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NO. 36690-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

PEDRO CADENAS,

Appellant.

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

The Honorable Alexander Ekstrom, Judge
The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding the record did not establish bias on the part of Juror Six.

2. The trial court erred in denying appellant Pedro Cadenas' for cause challenge to Juror Six.

3. The sentencing court erred in failing to give meaningful consideration to the relevant factors of youthfulness at Cadenas' sentencing hearing.

4. The sentencing court erred in failing to recognize its discretion impose an exceptional sentence downward on the basis of youthfulness, and its potential discretion to waive the mandatory firearm enhancement on that same basis.

5. Trial counsels' failure to cite to established jurisprudence authorizing an exceptional sentence on the basis of youth, violated Cadenas' Sixth Amendment right to effective assistance of counsel, and contributed to the sentencing court's error.

6. The sentencing court erred in imposing the discretionary costs of community custody on Cadenas, an indigent defendant.

Issues Pertaining to Assignments of Error.

1. Juror Six indicated he could not be fair in the case due to the fact his mother had been raped and murdered. Despite repeated

explicit questioning, he never unequivocally stated he could be fair or was otherwise rehabilitated. Did the trial court err in concluding the record did not support a showing of bias?

2. Given the above, did the trial court commit reversible error by denying Cadenas' for cause challenge?

3. Defense counsel argued for a low-end sentence on the basis of Cadenas' youth and history of abuse. However, the court failed to consider systematically the factors of youthfulness discussed in relevant jurisprudence, and failed to apply those factors to the specifics of Cadenas' case, except to improperly consider at least one of those factors as aggravating rather than mitigating. Did the sentencing court commit reversible error by failing to meaningfully consider Cadenas' youthfulness as factors in mitigation at sentencing?

4. The trial court also failed to acknowledge its discretion to rely on youthfulness as a justification for an exceptional sentence downward, and potentially as a basis to waive the otherwise mandatory five year firearm enhancement. Did the court abuse its discretion by failing to recognize and analyze its discretion to impose an exceptional sentence downward, or potentially to waive the firearm enhancement?

5. Trial counsel also failed to alert the sentencing court to relevant jurisprudence discussing the framework for the analysis of

youthful characteristics at sentencing, and also failed to alert the court to its discretion to impose an exceptional sentence downward or potentially waive the firearm enhancement. To the extent these failures to research and cite to relevant law contributed to the court's decision to impose a high-end sentence, was counsel's performance deficient, requiring reversal?

6. After finding Cadenas indigent and waiving all other non-mandatory fees both orally and in writing, the trial court imposed the discretionary costs community custody in block of preprinted text in a different section in the judgment and sentence. Does the imposition of this cost violate recent amendments to the statute on Legal Financial Obligations (LFOs)? Was the cost imposed inadvertently? Is remand to strike the costs the proper remedy?

B. STATEMENT OF FACTS

1. Charges & Plea

The Franklin County Prosecutor's Office charged Pedro Cadenas with first degree murder, second degree murder,[1] second degree unlawful firearm possession, and attempted theft of a motor vehicle. CP 29-30. The State alleged that on July 4, 2017, Cadenas, who was seventeen years

[1] Although only one death occurred, Cadenas was charged with both Murder I and Murder II. The prosecutor explained these were alternate theories of prosecution: felony murder I on the basis of the attempted robbery, and murder II on the basis of intent to kill. 3RP 297-98.

old at the time, attempted to take a black sport utility vehicle (SUV) from Manuel Molina, a.k.a. Jorge Rodriguez, and in furtherance or flight from that attempted crime, shot Molina who died of his injuries several weeks later. CP 3.

Cadenas pleaded not guilty to all counts and the case was tried by jury. 3RP 223.

2. Voir Dire

During individual questioning of potential jurors, the following exchange occurred between Juror Six and defense counsel:

> Q. Good morning. We noticed in the questionnaire that you completed that there was some trauma in the past with your mother being murdered and raped. That's pretty serious. That's why we're asking you questions outside of the jury so that you don't cause any embarrassment or revelation of your personal history. We're just wondering how has that affected, you, and would it affect you to go through a murder-type trial?
>
> A. Well, you know, that was something - - I don't know for sure. You know, since yesterday certainly have been reflecting on that period of time in my life. But, you know, I don't know how emotional or whatever I'd get about it, but I think I'd be relatively stable.
>
> Q. So you don't feel like it would distract you in any way?
>
> A. Well, that's the part that I'm not really clear on if - - if, yeah. I don't think it would, but you never know.
>
> Q. If it did distract you, would you be willing to bring it to the Court's attention?
>
> A. Sure.

3RP 42.

After discussing another issue with the juror, defense counsel returned to the questionnaire.

> Q. And then you also indicated in your questionnaire that you feel like you could not be fair and impartial in this case regarding your history with your mother's trauma and those types of things. So to balance that out obviously you thought about it last night. Has your opinion changed?
>
> A. Well, I can't say it's changed. It's basically - - I put that down just as a flag, if nothing else, because I think it would be OK, but, you know, I don't want to go with the pretense that - - I'll definitely, you know, be fine and wouldn't have some, you know, it wouldn't affect me. I don't think it would, but, you know, I don't know for sure.

3RP 43.

The prosecutor then questioned the juror who explained the homicide occurred in 1980. 3RP 43. The juror also had served on a criminal jury trial for a DUI around 1992. 3RP 43-44. The following exchange occurred:

> Q. And so were you able to deliberate in that process and come to a verdict?
>
> A. Yeah. The jury ended up hung.
>
> Q. I wasn't going to ask you about that, but it came out. Did anything about that trauma that you had in 1980 come over into a criminal trial? I recognize it's unrelated.
>
> A. No.

3RP 44.

The parties also discussed with Juror Six that he knew another judge who was not presiding over this trial. 3RP 42-43. When asked if

his friendship with another judge would influence his decision on the outcome of this case, Juror Six unequivocally stated, "No." 3RP 43.

The trial court also had the following exchange with Juror Six:

> Q. … I read in your questionnaire that you read a couple of articles in the newspaper about the case, and you don't remember any details. Anything about what you read that might impact your ability to fairly and objectively weigh the evidence?
>
> A. I don't know enough about it that that would weigh my decision one way or the other.
>
> Q. So you would be able to listen to the facts in the course of the trial and make a decision based on those facts
>
> A. Correct.

