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66674-6

NO. 66674-6-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

*Respondent,*

v.

PEDRO JOSE MARTINEZ,

*Appellant.*

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
2011 SEP -9 PM 1:24

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BRIEF OF APPELLANT

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James E. Lobsenz  
Attorney for Appellant

Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020

ORIGINAL

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**A. ASSIGNMENTS OF ERROR**

Appellant assigns error to:

1. The admission into evidence of Exhibit 32, complete copies of two separate immunity agreements entered into by the trial prosecutor and prosecution witness Martin Monetti. (Appendix A).

2. The failure to sustain defense counsel's objection to the prosecutor's statements in closing argument that (a) he couldn't charge witness Monetti with anything because Monetti wasn't guilty of anything and (b) his statement that "we" charged the right person.

3. The trial court's admission of Exhibit No. 30 (Appendix B) after ruling that the procedure of showing a witness a single photo of the defendant's tattoo, instead of showing the witness multiple photos of several tattoos, was not an impermissible identification procedure.

4. Jury Instruction No. 14, which permitted the jury to convict the defendant of first degree robbery on the basis of an alternative means which was never charged. (Appendix C) (CP 339).

5. The trial judge's refusal to give defense proposed jury instruction number 1 on the lesser degree offense of Robbery 2. (Appendix D).

6. The trial judge's refusal to give defense proposed instruction number 2 on the lesser included offense of Attempted Robbery 2. (Appendix E).

7. The trial judge's refusal to give defense proposed jury instruction number 3 on the relationship between Robbery 1 and Robbery 2. (Appendix F).

8. The trial judge's refusal to give defense proposed jury instruction number 4, a to-convict instruction setting forth the elements of the offense of Robbery 2. (Appendix G).

9. The trial judge's refusal to give defense proposed jury instruction number 5, a to-convict instruction setting forth the elements of Attempted Robbery 2. (Appendix H).

10. The trial judge's determination that the defendant was not entitled to *Miranda* warnings, set forth in Conclusion of Law No. 3a in the CrR 3.5 findings of fact and conclusions of law. (Appendix I).

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Two immunity agreements between the trial prosecutor and prosecution witness Martin Monetti were admitted into evidence and both agreements contained the prosecutor's explicit statement that he believed that Monetti did not have anything to do with the robberies which the defendant was charged with. Did this violate the defendant's constitutional right to a jury trial and constitute manifest constitutional

error under the rule of *State v. Kirkman*<sup>1</sup>?

2. Did the trial judge err in overruling the objection to the prosecutor's closing argument statements that (a) he could not charge witness Monetti with a crime because Monetti did not commit a crime, and (b) that his office charged the person who did commit the crime. Did these statements constitute improper vouching and violate the fair trial guarantee of the due process clause?

3. Did the trial court violate the defendant's Fourteenth Amendment right to due process when he allowed the prosecution to elicit a witness' in-court identification of the defendant's tattoo as the same as the one he saw on the robber's arm after having employed the suggestive procedure of only showing the witness photos of the defendant's tattoo?

4. Did it violate the defendant's Sixth Amendment and article 1, § 22 rights to instruct the jury that it could convict the defendant of first degree robbery on the basis of a statutory alternative which was never charged?

5. Given that there was no evidence whatsoever to support the statutory alternative means of committing the first degree robbery charged in Count I by display of a firearm, and the fact that the jury's general

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<sup>1</sup> 159 Wn.2d 918, 155 P.3d 125 (2007).

verdict on Count I fails to indicate which alternative means it found, does the defendant's conviction on Count I violate his constitutional right to a unanimous jury verdict?

6. Did the trial court err by refusing to give lesser degree jury instructions on second degree robbery and attempted second degree robbery by failing to properly consider the affirmative evidence in the record that only the lesser offense was committed, thereby violating the rule of *State v. Fowler*?

7. Assuming, *arguendo*, that the rule of *Fowler* was not violated, was there a violation of the guarantee that the right to jury trial would be preserved inviolate by the refusal to give the jury instructions on the lesser degree offenses because the rule of *Fowler* itself violates article 1, section 21 by imposing a requirement for jury consideration of lesser offenses which was not imposed at the time the State Constitution was adopted?

