentiary independence: Can confessions corrupt eyewitness identifications?* Psychological Science, 21, 124 (2009); Saul Kassin, Daniel Bogart & Jacqueline Kerner, *Confessions that Corrupt: Evidence from the DNA Exoneration Case Files*, Psychological Science 23, 41-45 (2012). According to the Innocence Project, more than 1 out of 4 people wrongfully convicted but later exonerated by DNA evidence made a false confession. The Innocence Project, *False Confessions or Admissions*, available at

<http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions#sthash.2hXsjBAO.dpuf>In exonerations.

People who want to protect their families are motivated to make a false confessions. This Court should scrutinize the promises made by the police before and during Mr. Samaniego's statement and find it was involuntarily made.

The failure to suppress Mr. Samaniego's statement was not harmless. There is insufficient evidence Mr. Samaniego sold drugs to another person just prior to his arrest. His statement also has a direct impact on the sufficiency of the evidence of other charges. Mr. Samaniego's statement indicated he intended to deliver the drugs he possessed to another and was used to establish he maintained his dwelling for drug purposes. The statement is central to the State's evidence. Its admission was not harmless.

Because Mr. Samaniego's incriminating statement was coerced through implied and express promises of leniency to his family, this Court should find the court erred in finding Mr. Samaniego's statement was voluntary. This Court should order suppression and remand for a new trial.

**3. There was insufficient evidence Mr. Samaniego maintained a drug dwelling.**

- a. Sufficiency requires that the drug activity which occurs in the dwelling must be a substantial rather than incidental purpose of the dwelling.*

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. XIV; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When viewing evidence in the light most favorable to the State, evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 414 (2000). There must be substantial evidence to support the court's findings of fact in order for them to be sufficient. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (citing *Rae v. Konopaski*, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

In order to establish that a person is guilty of maintaining a drug dwelling, the State must provide “that the drug activity is of a continuing and recurring character; and that a substantial purpose of

maintaining the premises is for illegal activity.” *State v. Ceglowski*, 103 Wn. App. 346, 352-53, 12 P.3d 160 (2000); RCW 69.50.402(1)(f)<sup>3</sup>.

The words “keep” and “maintain” in the statute connote continuing conduct and require proof that drug activity is a substantial, rather than incidental, purpose for maintaining the premises. *Ceglowski*, 103 Wn. App. at 347-48.

In *State v. Fernandez*, 89 Wn. App. 292, 297, 948 P.2d 872 (1997), the court found insufficient evidence of a drug dwelling where evidence demonstrated that at least one person had purchased drugs at the defendant’s home on three occasions; there was a dramatic increase in pedestrian and vehicular traffic on their street after the defendant moved in; indicia of drug selling including pipes, a beaker, measuring spoons with white residue and burn marks, burnt tweezers, sandwich bags, and a propane torch; and 20 bags, each containing about a half gram of cocaine were found inside a fireproof safe. Key to the court’s analysis was the probability that the residents of the house were the

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<sup>3</sup> (1) It is unlawful for any person: ... (f) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter. RCW 69.50.402.

persons who used the drugs there, despite strong evidence that others did as well. *Id.* at 300.

*b. The purpose of the dwelling was as a residence for Mr. Samaniego, his girlfriend and his child.*

Mr. Samaniego was convicted for maintaining a drug dwelling within the hotel room where he and his family were living. 6 RP 913. He resided with Ms. Cochran and his 17-month-old child. CP 2. When the police searched the hotel room, they found contraband, including a methamphetamine pipe that had recently been used, along with a quantity of the drug. 6 RP 964. Mr. Samaniego stated that other people had purchased methamphetamines in the room and would sometimes smoke the drug there. 6 RP 964.