3RP 44.

Defense counsel then moved to strike Juror Six for cause. 3RP 45. Counsel noted her concern was both "the risk involved in losing a juror in the middle of the trial if something were to happen" and "the fact that he answered the question on the juror questionnaire differently than he did on the stand but still wavering." 3RP 45.

The State responded by arguing:

> Your Honor, the witness indicated that this occurred in 1980, has previously served on a jury that was more close [sic] in time. I recognize that it was a DUI case. Still indicated that he could follow the instructions. The juror is aware of those instructions, I don't think gave any kind of answer indicating clearly that he would not be able to sit through this particular trial.

3RP 45.

The trial court denied the for cause challenge, reasoning, "Listening to the statements, the testimony of the prospective juror this morning, the Court does not believe that it's been established that he could not be fair and impartial in this case." 3RP 45-46.

Ultimately, Cadenas utilized four of his eight peremptory challenges and Juror Six sat on the jury. Supp CP ___ (sub. no. 116, "Peremptory Challenges"); Supp CP ___ (sub. no. 110, "Jury List"); 3RP 215, 267-68. Juror Six remained in seat number six and was not selected as an alternate. 3RP 267-68, 818.

3. Trial Evidence

At trial, the State presented undisputed evidence that Manuel Molina, who went by the name Jorge Rodriguez, was shot by an individual or group of individuals who tried to steal his black SUV. 3RP 442, 472, 621. Although there were no direct witnesses to the shooting, the State obtained several surveillance videos, including one video showing a person leave the black SUV from the passenger seat while Molina exited the vehicle from the driver's seat. 3RP 479, 548. Molina flagged down passers-by who called Molina's daughter, police, and medics to the scene. 3RP 352, 443.

One passerby testified that Molina, speaking in Spanish, had told him a group of people—not an individual—had tried to steal his car, he

had resisted, and been shot. 3RP 447; see also 3RP 372-73 (officer testifies other witness was unclear whether Molina stated group or individual). Another passerby said Molina stated it was an individual. 3RP 442.

EMTs were on scene for approximately 15-20 minutes attempting to establish an airway, but had difficulty. 3RP 322-34. Molina then lost consciousness shortly after being placed into the ambulance. 3RP 347. The EMTs continued their efforts while en route to the hospital and testified they established an airway after making an incision. 3RP 322. However, the emergency room doctor opined that Molina arrived to the hospital with an airway inserted in the wrong place, and they lost his pulse shortly thereafter. 3RP 335. The ER doctor then made another incision, established an airway, and re-established a pulse with CPR, but Molina never re-established independent breathing. 3RP 335, 337. Molina later died. The autopsy doctor opined Molina's death was caused by lack of oxygen to his brain, and such brain death could be caused by a failure to timely place the air tube in the correct location, though he was reluctant to question the decisions of the EMTs given that was not his area of expertise. 3RP 565, 567-68.

DNA and fingerprint evidence was collected from the inside of the SUV, as well as from Molina and Cadenas. 3RP 534-35. One sample of

DNA from a beer can inside the vehicle showed Molina was a contributor and Cadenas was not. 3RP 600,612. A fingerprint on the same can also matched Molina, and no prints were discovered matching Cadenas. 3RP 426, 428. Several other DNA samples from the passenger side of the vehicle were collected, and could have been tested, but for reasons that were not explained, the lab never received permission to test the samples and so they were never compared to Cadenas' DNA. 3RP 585-87, 613.

The primary dispute centered on identity. Cadenas' ex-girlfriend, Julia Castillo, testified she saw Cadenas leave a barbeque that evening wearing clothing similar to that in the video, and he returned "drenched" and "covered" in blood on his shirt and left arm. 3RP 683, 687, 695. She testified that when she asked him what happened, he told her, "I had to do it." 3RP 688. Castillo also testified she was 100% certain Cadenas was the individual depicted in the video, on the basis of his clothing and his build. 3RP 698-99. She also testified that Cadenas called his sister from the barbeque, and that his sister arrived along with others, who transported Cadenas to a hotel and provided him with a change of clothes. 3RP 690-93. Castillo denied any involvement by herself or her friends in procuring clothing or transportation for Cadenas. 3RP 697. Castillo also denied ever being told by police officers that she could be facing criminal charges for assisting Cadenas. 3RP 699. However, a police officer testified that

he told Castillo she would be charged with rendering criminal assistance unless she told him something to make him believe otherwise. 3RP 735.

Cadenas' sister, Zeima Cadenas, also testified. She agreed she had received phone call from her brother that evening, he sounded "scared" and in need of help, she arranged for food and transportation to a hotel, and Castillo's friend gave him clothes. 3RP 365, 641. Ms. Cadenas also testified she gave Cadenas almost all of her rent money. 3RP 642. She testified, however, that Cadenas was not covered in blood, but looked "dirty" because he had been homeless, and had recently been barbecuing. 3RP 654. Ms. Cadenas also testified the individual depicted in the video leaving the SUV passenger seat was not Cadenas, and she was familiar with his appearance, including how he ran, based on his participation in soccer as a child. 3RP 729. Ms. Cadenas agreed with the prosecutor that she was very close to her brother and would do almost anything to help him. 3RP 732.

The prosecutor also confronted Ms. Cadenas with various inconsistent statements she had made to police detectives in pre-trial interrogations, statements which implicated Cadenas in the murder. 3RP 643-45. However, Ms. Cadenas also testified that law enforcement had lied to her, telling her they had DNA and fingerprint evidence conclusively establishing Cadenas' guilt, and they had threatened to send

her to jail and ensure her young children were either taken away or never returned to her if she did not tell them what they wanted to hear. 3RP 646, 653, 659. Ms. Cadenas then testified that the State had made good on its threat by arresting her and taking her infant daughter away to ensure her testimony at trial. 3RP 646, 651. The prosecutor did not attempt to refute these claims, and in fact defended the officer's misstatements about evidence, their threats to arrest her, and their threats that her children would be taken away and possibly never returned by CPS, all as valid interrogation techniques. See 3RP 660 (prosecutor stating, "And that's always a possibility in these things," referring to criminal charges and removal of children), 809-10 (prosecutor arguing in closing, "Police oftentimes will say things to people who don't really want to help them …").

