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35752-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSE M. QUINTERO, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	2
V. <u>ARGUMENT</u>	12
A. <u>The Court Did Not Abuse Its Discretion In Excluding The Immigration Status Of Witnesses</u>	12
B. <u>The Court Did Not Prevent The Defendant From Presenting A Defense</u>	15
C. <u>The Court Did Not Err Or Abuse Its Discretion In Imposing The Fees</u>	17
VI. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

State Cases

Page No.

Salas v. Hi-Tech Erectors,
168 Wn.2d 664, 230 P.3d 583 (2010) 13

State v. Aguirre,
168 Wn.2d 350, 229 P.3d 669 (2010) 16

State v. Arroyo,
1 Wn. App. 2d 1010 (2017) 6, 7, 8

State v. Avendano-Lopez,
79 Wn. App. 706, 904 P.2d 324 (1995) 12

State v. Barry,
184 Wn. App. 790, 339 P.3d 200 (2014) 12

State v. Dodd,
181 Wn. App. 1029 (2014) 2

State v. Gomez,
180 Wn. App. 1012 (2014) 6

State v. Jones,
168 Wn.2d 713, 230 P.3d 576 (2010) 16

State v. Maldonado,
4 Wn. App.2d 1017 (2018) 6

State v. Ramirez,
191 Wn.2d 732, 426 P.3d 714 (2018) 17

TXI Transp. Co. v. Hughes,
306 S.W., 245 13

Court Rules and Statutes

Page No.

ER 402	13
ER 403	13
ER 413	12
HB 1783	17
RCW 10.101.010.....	1, 17, 18
RCW 36.18.020.....	17
RCW 43.43.7541.....	1, 18
RCW 72.11.020.....	18

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the court act within its discretion by excluding prejudicial questioning which would falsely suggest that the witnesses only cooperated in the prosecution in exchange for a letter of support for use in a U-Visa application thereby informing the jury of the witnesses' immigration status?
2. The sentencing court must impose the criminal filing fee in the absence of a record of indigency under RCW 10.101.010(3)(a) through (c). Where there is no record that the Defendant is indigent under this standard, did the court err in imposing the mandatory fee?
3. The sentencing court must impose the DNA fee under RCW 43.43.7541, unless there is a record of a previous collection of

this fee by the state. Where there is no record of a previous collection and where the court has discretion to impose the fee even in the presence of such proof, did the court err in imposing the mandatory fee?

IV. STATEMENT OF THE CASE

The Defendant Jose Quintero has been convicted by a jury of the first degree murders of Janette Rojas Balderas and Jon Cano and of unlawful possession of a firearm in the first degree. CP 191, 199. This case represents yet another informant murder in Walla Walla. RP 515-16, 518. *See also State v. Dodd*, 181 Wn. App. 1029 (2014) (unpublished) (describing other informant murder).

Between 2014 and 2015, Ms. Rojas assisted the police in fifteen controlled buys. RP 960-62. When she began to assist police, Ms. Rojas had no enemies. RP 963. After she had been working with them for some time, Ms. Rojas told police that she learned the 18th Street gang had “green-lighted” her, i.e. identified her as an assault target. RP 963. Prosecutors had only gotten around to charging five of the fifteen controlled buy cases involving Ms. Rojas. RP 965. And only one defendant, Charley Lozano, had learned her

identity during the discovery process. RP 966. Mr. Lozano's sister-in-law Alexis Gutierrez had also sold drugs to Ms. Rojas in a controlled buy, such that the unmasking of the informant would have informed the Lozano family that Ms. Gutierrez was likely to be charged with a crime in the near future. RP 1183. Charley Lozano let it be known that he wanted Ms. Rojas dead. RP 702-03.

It was the night of Charley Lozano's going-away party, while he was still out of custody and just two days before he was to be sentenced. RP 966-67, 1136-37, 1319. Ms. Rojas and her boyfriend Mr. Cano were sitting outside smoking on a late summer night at the home Ms. Rojas shared with her three children. RP 598-99, 625, 629, 959. Ms. Rojas was shot eleven times – the three shots in her upper torso/back being the fatal injuries. RP 558-61, 573-74, 578. She fell forward with her hands covering her face. RP 612, 618-19. Mr. Cano was shot five times – in the legs as he tried to run away, and then executed with a bullet that traveled up his spine and ended in his brain. RP 580-81, 586, 1313. Ms. Rojas' son held his mother as she died. RP 617-18, 629. Her family was too terrified of retribution to even participate at the sentencing hearing. RP 1469.