8. Did the trial court err in concluding that *Miranda* warnings were not required because the defendant was not subjected to custodial interrogation where the defendant had been directed at gunpoint to sit on the ground and wait while police investigated a report of robbery?

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**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

Together with co-defendant Hector Veteta-Contreras, Pedro Jose Martinez was charged by amended information with Robbery 1 for the robbery of Walter Flores Cruz (Count I); Attempted Robbery 1 for the attempted robbery of Eliezer Duran (Count II); and Felony Harassment, for threatening to kill Juan Lopez Pando (Count IV). CP 20-22. For each offense it was also alleged that Martinez was armed with a deadly weapon, a machete, during the commission of the crime, CP 20-22. It was also alleged that Martinez was armed with a firearm during the commission of the attempted robbery charged in Count II and the felony harassment charged in Count IV. CP 21-22.

The case was tried to a jury in December of 2010 and January of 2011. On January 4, 2011, the jury returned general verdicts finding Martinez guilty of the substantive offenses charged in Counts I, II and IV. CP 360, 362, 365. The jury also returned special verdicts finding Martinez was armed with a deadly weapon, a machete, in the commission of Counts I, II, and IV. CP 361, 363, 366. Two more special verdicts were returned finding that he was armed with a firearm in the commission of Counts II

and IV. CP 364, 367.

Judgment and Sentence was entered on February 4, 2011. CP 377-384. Martinez was sentenced to three concurrent sentences of 46 months on Count I; to 45-3/4 months on Count II; and to 12 months on Count IV. CP 380. In addition, Martinez was sentenced to five *consecutive* terms of confinement for the following periods of time on the special verdict findings: 24 months on the Count I deadly weapon finding; 12 months on the Count II deadly weapon finding; 36 months on the Count II firearm finding; 6 months on the Count IV deadly weapon finding; and 18 months on the Count IV firearm finding. CP 380. The total of all terms of confinement imposed came to 142 months. CP 380. Timely notice of appeal was filed on February 8, 2011. CP 385.

## 2. SUBSTANTIVE TESTIMONY

### a. Police Response to “Robbery In Progress,” the Initial Detention of Five Suspects, and the Arrest of Two of Them.

On April 17, 2010 at 1:14 a.m., Seattle police responded to a report that there was “a robbery in progress with a knife” at the China Harbor restaurant on Lake Union. RP III, 327-328, 365.<sup>2</sup> When Officers Reyes

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<sup>2</sup> The volumes of the verbatim report of proceedings are referred to in this brief as covering the following pretrial, trial and sentencing proceedings: RP I – December 6,

and Ragillio arrived there were many people in the restaurant parking lot because it was bar closing time. RP III, 329. According to Reyes, most of the people milling around were Hispanic and were between the ages of 18 and 25. RP III, 353.<sup>3</sup> A man in the parking lot, Walter Flores Cruz, flagged down the officers and told them that he was the person who had called the police. RP III, 329. Cruz pointed out two other men in the parking lot, so with their guns drawn the two officers contacted the two men pointed out by Cruz. RP III, 333-34. One man was wearing a white shirt, and he was subsequently identified by Officer Reyes as Pedro Jose Martinez. RP III, 343. The second man was identified by Officer Terry, an officer who arrived after Officer Reyes, as Robin Barrera. RP III, 372. Terry said that Barrera had been wearing a white shirt. RP III, 373.

Reyes yelled at Martinez to get down on his knees, and Martinez was compliant and did as he was told. RP III, 339, 346, 352. Reyes told Martinez to sit down on the ground. RP III, 343. Barrera was not compliant with Officer Ragillio's instructions. RP III, 339. Other people

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2010; RP II – December 7-9, 2010; RP OS – Opening Statements made on December 9, 2010; RP III -- December 13, 2010; RP IV – December 14, 2010; RP V – December 15, 2010; RP VI – December 16, 2010; RP VII – December 27, 2010; RP VIII – December 29 & 30, 2010; RP IX – January 3-4, 2011; RP X – February 4, 2011.