4. Closing Arguments & Verdicts

In closing argument, the parties agreed Cadenas was killed by a firearm; the dispute centered on the identity of the person who killed him. 3RP 793. The prosecution pointed to Castillo's testimony and 100% certainty identifying Cadenas in the surveillance video depicting the individual leaving Molina's vehicle. 3RP 777. The State urged the jury to find this identification credible because Castillo was a "close friend" of Cadenas, was familiar with him, and had testified she had the ability to

identify him even in dim lighting. 3RP 777. The State urged the jury to find Cadenas' sister was biased and not credible when she testified the person in the video was not Cadenas. 3RP 810.

Defense counsel urged jurors to consider that officers had lied to Ms. Cadenas and threatened her with removal of her children and incarceration, and threatened both her and Castillo with criminal charges if they did not testify. 3RP 796-98. The State essentially conceded the factual assertions underpinning these arguments, but argued the officer's statements were reasonable. 3RP 809-10. Counsel also pointed out Castillo was not a "good friend" but in fact an ex-girlfriend, who was "an ex for a reason." 3RP 777. Surveillance video did not show the attacker covered in blood, yet Castillo had manufactured her testimony to placate officers by testifying Cadenas was "drenched" and "covered" in blood upon his return to the barbeque. 3RP 800-03. She had also lied about her interactions with officers, as shown by the detective's candid testimony that he had told her she was facing charges for rendering criminal assistance unless she told him something that caused him to believe otherwise. 3RP 798. Counsel urged the jury to find Castillo was biased and had a motive to lie. 3RP 798, 799, 803.

In addition, counsel pointed out various holes in the State's case. The time stamp on certain segments of key surveillance video did not line

up with the times Castillo had testified Cadenas was allegedly absent from the barbeque. 3RP 796. The State also had collected "a pile of DNA" from inside the SUV that for unexplained reasons "they didn't bother testing." 3RP 808. Furthermore, the DNA and fingerprint evidence they did process showed evidence Molina was in the vehicle, but no evidence linked Cadenas to the crime. 3RP 805-06.

After deliberating, the jury returned guilty verdicts for first degree murder with a firearm, second degree unlawful firearm possession, and attempted theft of a motor vehicle. CP 92, 93, 95, 96. The jury acquitted Cadenas of second degree murder. CP 94.

5. Sentence & Appeal

Despite the seriousness of the conviction, and Cadenas' relative youth, it appears neither party submitted a written sentencing motion. The sum total of all materials the court considered, in addition to the evidence at trial, were as follows: a three page report prepared by a Department of Corrections (DOC) community corrections officer (CCO) primarily addressing Cadenas' disruptive behaviors during his incarceration; two statements by Molina's family members addressing the impacts of Molina's death on their lives; a letter from Cadenas' mother, Maria Quintera, discussing Cadenas' childhood; and the oral arguments of the parties. 4RP 13-21 (family impact statements), 21-34 (State's arguments),

34-37 (Quintera's letter), 40 (court's consideration of DOC report), 40 (allocution); CP 99-100 (CCO Risk Assessment Report).

The State argued the behavior was egregious because Cadenas and Molina were strangers. 4RP 22. The prosecutor also raised the issue of Cadenas' youth and addressed it as follows:

> Your Honor, looking at this, looking at the criminal history of this particular defendant -- and I recognize there is a lot of discussions about a person in their youth and we need to consider that. It was originally our understanding that we were going to perhaps hear information about why that should be some kind of a mitigation. But I offered a counter to this mitigation. I think we actually have aggravators as far as -- not aggravators in the sense of exceeding beyond the standard range, but aggravators that really show the defendant's particular lack of remorse and lack of changes, lack of being affected at all, in any way, since he has been incarcerated on this matter.

4RP 26-27.

The State pointed to Cadenas' juvenile criminal history and disruptive behavior while incarcerated on the present charges to argue he displayed a pattern of increasingly violent behavior that had gone uncorrected. 4RP 23-24. The prosecutor argued his assaultive behaviors toward other inmates and jail staff coupled with his lack of remorse showed he was a danger to the community, lacked any amenability to treatment, and should therefore be locked up for as long as possible. 4RP 27-31.

Defense counsel asked for 28.4 years of incarceration, which corresponded to 381 months (the bottom end of the standard range plus the 60 month firearm enhancement), out of consideration for Cadenas' youth and childhood history. 4RP 39.

Counsel pointed to the letter from Cadenas' mother, Maria Quintera, which stated the following. She had been deported and so was not available to attend the hearing. 4RP 37. She felt partly responsible for failing to provide adequate parental guidance. 4RP 34.

Cadenas' childhood was characterized by violence and loss. Quintera was just twelve years old when she began a relationship with Cadenas' father, who was 25 years old. 4RP 35. Quintera became pregnant at age thirteen and for some time lived on the streets after fleeing sexual abuse by her father at home. 3RP 35. Although Cadenas' father was "manipulative," "emotionally and physically abusive," and addicted to crack cocaine, Quintera felt she had no choice but to live with him. 4RP 35. Thus, Cadenas was exposed to drug use and domestic violence from a very early age.

During his childhood, Cadenas effectively lost both his parents. Quintera herself was an impressionable youth, and after being influenced by Cadenas' father's lifestyle, she went to prison when Cadenas was around three years old. 4RP 35. Cadenas' father was killed when

Cadenas was just five years old. 4RP 35. Cadenas was sent to live with his aunt who abused him physically and emotionally, telling him no one loved him and his mother had abandoned him. 3RP 35. Cadenas was diagnosed with ADHD which caused him to be restless; his aunt's response to this behavior was "to hit him a lot." 4RP 35-36.

Quintera was later deported to Mexico upon her release from prison. 4RP 36. She returned to the U.S. and regained custody of Cadenas, but was not able to form a parental bond with him because he was angry with her and rejected her. 4RP 36. Cadenas became involved in the foster care system, began running away constantly, was incarcerated as a juvenile, began using methamphetamines at age eleven, and began living on the streets at a very early age. 4RP 36.