The police also found evidence that the primary purpose of this dwelling was as a living place for Mr. Samaniego and his family. In Mr. Samaniego's original trial, the State sought to introduce photos of the hotel room showing clothing, children's toys and diapers. 2 RP 143. While there was testimony of increased traffic, there is no evidence the police ever saw anyone purchase drugs or otherwise use them within the hotel room. 6 RP 890. While the State introduced statements from Mr. Samaniego that people had used drugs within the hotel room, no timeframe was given or any reason to believe that this was anything

other than a general statement. 6 RP 914. This Court cannot be satisfied the State presented sufficient evidence that Mr. Samaniego was maintaining a drug dwelling.

The fact that this was not where Mr. Samaniego sold drugs is corroborated by the State's evidence of what they believed to be a drug sale. The State's evidence demonstrated that he left his room to conduct the delivery they allege and did not conduct the transaction in his room. 6 RP 959. Within the room, they found his girlfriend and a pipe which may have just been used. 6 RP 972. No other evidence was ever introduced that other persons used drugs in Mr. Samaniego's room.

*c. There was insufficient evidence that the substantial purpose of the dwelling was for drug activity.*

The hotel room the State charged as a drug dwelling was a residence for Mr. Samaniego and his family. 6 RP 913. The primary and substantial purpose of this room was to be a place for them to live and not a place for Mr. Samaniego to sell drugs. The sole delivery in evidence took place outside the residence at the nearby Burger Ranch. The evidence Mr. Samaniego's residence was operated as a drug dwelling is insufficient. As such, this Court should hold the State failed to present sufficient evidence Mr. Samaniego maintained a drug dwelling and dismiss that charge.

**4. Mr. Samaniego’s right to compulsory process was denied when he was restricted from impeaching the State’s witnesses.**

*a. The right to compulsory process includes the right to present a defense.*

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). Sixth Amendment violations, including the right to present a defense, are reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

The trial court must consider the “the integrity of the truth finding process and [a] defendant's right to a fair trial” before precluding defense evidence. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). If evidence is relevant, “the burden is on the State to

show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Darden*, 145 Wn.2d at 622. Evidence rules that “‘infring[e] upon a weighty interest of the accused’ and are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve’ ” abridge this essential right. *State v. Cayetano-Jaimes*, --- P.3d ---, 70547-4-I, 2015 WL 5547450, at \*5 (Wash. Ct. App. Sept. 21, 2015) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998))).

Reversal for a violation of the constitution is required unless the court finds it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Error is only harmless if the court is convinced beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

*b. The failure of Sunnyside Police to maintain adequate reports was relevant to Mr. Samaniego’s defense.*

Mr. Samaniego sought to impeach the State’s witnesses with the failure to properly document their work. This was a central issue in both trials. Before the second trial began, Mr. Samaniego apprised the

court of a report created by the Washington State Association of Police Chiefs and Sheriffs (WASPC) titled “*Loaned Executive Management Assistance Program Review of the Sunnyside Police Department*” and referred to as the LEMAP. 6 RP 946. This report was critical of the work done by the Sunnyside Police Department, especially with regard to report writing. The report stated “Multiple people who were interviewed indicated that patrol seemed to lack the effort to more than just make arrests, properly documenting data, and protecting evidence to achieve successful prosecution.” 6 RP 947.

Mr. Samaniego indicated he intended to use the report to impeach the testimony of Officer Berry who had indicated he was not important enough to write a report. 6 RP 947. The court indicated the report had received some political notice and it did not want to “open a whole can of worms” the report was likely to highlight if used on cross examination. 6 RP 949. The State opposed the defense’s motion to use the report, arguing the report had foundational, hearsay and reliability problems. 6 RP 949. It also argued despite the fact that the report had been written by WASPC and commissioned by Sunnyside, this report

came from an anonymous source. 6 RP 950.<sup>4</sup> The State also argued the probative value of the report was outweighed its prejudicial effect. 6 RP 950.

The court precluded Mr. Samaniego from impeaching the State's witnesses with the report for "all the reasons stated." 6 RP 951. The court specifically found there was no way to lay a foundation for this report and there was "no specificity as to Officer Berry being one of the ones of concern." 6 RP 951.