The Defendant Quintero was identified as one of the shooters

by his multiple confessions and the forensic evidence connecting him to the weapon. CP 92-94; RP 1312-16. Charley Lozano was the other shooter; his brother Jose Lozano drove the vehicle. RP 651, 1127-30. Many witnesses identified the Defendant as the person who left shell casings at two different drive-by shootings shortly before the Rojas-Cano murders. RP 734-35, 737, 762-63, 767, 796-99, 803, 817-18, 822-23, 826-27, 913. Ballistics determined the same weapon used in the drive-by shootings was used in the murders. CP 106-08, 113-29; RP 879-89, 894-95, 989-1104, 1160-63, 1174-76, 1186-92. The State's case included 23 witnesses and 160 exhibits. RP 1333.

While awaiting trial, the Defendant composed narcocorrido lyrics which would be admitted against him. CP 61-66, 141-43; RP 666, 915-17, 925. The lyrics describe that the victims twitched as they expired and that he desires to murder "snitches." CP 109-10 (lyrics name actual people and describe actual events), RP 670-77, 1316-18. Cf. RP 536, 540, 611-12, 617, 769, 774-77.

... one eight seven green light to all them known ratas
... and that fagget lil one, homeboy left yo ass paralyzed
... siempre listos for the blatin
... homies on the prowl
caught a slob slipping trigga-trippin did em foul
but once again these muthafuckas always snitchin
what must it take for a rat to stop talkin

take care of it yourself and you better gets to walkin
you get the cold metal and you point at their dome
let them know they dead and put some lead up in the
head
the muzzle keeps flashin. it keeps the body shaking
[balazo] por [balazo] all the bullets it be takin
a change of scenario – siempre rente tuchra
be ready for the gangsta shot and always keep a tuska.

CP 62-66. The lyrics also described his concern that fellow
gang members/cellmates might testify against him.

... there's only so many
down to pull the trigger sitting stuck with the celly
pay attention to that gut feeling when you riding
cuz that muthafucka next to you inside could be crying

CP 61.

While in jail, the Defendant shared a cell with fellow 18th Street
Gang members Diego Bante Rivera and Birzavit Carmona
Hernandez. RP 640, 1125. He confessed to both Mr. Bante and Mr.
Carmona that he killed Ms. Rojas and her boyfriend, because Ms.
Rojas was a police informant. RP 516-23, RP 648-651, 1126-32.

After Mr. Bante was released from jail, police interviewed him
about the Rojas/Cano murders. RP 1134, 1140. Complying with
gang code, he refused to cooperate. RP 1134, 1141. However, his
gang believed he had assisted police, and so they shot him. RP
1133-34, 1142. Paralyzed from the chest down, he realized the gang

has no loyalty to him, and he cut ties and cooperated with police. RP 522-23, 1134-35, 1145. He did not ask police for any consideration. RP 1202-03.¹

Mr. Carmona was in jail for participating in a fight intended to punish Andres Solis for testifying² against a fellow gang member. RP 643-47. During the fight, Roberto Arroyo pulled out a gun and killed Juan Pedro Martinez and shot Andres Solis.³ RP 647. Mr. Arroyo would plead guilty to the murder. *Id.* However, until everyone's roles could be determined, the State charged all participants in the fight with Mr. Martinez's murder, Mr. Solis' assault, and with intimidating Mr. Solis. RP 647.

Mr. Carmona approached police with information; he did not ask police for any consideration for this information. RP 1202-03. After the fact, his attorney negotiated a plea in exchange for Mr. Carmona's testimony (1) against the Defendant Mr. Quintero in this murder case, (2) against his co-defendant Mr. Arroyo, and (3) against

¹ See also *State v. Maldonado*, 4 Wn. App.2d 1017 (2018) (unpublished) (describing how Mr. Bante Rivera testified in Maldonado's trial that he had been shot and left for dead).

² Mr. Solis testified in Benito Gomez's trial for murder. See Respondent's Brief at 2-6, *State v. Gomez*, 180 Wn. App. 1012 (2014) (No. 31050-7-III) (unpublished).

³ See also Appellant's Opening Brief at 2 ("during the fight Mr. Arroyo fired several shots from a gun, injuring Mr. Solis and killing Juan Martinez"), *State v. Arroyo*, 1 Wn. App. 2d 1010 (2017) (No. 34593-9-III) (unpublished).