Quintera explained that as a result of his childhood, he suffered "mood swings," and "developed emotional issues" related to "anger, trust and abandonment." 4RP 36. She explained Cadenas lacked parental guidance or role models, and so had never been provided with "tools," "life skills," or "coping mechanism[s]" necessary "to become a successful adult." 4RP 36-37. If he had access to these things, "he would be a different person today." 4RP 37.

Counsel argued Cadenas was very young, just seventeen years old at the time of the offense. 4RP 39. Recent scientific literature supported

finding that teenagers did not have fully formed brains, resulting in an inability to engage in adult decision-making. 4RP 39. However, after serving the sentence requested by defense, he would have the ability to mature and behave as a responsible adult. 4RP 39. Counsel pointed out even the low-end sentence was long, representing considerably more years than Cadenas had even been alive so far. 4RP 38. Moreover, up until recently, Cadenas had no structure in his life – his mother had been on the streets and was later deported, his father was a drug addict who died when Cadenas was just five years old. 4RP 38. Cadenas had spent most of his time awaiting trial in the local jail, which offered "basically nothing in terms of rehabilitative services." 4RP 39. However, after sentencing, Cadenas would be incarcerated at DOC where "he will have access to programs that will help to rehabilitate him," that would provide "more structure" that was "significantly better" than he had ever had in his life, and that would enable him to "be an adult" "out in the world." 4RP 39-40. These considerations offered "hope" that he would find help and "eventually be able to re-enter society." 4RP 40.

Defense counsel also disputed the State's discussion of purported aggravators. Cadenas' disruptive behavior in the facility did not consist of violent assaults, rather he was in trouble for throwing water on someone and damaging jail property. 4RP 38. Although these behaviors were

unacceptable, they were "childish behaviors" indicative of someone who has not grown up. 4RP 39. Counsel further pointed out that any first degree murder conviction necessarily resulted in a tragic loss of a family member, was necessarily incorporated into the standard range calculation, and so should provide no basis to impose a higher sentence. 4RP 39.

Neither the parties nor the trial court ever explicitly addressed the issue of the trial court's discretion to waive the purportedly mandatory 60 month firearm enhancement. In fact, such a request was implicitly excluded from defense counsel's request for a low-end sentence of just over 28 years, because this number corresponded to 381 months, representing the low-end sentence plus the 60 months of firearm enhancement. See 4RP 39 (counsel request); CP 109 (judgment and sentence standard range calculation).

When given the opportunity for allocution, Cadenas stated only, "Just want to say sorry for their loss; and that's it." 4RP 40.

The State presented a "Risk Assessment Report" authored by Kristin Tripp, a community corrections officer (CCO). CP 98-100. The CCO noted Cadenas refused to participate in several parts of the interview, including the sections for Leisure/Recreation, Companions Alcohol/Drugs, and Emotional/Personal Narratives. CP 99. According to the report, Cadenas also refused to participate in the "Accommodation Narrative."

CP 99. The CCO supplemented this section with a discussion of Cadenas' behavior while in custody, noting he was currently housed in the Intensive Management Unit (IMU) of Franklin County Jail "due to extreme behavioral issues." CP 99. The report detailed that Cadenas "had conditions of confinement which required him to be escorted" by four officers (rather than the ordinary two officers) and in restraints with a "spit sock" to prevent him from spitting on anyone. CP 99. The report notes that when Cadenas was asked to discuss his criminal history, he responded "Don't remember it," but a review of his history showed he had "an extensively assaultive history" in that he had been charged with "assault" over ten times while in or out of custody. CP 99. The "Family" section states Cadenas said his sister Zeima was "the only person he has in his life," and he was not in contact with his younger siblings or his mother in Mexico. CP 99.

The most substantive sections were provided in the "Attitudes/Orientation Narrative" and "Victim Statement/Issues and Community Concerns" wherein the CCO stated the following:

> **Attitudes/Orientation Narrative**
>
> While attempting to complete this interview with Mr. Cadeans [sic] at the WSP it was explained my intent with the information he surrendered and he initially agreed to participate. He as short and resistive to answering questions, interupting [sic] my questions by asking what this interview was for multiple times. Approximatley [sic] 10

> minutes into the interview Mr. Cadenas stated he no longer wanted to particpate [sic]. Even thought Mr. Cadeans [sic] did answer a few questions, it was clear that he was withholding information and not truly willing to participate. Mr. Cadenas never showed any remorse for commiting [sic] these crimes and seemed only concerned with maintiaing [sic] the "tough guy" version of himself even in a private interview area.

CP 99 (emphasis in original).

> **Victim Statement/Issues and Community Concerns**
>
> There are ultiple [sic] community concerns regarding Mr. Cadenas. At only 19 years old he has a fairly extensive and violent criminal history. Mr. Cadenas shows no regard for the laws, and shows no rescpect [sic] for law enoforcement [sic] or jail/prison staff and the rules of their institutions.

CP 100 (emphasis in original).

The court noted it "had a chance to consider this matter with some length," and noted it had "certainly taken into consideration Mr. Cadenas's youth." 4RP 40. The sentencing judge noted he was present during the trial and noted a "smugness" and "almost a total lack of any remorse" from Cadenas throughout trial and sentencing, notwithstanding his brief allocution. 4RP 40-41. The court noted it was aware "there is a great deal of research regarding adolescent brain development, and the lack thereof, and how that impacts an individual's abilities to make decisions and impulse control, things of that nature. So that's given me a great deal of pause as to what is the appropriate sentence this in case." 4RP 41. The court concluded that despite this research and despite Cadenas' youth, "I

haven't seen anything or heard anything that suggests to me that Mr. Cadenas is more likely to be ready to be back in the community after 341 months," and imposed a high-end sentence of 434 months, inclusive of the 60-month firearm enhancement. 4RP 42; CP 109, 111. The court recognized the sentence was "a very long time," noted it did not impose the sentence "lightly," but concluded "even considering the youth," it believed this sentence was "appropriate." 4RP 42.

At no point during the hearing did either party or the court cite to any relevant case law applicable to sentencing offenders with youthful characteristics.

The court also imposed 42.75 months on the attempted theft charge and 16 months of the unlawful firearm possession charge, to run concurrently, as well as 36 months of community custody. CP 111.