The court failed to apply the constitutionally required analysis, which obligates the court to determine whether evidence was "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. First, the court is required to analyze whether the evidence is of at least minimal relevance. *Id.* If relevant, the State is required to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Id.* Then, relevant evidence may only be withheld if the State's interest to exclude

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<sup>4</sup> This report was not anonymous. The authors of the report were Mark Mears, the Assistant Police Chief of the Fife Police Department; Mike Warren, the Chief of Police for the City of Ephrata; Cathy Munoz, the Director of Communications for the City of Cheney; Trevor White, the Criminal Investigations Commander for the Kennewick Police Department; Chris Guerrero, a sergeant with the Kennewick Police Department; and Michael Painter, the Director of Professional Services for WASPC. It can be found online at <http://www.ci.sunnyside.wa.us/documentcenter/view/707>.

prejudicial evidence outweighs the defendant's need for the information sought. *Id.*

Clearly, the evidence was relevant. ER 401. The threshold to admit relevant evidence is very low and even “minimally relevant evidence” is admissible. *Hudlow*, 99 Wn.2d at 16. Impeachment testimony is relevant if it tends to cast doubt on the credibility of the person being attacked, and credibility is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 466, 989 P.2d 1222 (1999). Officer Berry testified in the first trial he did not write reports and Mr. Samaniego spent extensive time cross-examining him on this issue. 3 RP 341. While Officer Berry was not mentioned specifically in this report, this is not an argument to preclude cross examination with the report. Instead, this is clearly a question for the jury to determine the weight to give to the report, which meets the minimum standard for relevancy. Few officers in fact wrote reports, a central theme of Mr. Samaniego’s defense. 3 RP 350. This cross examination would have been central to the other officers who did not write reports as well. *Id.*

While the State argued the evidence was prejudicial, there was no record made as to what the prejudice might be. 6 RP 950. Certainly there was no prejudice which would have met the high standard

required for preclusion, which is that it would have disrupted the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

Finally, there is no State's interest that exceeds the interest of ensuring that Mr. Samaniego receive a fair trial. The State has an interest greater than other advocates, which is to ensure justice. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Allowing Mr. Samaniego to fairly cross-examine the State's witnesses was proper and the court erred in precluding Mr. Samaniego from presenting his defense.

There is no requirement Mr. Samaniego establish a foundation to impeach with the Sunnyside Police Report. ER 401 does not limit relevant evidence to that which satisfies the court's requirement for independent admissibility. *See, e.g., State v. Jones*, 25 Wash. App. 746, 750, 610 P.2d 934 (1980) (reversible error to refuse to permit defendant to offer extrinsic evidence of police officer's bias). Instead, it is appropriate impeachment for an advocate to confront a witness with relevant evidence and allow the witness to confirm or deny the existence of the evidence. At the very least, Mr. Samaniego should have been allowed to confront the officer with the findings that brought into question his lack of report writing.

This court should in fact reject the finding that foundation could not be established. First, Mr. Samaniego was never given the opportunity to establish a foundation. Second, it appears everyone in the courtroom was aware of the report, including the trial judge. 6 RP 948. It is likely Mr. Samaniego could have authenticated the report through Officer Berry or any other officer who testified. ER 901. It may have also been a self-authenticating document, since it was commissioned by the City of Sunnyside and published on the city's website. ER 902, 6 RP 948.<sup>5</sup> The court could have also taken judicial notice, since the existence of the report was not in dispute. ER 201.

The error in denying Mr. Samaniego his right to present his defense was not harmless beyond a reasonable doubt. The failure of the officers to keep full and complete reports was central to Mr. Samaniego's defense. It impacted the credibility of the officers who claimed to have witnessed a drug transaction and who took his statement. The ability to explain to the jurors why report writing is critical to good police work and was a systemic failure of the police departments involved in the investigation and prosecution of Mr.