George Cantu in an Oregon prosecution. CP 241-43, 260-61. The State agreed to reduce the original charges to the more appropriate charges of misdemeanor assault and criminal mischief. *Id.* Mr. Carmona's testimony was to be consistent with his statements to police as detailed in the agreement. *Id.* The Defendant Quintero had confessed to Mr. Carmona that he shot and killed both victims in the front yard of 40 East Walnut Street on August 8, 2018, because Ms. Rojas had been working as an informant. *Id.* The Defendant admitted that he used the same gun in a drive-by shooting at the TAJ Food Mart in Milton-Freewater, but destroyed it after the murders. *Id.* Mr. Carmona could provide the vehicle and the identities of the other shooter and the driver. *Id.* He provided details to police that he could not have learned otherwise, e.g. the caliber of weapons and the position of the victims' bodies. RP 517-20.

On February 29, 2016, Mr. Carmona entered into a plea agreement in which the parties agreed that he would receive the maximum penalty of 364 days for each misdemeanor. *Id.*; CP 257, 241-43, 260-61. However, Mr. Carmona could not be sentenced until the Defendant's case was resolved, therefore, his agreement required that he waive his right to speedy sentencing and agree to remain in

custody until sentencing. CP 241-43, 260-61.

The Defendant was not charged until April 7, 2016. CP 1. By then Mr. Carmona had been in custody for half a year. *Id.* The Defendant did not go to trial for another year and a half, such that Mr. Carmona served more time than anticipated under the plea agreement. CP 258; RP 2. Mr. Carmona's attorney asked that he be released after serving the full sentence but prior to the Defendant's trial, informing the State for the first time that Mr. Carmona had an ICE hold. CP 218; RP 92. The prosecutor was concerned that, if released, Mr. Carmona would be deported or would flee for his safety because the 18th Street Gang would try to kill him. CP 259. The prosecutor was also concerned that the gang might kill Mr. Carmona in jail. *Id.* Both Mr. Carmona and the State asked for a deposition to perpetuate his testimony. CP 215-21, 244-55, 259. The Defendant opposed the motion. CP 224-43, 262-67. Mr. Carmona was released from custody, and a material witness warrant issued to obtain his testimony at the trial. CP 290-92; RP 635-713.

In motions in limine, the prosecutor asked that Mr. Carmona's immigration status be excluded as prejudicial and irrelevant. CP 270; RP 91-92. The defense intended to argue that Mr. Carmona's

decision to testify was motivated by the State's offer to write a letter for use in a U-Visa application. CP 32; RP 92. In fact, this was not part of plea negotiations. CP 241-43, 260-61; RP 92 ("When he pled guilty, his immigration was not even in issue."). The prosecutor explained that much later, when the State become concerned that Mr. Carmona would be deported before the Defendant's trial, the State only agreed "to consider" providing such a letter and only for the purpose of keeping him available for trial. CP 258; RP 92-93, 168. However, by the time of trial, Mr. Carmona had made no application for a U-Visa, and the prosecutor had written no letter. RP 93. The prosecutor opined that if the State provided such a letter, it would have no effect on the federal government's decision to deport him, because he would have completed testifying. RP 93.

The witness testified that he did not understand the significance of such a letter. CP 165-66. He expected to be deported based on his gang history. CP 163. His counsel informed the court: "It is quite possible that Mr. Carmona-Hernandez will not be available to provide testimony during the August 2017 trial if he is either (a) in the custody of ICE or (b) deported." CP 221.

At trial, Mr. Bante testified that he received no benefit for

cooperating with police or for testifying. RP 1146. He denied that he was testifying in exchange for police protection. RP 1153. Defense counsel asked that she be permitted to impeach the witness' testimony with evidence of the prosecutor's intention to write a letter for Mr. Bante's U-Visa application. RP 1154. Without inquiring of the prosecutor, the court denied the request, noting that immigration status information was "highly prejudicial, given the political climate today." RP 1155.

The defense case was multifaceted. It attacked the crime scene investigation as inadequate. RP 1339, 1346-47. It attacked the forensic testing as inconclusive or outcome driven. RP 1343, 1346, 1350. Counsel argued that there were any number of suspects, because Ms. Rojas had been involved in 15 cases. RP 1374, 1377. But the police were motivated to close this case, because Ms. Rojas had worked for them. RP 1375-76.