The court found Cadenas indigent, waived non-mandatory costs, and accepted his timely notice of appeal as filed at the hearing. 4RP 43, 46; CP 105, 147. On a separate page, in a block of pre-printed text requiring no affirmative mark by the trial court, the court also ordered Cadenas to "pay supervision fees as determined by DOC." CP 112 (condition (7) of (8)).

C. ARGUMENT

1. THE TRIAL COURT VIOLATED CADENAS' RIGHT TO A FAIR TRIAL AN IMPARTIAL JURY.

"Criminal defendants have a federal and state constitutional right to a fair and impartial jury." State v. Irby, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)), review denied, 184 Wn.2d 1036, 379 P.3d 953 (2016); U.S. CONST., AMEND. VI; WASH. CONST., ART. I, §§ 21, 22. "[S]eating a biased juror, violates this right." Irby, 187 Wn. App. at 193 (citing In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)). Moreover, "[a] trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant." Id. (citing State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012), cert. denied, 571 U.S. 832, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 24, 35-36, 427 P.3d 621 (2018); Hughes v. United States, 258 F.3d 453, 464 (6th Cir. 2001)).

Actual bias means "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). When it appears a juror has formed an opinion about the

case, "such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190.

To protect the right to a fair and impartial jury, a potential juror will be excused for cause if his views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" State v. Gonzales, 111 Wn. App. 276, 277-278, 45 P.3d 205 (2002) (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003). The seating of a biased juror is manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a)(3). Irby, 187 Wn. App. at 193. This error is not subject to harmless error analysis and requires reversal. Id.

Here, the trial court concluded that based on the statements and testimony "the Court does not believe that it's been established that he could not be fair and impartial in this case." 3RP 45-46. This conclusion is unwarranted and unsupported by the record. Rather, the record shows Juror Six was asked multiple times about the impact of his mother's murder on his ability to be a fair and impartial, yet repeatedly failed to give unequivocal assurances he could set aside his personal history to

fairly determine Cadenas' criminal liability. The trial court should not have allowed him to sit on the jury.

Defense counsel asked the juror two times whether the fact his mother was murdered and raped would emotionally affect him or distract him during the trial. 3RP 42. Both times, Juror 6 repeatedly responded equivocally, stating "I don't know for sure," "I don't know how emotional or whatever I'd get about it, but I think I'd be relatively stable," and "that's the part that I'm not really clear on … " "I don't think it would, but you never know." 3RP 42. He stated he would bring it to the court's attention if he did become "distracted." 3RP 42.

Counsel then noted that the juror had expressly indicated on his questionnaire that he "could not be fair and impartial in this case" given his personal history and past trauma with his mother's murder. 3RP 43. Counsel asked the juror if his opinion had changed, and again, Juror Six responded equivocally, stating "I can't say it's changed … " and concluding "… I don't know for sure." 3RP 43. In his responses, Juror Six was very candid, and even stated that, "I think it would be OK" but he did not want to proceed with the "pretense" that it would "definitely" "be fine" and that "it wouldn't affect me." 3RP 43.

At no point during these discussions did Juror Six ever give an affirmative, unequivocal statement that he would be unbiased regarding

the case given the fact that his mother had been murdered. It is telling that Juror Six did give clear and unequivocal one word statements to assure he could be fair regarding other concerns, such as his exposure to newspaper articles and his friendship with a judge unrelated to the case. 3RP 43 ("No."), 44 ("Correct."). This shows that the Juror's equivocal answers regarding his mother's murder were not the product of his communication style, but rather showed his inability to confidently say her death would not impact his decision in this case.

The prosecutor's somewhat feeble attempt to rehabilitate Juror Six revealed only that Juror Six had participated in a jury trial for a DUI and his mother's death had not affected him in that case. 3RP 44. The State argued against a for cause challenge, stating the juror's participation in the DUI trial "indicated he could follow the instructions." 3RP 45. However, the juror admitted that DUI case had resulted in a hung jury. 3RP 44. And even the prosecutor "recognize[d] it's unrelated" to compare a DUI trial to the present murder trial. 3RP 44. Thus, it is not possible to draw any conclusions about whether Juror Six could or could not follow the court's instructions in the DUI trial, or to analogize it to this murder trial.

At one point the juror unequivocally stated he could disregard information and apply the facts presented at trial, and fairly and objectively weigh them in this case. 3RP 44. However, this was in

explicit reference to his ability to disregard two newspaper articles about the case he had read prior to being summoned as a juror. 3RP 44. Understood in context, this statement by the Juror was an expression that he could easily disregard any information contained in those articles, likely because, as the juror stated, he did not recall any details of the articles. 3RP 44. His answer to questions about his vague recollection of newspaper articles should not be taken as a holistic expression of his ability to disregard emotional biases related to his mother's death.

The circumstances in Gonzales are similar. At Gonzales's trial, Juror Eleven indicated bias in favor of police witnesses that "would likely affect her deliberations." Gonzales, 111 Wn. App. at 281. Juror Eleven "also candidly admitted she did not know if she could presume Gonzales innocent in the face of officer testimony indicating guilt." Id. Moreover, "no rehabilitation was attempted" following these answers. Id. This Court reversed and remanded for a new trial: "At no time did Juror 11 express confidence in her ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence. Juror 11 demonstrated actual bias, and the trial court erred in rejecting Gonzales' cause challenge." Id. at 282.

Gonzales' Juror Eleven revealed bias for police officers that could affect her deliberations. Cadenas' Juror Six revealed bias for sympathizing

with the family member of a murder victim that could affect his deliberations. Gonzales' Juror Eleven was unable to express confidence she could apply the presumption of innocence. Cadenas' Juror Six was similarly unable to do assert he could set his feelings aside to fairly determine the case, and even expressed concern that it would be "pretense" to proceed as if he could "definitely" be "fair and impartial." 3RP 43. Moreover, neither Gonzales's Juror Eleven nor Cadenas' Juror Six was ever rehabilitated after these disclosures.