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<sup>5</sup> The report remains on Sunnyside's website and is available at <http://www.sunnyside-wa.gov/documentcenter/view/707>.

Samaniego, precluded Mr. Samaniego from making a key argument than may have changed the jurors' verdict. As such, the error was not harmless beyond a reasonable doubt and reversal is required.

*c. Because Mr. Samaniego was prevented from presenting his defense, reversal is required.*

The court's error in precluding Mr. Samaniego from cross examining witnesses on why they did not prepare reports violated his constitutional right to present a defense. It was not harmless beyond a reasonable doubt. This Court should reverse Mr. Samaniego's convictions and order a new trial.

**5. The singular and cumulative effect of the State's disparaging defense counsel, invasion of the province of the jury and the trivialization of the burden of proof constituted misconduct entitling Mr. Samaniego to a new trial.**

“As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *Warren*, 165 Wn.2d at 27. A “[f]air trial” certainly implies a trial in which the attorney representing the State does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) ((quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)); see *State v. Reed*, 102 Wn.2d 140,

145–47, 684 P.2d 699 (1984). “Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must “seek convictions based only on probative evidence and sound reason,” *State v. Casteneda–Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968); *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated. *Monday*, 171 Wn.2d at 676.

*a. Disparaging defense counsel constitutes misconduct.*

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *State v. Warren*, 165 Wn.2d at 29–30; *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). Denigrating the role of defense counsel or their arguments is ill-intentioned conduct which may be grounds for reversal. *State v. Thorgerson*, 172 Wn.2d at 451 (*quoting Warren*, 165 Wn.2d at 29).

Mr. Bowman denigrated defense counsel and his arguments. Mr. Bowman concluded his initial closing argument by disparaging defense counsel’s role by telling the jury “Now, this is Mr. Therrien-Power’s

turn to tell you why I'm wrong in all the important ways, but I'll be back with you in a couple minutes,” implying defense counsel would not be honest in his closing arguments. 7 RP 1115. He then began his rebuttal by disparaging defense counsel again by stating “Ladies and gentlemen, let's have a little instructional session on twisting facts and taking things out of context.” 9 RP 1242. During the course of his argument, Mr. Bowman described defense counsel’s closing as “an interesting argument from a rhetorical perspective.” 9 RP 1128. Finally, Mr. Bowman disparaged defense counsel in his concluding remarks to the jury by calling his argument “exaggeration and misconstrual of the testimony.” 9 RP 1129. Mr. Samaniego is entitled to a new trial to remedy this abuse.

*b. It is improper to suggest defense counsel is appointed.*

While appointed counsel must comply with standards which require minimum levels of experience, many people think appointed counsel will not represent a person as well as private counsel. *See*, Washington Supreme Court Indigent Defense Standards, CrR 3.1, *see also*, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1137 (W.D. Wash. 2013).

While the vast majority of public defenders do sterling and impressive work, in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance.

*State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956 (2010). This assumption has also been recognized in popular culture. Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, New York Times, Feb. 19, 2014, on page A10; *Last Week Tonight with John Oliver: Public Defenders* (HBO) (Sep 13, 2015), available at <https://www.youtube.com/watch?v=USkEzLuzmZ4>.

Mr. Bowman denigrated defense counsel when he suggested through cross examination that defense counsel was appointed. In Mr. Bowman's cross examination of Mr. King, who was Samaniego's investigator, Mr. Bowman focused on the investigator's qualifications. Mr. Bowman asked Mr. King "who pays your bill?" 7 RP 1054. The objection to this question was sustained. Mr. Bowman asked this question not to discover whether Mr. King was paid for his work, as he had already admitted to this, but to let the jury know Mr. Samaniego was represented by appointed counsel. In defense counsel's motion to dismiss, counsel stated he was put into a Hobson's choice of asking for

further instruction on this misconduct and confirm the juror's suspicions he was appointed. CP 57. This misconduct tainted the remainder of Mr. Samaniego's defense and entitles him to a new trial. *Monday*, 171 Wn.2d at 681.