Defense counsel argued Eduardo Chavez was the more likely killer. RP 1194-1200, 1205-13, 1345-47 (holds the guns for the gang). After all, he had originally been tasked with the job. RP 1211. Counsel argued that Cisco Gonzalez may be tied to the gun and therefore be the killer. RP 1338 (if the jury disregarded witness

testimony and interpreted the video evidence differently). And she argued at great length that gang member witnesses were unreliable. RP 1367 (informants provided incorrect or contradictory information); 1339-42 (Mr. Gonzalez had not immediately reported the July 20 drive-by shooting); 1356-57, 1371 (Mr. Bante may have lied to protect Eduardo Chavez who was his friend); 1360, 1363-65, 1372-73 (Mr. Carmona was motivated by the plea deal to implicate the Defendant).

In the end, the Defendant was convicted of both murders. RP 1430-31. The court imposed 780 months (65 years) incarceration and \$14,048.26 in restitution. CP 201; RP 1473-74. The court declined to impose various costs of prosecution initially written into the judgment and sentence (striking out witness, deposition, and jury costs, and crime lab, attorney, and defense expert fees). CP 201.

I do find the defendant is indigent and has appointed counsel, and obviously, in this situation, will not be able to pay the discretionary amounts. So I'm imposing the mandatory amounts. The mandatory amounts are \$200 for the criminal filing fee, \$500 for the crime victim fund, and \$100 DNA collection fee.

RP 1473. The order of indigency on appeal indicates only that "the Defendant lacks sufficient funds to prosecute an appeal." CP 213.

On appeal, the Defendant challenges the exclusion of

immigration status evidence.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE IMMIGRATION STATUS OF WITNESSES.

The Defendant challenges the trial court's exclusion of the immigration status of witnesses Mr. Bante and Mr. Carmona. Questions of the admissibility of evidence are within the trial court's considerable discretion to balance the probative value against possible prejudicial impact – and are reviewable only for manifest abuse of discretion. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014). Evidence likely to stimulate an emotional response rather than a rational decision creates a danger of unfair prejudice. *Id.* Questions regarding a witness' immigration status are "irrelevant and designed to appeal to the trier of fact's passion and prejudice." *State v. Avendano-Lopez*, 79 Wn. App. 706, 721, 904 P.2d 324 (1995).

Courts in other jurisdictions have uniformly condemned questions designed to appeal to national or other prejudice. At least one court has held that the above principle "is equally applicable to evidence as to an individual's immigration status."

Id. (citations omitted).

Under newly adopted ER 413, a witness' immigration status is presumptively inadmissible in a criminal case. ER 413. Immigration is a politically sensitive issue which can "inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010). "[T]he risk of prejudice inherent in admitting immigration status [evidence is] great," and improper admission is rarely harmless. *Id.* at 673. Racial and ethnic stereotyping inevitably results from the unnecessary injection of immigration status evidence into the fact-finding process. *TXI Transp. Co. v. Hughes*, 306 S.W., 245 3d 230 (Tex. 2010).

Evidence may be excluded when it is not relevant. ER 402. And it may be excluded when the probative value is substantially outweighed by unfair prejudice, confusion of the issues, or for misleading the jury. ER 403. Here the Defendant intended to offer the information in order to confuse the jury with a false argument.

In motions in limine, the Defendant asked to be permitted to disclose Mr. Carmona's immigration status. CP 32. The defense made no similar written motion in regard to Mr. Bante.

The Defendant claimed that the State had offered immigration benefits “in exchange” for Mr. Carmona’s testimony. CP 32. That is not the record. Mr. Carmona gave information to police without any consideration offered in return. He then agreed to testify under a very detailed agreement. CP 241-43, 260-61. Nowhere in that agreement was there any offer for immigration assistance. The prosecutor’s only interest was in keeping Mr. Carmona in country until the trial was concluded. Much after the negotiation was concluded, the prosecutor offered to “consider” writing a letter to obtain that result. CP 168. Therefore, the Defendant’s impeachment argument is not supported by the record. The prosecutor’s offer was not “in exchange” for anything.