Ultimately, Juror Six revealed himself to be the son of a murder victim who could not promise his mother's death would not impact his ability to remain dispassionate in the case. Rather, he admitted even the knowledge of the charges had caused him to "reflect[] on that period in [his] life" overnight. 3RP 42. His candid answers displayed actual biased and the court should have granted defense counsel's for cause motion, particularly in the context of a murder trial during which, as described below, the victim's daughter ultimately would testify and other witnesses would describe to her emotional reactions to seeing her father bleeding out on the sidewalk.[2] This

[2] Although not subject to harmless error analysis, it should be noted that the murder victim's daughter was a witness in the trial, and various witnesses described the father-daughter relationship with emotionally-charged language. 3RP 622 (daughter's testimony that she never got a chance to say goodbye); e.g. 3RP 388 (court sustains hearsay objection to witness who describes daughter's reaction as "hysterical"), 440 (witness

manifest constitutional error is not subject to harmless error analysis and requires reversal for a new trial. Irby, 187 Wn. App. at 193.

2. THE TRIAL COURT FAILED TO MEANINGFULLY CONSIDER CADENAS' YOUTH AT SENTENCING.

In sentencing Cadenas, the court did not conduct a meaningful, individualized inquiry into whether Cadenas' youth should mitigate his sentence. Precedent requires the court in sentencing a young adult to consider the specific hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, as well as the nature of the youth's surrounding environment and family circumstances, the extent of the youth's participation in the crime, the effect of familial and peer pressures, the impact of youth on any legal defense, and any factors suggesting that the young person might be successfully rehabilitated. The court did not consider these requisite factors in sentencing Cadenas. Remand for resentencing is therefore appropriate.

i. Children are different.

"[C]hildren are different." State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting Miller v. Alabama, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). "That difference has

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describing that bleeding man was "freaking out" and wanted to speak to his daughter), 505 (officer describing daughter as "hysterical" at the scene before her father lost consciousness due to blood loss).

constitutional ramifications: 'An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" Id. at 8 (quoting Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), citing U.S. CONST., AMEND. VIII).

In State v. O'Dell, the Supreme Court held that even in the case of a defendant who was ten days past his eighteenth birthday at the time of the offense and thus was technically an adult, still youth is a mitigating circumstance that can support an exceptional sentence below the sentencing guidelines under the Sentencing Reform Act (SRA). 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015)[3]; see also State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015); Matter of Light-Roth, 191 Wn.2d 328, 336, 338 n.3, 422 P.3d 444 (2018). The Supreme Court reaffirmed the principle in Houston-Sconiers, when it concluded sentencing courts have discretion to depart from purportedly mandatory firearm enhancements when sentencing juveniles. 188 Wn.2d at 24. In a concurrence, Justice Madsen would have held that courts have authority to waive firearm enhancements even for adults, such as O'Dell and Cadenas,

[3] The O'Dell Court cited RCW 9.94A.390(1)(e) which provides the following as a basis for a downward departure below sentencing guidelines: "defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

who qualify for an exceptional sentence downward on the basis of youth. Houston-Sconiers, 188 Wn.2d at 38 (Madsen, J., concurring).

Houston-Sconiers and O'Dell relied on U.S. Supreme Court decisions that identified three general differences between adults and juveniles or even young adults. Houston-Sconiers, 188 Wn.2d at 18-20, n.4; O'Dell, 183 Wn.2d at 691-93.

First, juveniles more often display "[a] lack of maturity and an underdeveloped sense of responsibility," resulting in "impetuous and ill-considered actions and decisions." Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). This susceptibility means that their "irresponsible conduct is not as morally reprehensible as that of an adult." Roper, 543 U.S. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)).

Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569. This "vulnerability and comparative lack of control over their immediate surroundings" give juveniles "a greater claim than adults to be forgiven for failing to escape negative influences." Id. at 570.

Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles . . . less fixed." Id. Thus, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id. at 570.

Developments in psychology and neuroscience showed "'fundamental differences between juvenile and adult minds' — for example, in 'parts of the brain involved in behavior control.'" Miller, 567 U.S. at 471-72 (quoting Graham, 560 U.S. at 68). These differences lessened a juvenile's moral culpability, Roper, 543 U.S. at 571, and enhanced the prospect of reformation, Miller, 567 U.S. at 472.

The scientific studies underlying Miller, Roper, and Graham establish a "clear connection between youth and decreased moral culpability for criminal conduct." O'Dell, 183 Wn.2d at 695. They "reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." Id. at 692 (footnote citations omitted). "Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." Id. at 693 (quoting amicus with approval) (emphasis added).

ii. This reasoning applies equally to adult defendants with youthful characteristics.

As noted by the Court in O'Dell, research shows that "full neurological maturity" may not occur until the "late twenties and beyond." Id. at 93. Relying on this research the O'Dell Court held that even in the case of a defendant who was ten days past his eighteenth birthday at the time of the offense, youth was a mitigating circumstance that may support an exceptional sentence below the sentencing guidelines under the SRA. 183 Wn.2d at 688-89. Thus, the requirement to consider youthfulness at sentencing applies even to youthful individuals who were technically adults at the time of the offense. This reasoning then, must apply with greater force to Cadenas, who was truly a juvenile, seventeen years old, at the time of the incident, and just barely an adult at nineteen by the time of sentencing.

iii. The sentencing court bears the burden to recognize its discretion and undertake meaningful, systematic consideration of a defendant's youthful characteristics.

Jurisprudence has placed specific requirements on trial courts to consider youthfulness when imposing sentences. First, the court bears the burden to recognize and apply its discretion. Second, mere passing reference to a defendant's chronological age and to the existence of scientific research is insufficient. The factors identified in O'Dell and

Houston-Sconiers must be systematically considered, applied to the youth, and analyzed in light of relevant jurisprudence.

The Washington Supreme Court's language in O'Dell places the burden on the sentencing court to recognize and apply its discretion to determine when youthfulness supports an exceptional sentence downward. Id. at 698-99 ("We hold that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.") (emphasis added)). The failure to recognize its discretion is itself an abuse of discretion requiring remand for resentencing. Id. at 697.

Sentencing courts must also consider relevant lay testimony. Despite the scientific research underpinning Roper, Graham, and Miller, "a defendant need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing." O'Dell, 183 Wn.2d at 687. In O'Dell, the Court relied on lay testimony of the defendant's mother and other family members and friends, and found the sentencing court committed reversible error by failing to meaningfully consider such lay testimony. Id. at 697-98.