*c. Asking the jury to determine which witnesses are liars is misconduct.*

It is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are lying. *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) (citing *State v. Casteneda-Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74 (1991)).

Arguing that jurors must disbelieve a witness or find the State's witnesses to be lying is misconduct. *State v. Barrow*, 60 Wn. App. 869, 875, 809 P.2d 209 (1991) (citing as example, *United States v. Richter*, 826 F.2d 206, 208-09 (2d Cir.1987); *United States v. Davis*, 328 F.2d 864, 867 (2d Cir.1964); *United States v. Hestie*, 439 F.2d 131 (2d Cir.1971); *People v. Ochoa*, 86 A.D.2d 637, 446 N.Y.S.2d 339, 340 (1982)). It violates the court's jurisprudence for a prosecutor to comment on the credibility of a witness or the guilt and veracity of the accused. *Monday*, 171 Wn.2d at 677.

In Mr. Bowman's closing argument, he invaded the province of the jury by suggesting they had to find officers had lied prior to

acquitting Mr. Samaniego. 7 RP 1108. Mr. Bowman stated that “if you’re going to lie to the cops, that’s probably not ... one you’re going to tell.” 7 RP 1108. This characterization of the evidence was unnecessary and put the jurors in the position where they had to decide that the police officers were lying about the statement Mr. Samaniego had made to them before they could acquit him. Because this misconduct invaded the province of the jury, Mr. Samaniego is entitled to a new trial.

*d. The State may not trivialize the burden of proof.*

Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (quoting *State v. Gregory*, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006)). A prosecutor commits flagrant and ill-intentioned misconduct by making burden-shifting arguments in closing. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 525, 228 P.3d 813 (2010).

Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

*In re Glasmann*, 175 Wn.2d at 706 quoting American Bar Association Standards for Criminal Justice std. 3-5.8 (2d ed. 1980).

Mr. Bowman spent some time explaining his view of reasonable doubt. He compared reasonable to possible doubt. 7 RP 1102. He then declared:

The difference between reasonable and possible is what you perceive it to be. I would say that is a possibility that a meteor could come out of the blue and wipe us all out right here as we sit.

7 RP 1102.

Defense counsel objected to this trivialization of the burden of proof, as well as Mr. Bowman's offering of his own opinion. 7 RP 1102. Mr. Bowman apologized for stating his personal opinion, telling the jury that it was a "slip" and he meant it was the opinion of the State. 7 RP 1102-03. He exacerbated this misconduct by putting the authority of the government behind it and then did not correct his statement on what reasonable doubt means. Mr. Bowman's trivialization of the burden of proof, comparing reasonable doubt to civilization being wiped out by a meteor, denied Mr. Samaniego his right to a fair trial.

*e. Cumulative effect requires dismissal.*

Each incident of misconduct warrants a new trial for Mr. Samaniego, but this Court should also find the cumulative effect of the

misconduct entitles him to a new trial as well. *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006). Because these acts of misconduct require prejudiced Mr. Samaniego and affected the jury's verdict, he is entitled to a new trial.

Mr. Samaniego's right to a fair trial was prejudiced by the State's misconduct. From the beginning of the case, the Court acknowledged that the primary issue was credibility. 8 RP 1219. Mr. Samaniego likewise argued that much of the State's case focused on witness credibility. 7 RP 1116. He discussed the inconsistencies in the State's case. 7 RP 1116 ("our witnesses can't decide what the evidence is"). He highlighted the failure of the State's witnesses to meet their own standards in conducting an investigation. 7 RP 1116 ("when an officer fails to write a report and write something down, there should be a concern.")

When the State focused its closing arguments upon the credibility and competency of defense counsel, while also trivializing the burden of proof, Mr. Samaniego was denied his right to a fair trial. The State cannot demonstrate beyond a reasonable doubt that the misconduct did not affect the juror's verdict. *Monday*, 171 Wn.2d at 680. This Court should grant a new trial to correct this error.