During Mr. Bante’s testimony, the defense asked permission to introduce Mr. Bante’s immigration status in order to allege that the prosecutor intended to provide a U-Visa letter to Mr. Bante. The Defendant did not make any offer of proof. Therefore, the record we have is limited to Mr. Bante’s denial that he was receiving any benefit and police confirmation that he cooperated without consideration. The record does not tell us whether the State intended to write such a letter or, more importantly, whether Mr. Bante was aware of the

State's intention. Absent this offer of proof, the Defendant's question risks incredible prejudice where zero probative value exists. Mr. Bante's answer indicates he was not aware, did not consider it a benefit, or did not consider it to be related to this case. His paralysis and exit from gang life meant he was no longer a Priority 1 threat to public safety. CP 286. And any offer of assistance, if it exists, was more likely to be related to Mr. Maldonado's trial eight months earlier in which Mr. Bante was the crime victim.

The court did not abuse its discretion in excluding evidence where it was not relevant, where the defense argument was misleading, and where unfair prejudice substantially outweighed any possible probative value. There was tenable basis for the court's decision.

B. THE COURT DID NOT PREVENT THE DEFENDANT FROM PRESENTING A DEFENSE.

The Defendant has framed what is essentially an admission of evidence question in constitutional terms. He complains he was prevented from cross examining witnesses sufficiently to present a defense. The Defendant does not have a right to present a defense consisting of irrelevant evidence or inadmissible evidence. *State v.*

Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). As addressed *supra*, the evidence was both irrelevant and inadmissible.

And in fact, the record demonstrates that the Defendant was not prevented from putting on a very strong defense. The Defendant challenged the forensic evidence and the integrity of the investigation. The Defendant argued that there were many more likely suspects than he. And the Defendant challenged the testimony of many witnesses, including Mr. Carmona and Mr. Bante. The Defendant was not prevented from arguing that either witness was unreliable, inconsistent, untrustworthy, biased, or motivated to lie by self-interest.

Significantly, the Defendant argued that Mr. Carmona received a substantial reduction of charges. RP 1372-73 (“facing life in prison,” he “took the first opportunity he could to try to buy himself freedom”). The Defendant claimed that the narco-ballad which Mr. Carmona provided to police described Mr. Carmona’s crimes, not the Defendant’s. RP 1364-65.

As to Mr. Bante, the Defendant claimed the confession was a factual impossibility. RP 1233, 1357-58 (other cellmate denied hearing any confession despite the close quarters). He argued Mr.

Bante, motivated to protect the real killer Eduardo Chavez, conspired with Mr. Carmona to frame the Defendant. RP 1358-59. The Defendant argued that Mr. Bante had allowed him to take the rap for Mr. Bante's own drive-by shooting, admitting his own culpability only after receiving immunity. RP 1372.

The Defendant was not prevented from presenting all of these arguments to the jury in order to impeach and discredit the witnesses.

C. THE COURT DID NOT ERR OR ABUSE ITS DISCRETION IN IMPOSING THE FEES.

The Defendant challenges the imposition of the criminal filing fee and DNA collection fee following HB 1783 and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) which finds the changes in law apply to cases not yet final on appeal.

Under the new law, the court must impose the criminal filing fee unless the defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h). Here the judge stated that the Defendant was "indigent," but did not indicate that the indigency was that defined under RCW 10.101.010(3) (a), (b), or (c). On the contrary, the order of indigency indicates that the Defendant's indigency is under subsection (d), i.e. lacks funds to hire an attorney

for appeal. This type of indigency does not affect the court's mandate to impose the criminal filing fee. Therefore, the court did not err.

The new law gives the court discretion to impose the mandatory DNA fee if the Defendant has actually paid (not merely been assessed) the fee in the past for previous felonies. RCW 43.43.7541. While the fee has likely been imposed in previous judgments against the Defendant, there is no proof on the record. Moreover, there is no record that that such a fee was ever actually "collected," as the new law requires before the court's discretion can be triggered. Therefore it remains mandatory. Even if there were proof on the record of past collection, the court would still have discretion to impose the small fee. Under the new law, the court's discretion is not limited by RCW 10.101.010(3)(a) through (c). Because there is no record of previous collection and because, even with such a record, the court has discretion, there was no error in imposing the DNA fee.

As a practical matter, the Defendant will likely be incarcerated for life. The Department of Corrections will disburse money from his inmate account under the authority of RCW 72.11.020. CP 202. He will not suffer hardship due to these disbursements. His food, shelter,

and medical care will be provided by the state. It is appropriate for the Defendant to make these small acts of reparation as ordered.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: January 22, 2019.

Respectfully submitted:



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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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