Furthermore, a sentencing court must make more than a passing reference to a defendant's chronological age at sentencing, rather it must

"meaningfully consider youth as a possible mitigating circumstance" and as a basis for an exceptional sentence. O'Dell, 183 Wn.2d at 696. Such meaningful consideration requires sentencing courts to consider the three youthful characteristics discussed above—(i) impetuousness and underdeveloped sense of responsibility, (ii) increase susceptibility to negative external influences, and (iii) unformed character and statistically higher prospects of reform. See e.g. Roper, 543 U.S. at 569-70; Miller, 567 U.S. at 472. It also requires the court to apply these characteristics to the individual defendant and discuss whether each criteria does or does not apply. See e.g., O'Dell, 183 Wn.2d at 697-98 (discussing testimony that defendant enjoyed video games and other childish pursuits, rolled his eyes at adult authority, had an unformed character, was emotionally immature, thinks and speaks like a teenager, and needed the chance to become an adult and a productive member of society).

iv. Here, the trial court had relevant testimony and argument, yet failed to meaningful and systematically consider youthfulness as required.

In Cadenas' case, the sentencing court had before it relevant argument and lay witness testimony from Cadenas' mother and sister, and from the CCO. The letter from Cadenas' mother set forth how Cadenas had been forced to deal with adult problems using childish coping mechanisms. 4RP 36-37. Lacking in parental support, he turned to the

streets and drug-use. 4RP 36. He displayed an inability to control his emotions. 4RP 36. He was influenced by his environment and likely by much older peers while living in the streets. See 4RP 36-37. Testimony from his sister at trial supported that although Cadenas had run away from foster care repeatedly, he still relied on his sister for basic necessities. 4RP 36, 641-42. When he was in scared or needed something, he did not deal with his problems on his own. 3RP 365, 641-42. Rather he called his older sister, for access to food, clothing, money, and shelter. 3RP 365, 641-62.

The CCO's report also supports that Cadenas was preoccupied with his "tough guy image" even in a private setting and when presented with the information to share mitigation information that would very likely have helped him at sentencing. CP 99. The CCO aggressively emphasized Cadenas' negative factors in her report. C.f. CP 99-100. Her frustration at Cadenas' lack of proper respect due to her as a DOC employee was palpable, and resulted in increasing typographical errors as the report progressed, particularly in the last two substantive sections of the report. See CP 99-100. In particular, her discussion of community safety does not in substance directly discuss the topic of the section, but rather describes Cadenas' interactions with DOC staff. See CP 99-100. Similarly, her discussion of Cadenas' housing prospects emphasizes his

disruptive behavior at the jail. CP 99. While the report has some value, this partisan document cannot substitute for the sentencing court's own analysis. In fact, the primary value to be gleaned from the report supports mitigation. The report shows Cadenas is short-sighted, disruptive for the sake of his image, and unwilling to cooperate even when doing so is in his bests interests—all of which are characteristic of juvenile behavior.

Defense counsel also pointed out much of Cadenas' disruptive behavior in custody, such as throwing water and spitting on people, was childish behavior. 4RP 38-39. Counsel also pointed out Cadenas had never had access to structure or rehabilitative services, and in fact, even while incarcerated pre-trial at the jail he lacked access to services. 4RP 38-39. Given time, structure, and services, there was every reason to believe Cadenas could achieve responsible adulthood. 4RP 38-40. This was not a case with documented and repeated intensive rehabilitation efforts had failed.

The court disregarded this mitigation evidence, and either made no effort to consider the primary factors of youthfulness as applied to Cadenas specifically, or contrary to scientific research and jurisprudence, concluded these very factors weighed against mitigation. For example, regarding factor (i), the youthful characteristic of impetuousness and underdeveloped sense of responsibility, the court noted Cadenas'

demeanor displayed "smugness" and lack of remorse, and considered them to be factors against mitigation, yet these are precisely the hallmarks of youthful behavior. Compare 4RP 40-41, with Roper, 543 U.S. at 569-70 ("underdeveloped sense of responsibility," resulting in "impetuous and ill-considered actions and decisions" but such "irresponsible conduct is not as morally reprehensible as that of an adult").

Regarding factor (ii), Cadenas' increased susceptibility to external factors and inability to escape his negative environment, the court made no comment.

Regarding factor (iii), Cadenas' increased prospects for rehabilitation, the court engaged in no analysis. The court made only passing reference to the existence of relevant research, but made no attempt to apply it to Cadenas' case. See 4RP 41. With respect to Cadenas' mother's lay testimony and counsel's arguments that Cadenas was young, would respond differently if given structure, role models, and tools, and would have access to such structure and rehabilitative programs at DOC, the court dismissed these arguments with a conclusory remark that he had heard nothing to suggest Cadenas would be ready to be out in

the community after a low-end sentence of 341 months. 4RP 42. After such a sentence, Cadenas would likely be in his 40s.[4]

In addition, it is telling that neither the parties nor the sentencing court made any citation to the relevant cases, including O'Dell, Houston-Sconiers, Miller, Roper, Graham or any other case.

The record shows that just as in O'Dell, here, the sentencing court failed to make any meaningful consideration of Cadenas' youthful characteristics in mitigation. The court also failed to make a record that such considerations could in fact support an exceptional sentence downward, and potentially, according to Justice Madsen's concurrence in O'Dell, the waiver of the otherwise-mandatory 60 month firearm enhancement. While it is not required that the sentencing court exercise its discretion to waive the enhancement or impose an exceptional sentence downward, the court is required to recognize it has this discretion and to undertake systematic and meaningful consideration of Cadenas' youthful characteristics. Because the sentencing court failed to do either, the case requires remand for resentencing.

[4] After 341 months, Cadenas would be 47 years old. Where Cadenas received a firearm enhancement of 60 months, even if he received 1/3 off for good time on the remainder of his sentence, he would still be 42 years old by the time of release.

3. TRIAL COUNSELS' ASSISTANCE WAS INEFFECTIVE.

Although the sentencing court has an independent duty to recognize and apply its discretion, to the extent trial counsel contributed to this failure, they too may be at fault.