**6. Mr. Samaniego is entitled to a new sentencing hearing to determine whether the school zone enhancements should be run concurrently.**

*a. School zone enhancements may be run consecutively or concurrently to each other.*

The Supreme Court recently held that multiple protected zone enhancements imposed under RCW 69.50.435 may be run consecutively or concurrently to each other. *State v. Conover*, --- Wn.2d ---, 355 P.3d 1093, 1095 (2015). The court found Mr. Conover was entitled to a new sentencing hearing so that the trial court could determine whether to impose the sentences consecutively or concurrently. *Id.*

The Supreme Court found the language of RCW 69.50.435 to be ambiguous as to whether the trial court must run multiple enhancements consecutively only to their underlying crimes or also consecutively to each other. *Id.* at 1094-95; *see also, In Re Post Sentencing Review of Charles*, 135 Wn.2d 239, 247, 955 P.2d 798 (1998). By allowing courts the discretion to determine whether the sentence shall run consecutively or concurrently, meaning is given to the differences in language between the school zone enhancements defined in RCW 69.50.435 and the firearm and deadly weapon enhancements defined in RCW 9.94A.533(3) and (4).

*b. The Court found it lacked discretion to run the school zone enhancements concurrently to each other.*

The judgment and sentence reflects that Mr. Samaniego was sentenced to 40 months on count one, 40 months on count two and 24 months on count three. CP 100. Each of these sentences were ordered to be run concurrently to each other. *Id.* In addition, the court imposed a protected zone enhancement on both counts one and two. *Id.* These enhancements were ordered to run consecutively to the base sentence and to each other. *Id.* Mr. Samaniego was sentenced to a total of 88 months. *Id.*

At sentencing, Mr. Samaniego requested that the protected zone enhancements be run concurrently to each other. 7 RP 1194. When the court imposed its sentence, it stated “I believe under the law that they [the protected zone sentencing enhancements] do have to be served consecutively.” 7 RP 1203. Based upon this misunderstanding of the law, the court imposed a sentence of 88 months. 7 RP 1205. This misunderstanding is in conflict with *Conover* and must be corrected by this Court. Like Mr. Conover, Mr. Samaniego is entitled to a new sentencing hearing.

F. CONCLUSION

The promises made to Mr. Samaniego to get him to make his statement rendered the statement coercive and involuntary. The statement should have been suppressed.

The State failed to establish sufficient evidence to establish the substantial purpose of the hotel room where Mr. Samaniego and his family resided was to operate a drug dwelling. This charge should be dismissed for insufficiency.

Mr. Samaniego is entitled to a new trial because of the cumulative and singular impact of the misconduct the State committed. The State trivialized defense counsel, asked questions of defense witnesses designed to imply defense counsel was appointed, asked the jury to find State's witnesses were not telling the truth before finding Mr. Samaniego not guilty and trivialized the burden of proof.

Finally, Mr. Samaniego is entitled to a new sentencing hearing because the court imposed its sentence under the mistaken belief it was obliged to impose the school zone enhancements consecutively to each other.

DATED this 11th day of December 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 33097-4-III
v.	)	
	)	
RUDOLFO SAMANIEGO,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TAMARA HANLON	( )	U.S. MAIL
[tamara.hanlon@co.yakima.wa.us]	( )	HAND DELIVERY
YAKIMA CO PROSECUTOR'S OFFICE	(X)	AGREED E-SERVICE
128 N 2 <sup>ND</sup> STREET, ROOM 211		VIA COA PORTAL
YAKIMA, WA 98901-2639		

[X] RUDOLFO SAMANIEGO	(X)	U.S. MAIL
708154	( )	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	( )	E-MAIL BY AGREEMENT
1313 N 13 <sup>TH</sup> AVE		VIA COA PORTAL
WALLA WALLA, WA 99362		

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF DECEMBER, 2015.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710