Both the federal and state constitutions guarantee the right to effective representation. U.S. CONST., AMEND. VI; WASH. CONST., ART. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).[5]

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Trial counsel failed in that duty to Cadenas.

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[5] While the SRA generally prohibits the appeal of a standard range sentence, this does not apply where the appellant alleges ineffective assistance. State v. Goldberg, 123 Wn. App. 848, 852, 99 P.3d 924 (2004).

As discussed above, the relevant case law on sentencing holds that youth and its attendant characteristics tend to mitigate culpability. E.g. Light-Roth, 191 Wn.2d at 336, 338 n.3 (citing Roper, 543 U.S. 551); Ronquillo, 190 Wn. App. at 780-83. This rule has been well-established in Washington since at least 2015, when our Supreme Court decided O'Dell, 183 Wn.2d 680.

Here, the trial attorneys for Cadenas raised the issue of Cadenas' youth for the court's consideration. However, as noted above, they failed to cite to O'Dell or any other basic and established Washington and U.S. Supreme Court jurisprudence that would have authorized an exceptional sentence below the standard range, and arguably even the waiver of the otherwise mandatory firearm enhancement. While it may have been a strategic decision to request a low-end sentence rather than an exceptional down, the jurisprudence authorizing even an exceptional down would as a matter of logic, also qualify as a factor in mitigation to justify a lower sentence within the standard range. See, e.g., Matter of Meippen, 193 Wn.2d 310, 313, 440 P.3d 978 (2019). Counsel can have no reasonable strategic reason for failing to cite to such authority. Moreover, although the sentencing court had an independent duty to know this area of law and recognize its sentencing authority, the court may have executed this duty properly, or even concluded a high end sentence was excessive, if

provided with relevant citations to authority for guidance. Thus both Strickland factors are met: deficient performance and resulting prejudice, and remand for resentencing is required. 466 U.S. 668.

4. THE TRIAL COURT ERRONEOUSLY IMPOSED DISCRETIONARY COSTS OF COMMUNITY CUSTODY ON AN INDIGENT DEFENDANT.

As discussed below, the recently amended statute on LFOs prohibits the imposition of discretionary costs on indigent defendants. Because Cadenas is indigent, supervision costs are discretionary, and the costs must be stricken.

As recently amended, RCW 10.01.160(3) prohibits the imposition of costs on indigent defendants. Generally, RCW 10.01.160 discusses a court's authority to impose legal financial obligations (LFOs) on criminal defendants. Subsection .160(3) states, "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3).

i. Cadenas was and remains indigent.

Here, the record established that at the time of sentencing, Cadenas was "indigent" as defined by the statute. RCW 10.101.010(3)(d).[6] Orally

[6] Subsection .010(3) defines "indigent" as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose "available funds are insufficient to pay any amount for the retention of

and in writing, the sentencing court found Cadenas indigent at the time of sentencing and entitled to appeal at public expense. 4RP 43; CP 147 (Order of Indigency). Cadenas remains incarcerated and there is no reason to believe his financial status has measurably changed.

Consistent with this finding of indigency, the court orally stated, "The court will impose only the standard required fines. This court does not believe that Mr. Cadenas has the ability to pay any of the discretionary fees, fines or costs." 4RP 43. Orally the court imposed only the mandatory $500 Victim Penalty Assessment (VPA) and restitution. 4RP 43-44. On the written Judgment and Sentence, in the section entitled "Legal Financial Obligations" the court struck multiple other fees (including court costs, attorney fees, expert witness costs, and the DNA collection fee), and imposed only the VPA and restitution. CP 113.

Despite these findings, on a separate page, in the middle of a block of pre-printed text requiring no affirmative mark by the trial court, the court also ordered Cadenas to "pay supervision fees as determined by DOC." CP 112 (condition (7) of (8)).

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counsel" in the matter before the court. RCW 10.101.010(3). The definition of "[i]ndigent" under subsection (3) is contrasted with "[i]ndigent and able to contribute" under subsection (4), defined as a person who "at any stage of the proceeding" has available funds sufficient to contribute to some but not all of the anticipated costs of counsel. RCW 10.101.010(4).

Because this fee is discretionary, this violated the statute's prohibition on discretionary costs for indigent defendants. RCW 10.01.160(3).

ii. The costs of community custody are discretionary.

The costs imposed here on Cadenas are discretionary. The judgment and sentence does not cite to any legal authority for the imposition of this cost. See CP 112. The cost appears to be authorized by the statute discussing allowable community custody conditions. RCW 9.94A.703(2)(d).

Examination of the statutory language, and recent case law, establishes these costs are discretionary. Subsection .703(2) states, "Unless waived by the court, … the court shall order an offender to: … (d) Pay supervision fees as determined by the Department." RCW 9.94A.703(2) (emphasis added). Given this language authorizing the court waive the cost, Division Two recently noted the cost is discretionary. State v. Lundstrom, 6 Wn. App. 388, 396, 396 n.3, 429 P.3d 1116 (2018).

In Lundstrom, the Court also recognized while the sentencing court there had intended to impose only mandatory fees, it had also imposed this discretionary community custody fee. Id. This is likely similar to what occurred here. In Cadenas' case, the court orally waived all discretionary costs. 4RP 43. Yet the court imposed the community custody costs in the

middle of a list of conditions buried in preprinted text. CP 112 (condition (7) or (8)). This suggests this discretionary fee may have been mere oversight, similar to the issue in Lundstrom.

This Court should find the cost of supervision imposed on Cadenas is a discretionary LFO subject to the recent statutory amendments. This Court should remand to strike the fees. State v. Ramirez, 191 Wn.2d 732, 735, 426 P.3d 714 (2018).

D. CONCLUSION

The trial court violated Cadenas' right to a fair trial by denying his for cause challenge to Juror No. Six. In addition, the trial court failed to meaningfully consider the O'Dell factors and violated statutory provisions prohibiting the imposition of discretionary costs on indigent defendants. To the extent trial counsel contributed by failing to cite appropriate authority regarding youthfulness in sentencing, their performance was deficient.

Cadenas respectfully asks this Court to reverse his conviction and remand for a new trial, or in the alternative, to remand for resentencing to consider the O'Dell factors and strike community custody costs.

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DATED this 14th day of January, 2020.

Respectfully submitted,

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