<sup>3</sup> One officer said there “was some kind of Hispanic function” there that evening. RP III, 447.

in the parking lot were shouting that there was a man with a gun in the parking lot. RP III, 341, 356. Reyes frisked Martinez for weapons and found nothing. RP III, 342, 351. Barrera was also frisked and no weapons were found on him either. RP III, 342.

When Officer Terry arrived at the scene he found that other officers already had the scene under control and had already ordered Martinez and Barrera to be seated on the ground. RP III, 367. Terry spoke with Cruz, who told him he had been robbed. RP III, 368, 370. Cruz told Terry that a man with a knife had said he was a gangster, and that “they” were going to kill him. RP III, 371-72. Cruz looked at Barrera and said that Barrera had been present when the demand for money had been made, but that Barrera had not said anything and had not done anything. RP III, 372. According to Officer Terry, Cruz said that Barrera had been “standing with the group of guys” which had included the two men who had robbed him. RP III, 372. Confusingly, Officer Terry also said that Cruz said that “the dude” who said “we are gangsters; we can kill you,” was wearing a white shirt and Terry identified this “dude” – the man in the white shirt – as Robin Barrera. RP III, 372-73.

Officer Terry spoke to Cruz, then to Martinez, and then to Cruz again.

RP III, 374. Ultimately, Officer Terry decided to let Barrera go and he arrested Martinez. RP III, 373.

When Terry asked him what he had said to Cruz, Martinez lifted up his shirt to reveal an empty waistband and said, "I don't have nothing." CP 312. Martinez said that he had nothing to do with the robbery and that he was not in any gang. RP III, 392. At the police station, Martinez told Officer Terry that he was from El Salvador. RP III, 383.

Meanwhile, other police officers including Officer Allan Schweiger, responded to a radio alert of a different attempted robbery incident committed at China Harbor. These officers contacted Elizier Duran and Juan Lopez Pando. RP III, 419. Duran told Officer Schweiger that "a group of . . . Mexicans came up to him and wanted money," and that he refused to give them any. RP III, 419. Duran told Schweiger that "one individual [who] stood in front of him . . . had what he described as a piece of cable or a club." RP III, 419. When Duran refused to give that man any money, the other man that was standing next to the guy with the piece of cable, "lifted his shirt and showed a handgun." RP III, 420. Duran told Schweiger that the man carrying the piece of cable punched him in the face twice. RP III, 425. No gun, no knife, no machete, and no

piece of cable, was ever found on anyone, and no weapon was found at the scene. RP III, 399, 400.

Schweiger had Duran look at Martinez, and Duran identified him as the other robber. RP III, 433. Schweiger “asked him are you sure, and [Duran] says [sic] it looks like him.” RP III, 468. Schweiger said there was “some hesitation” on Duran’s part when he identified Martinez:

There was some hesitation. He initially said that it was, and then there was a little hesitation. So when we left that scene to go to the other, I told them [other officers] to at this point detain him and make sure he’s patted down.

RP III, 434.

There was just a little hesitation as to -- I wasn’t completely sure at that point that it was him, and that’s why I didn’t say arrest him. I said detain him until we get back – or basically until we get back.

RP III, 435.

While speaking with Duran, Schweiger was notified that Officer Chris Hairston had detained three other men at a nearby mini-mart, so he gave instructions to continue to detain Martinez while transported Duran to the location where Hairston had his detainees. RP III, 468.

Hairston had seen three men walking away from China Harbor and he had detained them; they were Martin Monetti, Hector Veteta-Contreras

and Denis Garcia. RP III, 426, 481-82. Hairston heard Schweiger broadcast a description of one of the robbers as a Hispanic male wearing a long sleeved white t-shirt and black shorts, and believed to be armed with a handgun. RP III, 480. Hairston decided to detain the three men because he believed that Garcia matched the description of the robber with the handgun. RP III, 481. Hairston drew his gun and ordered the three men to go to the ground. RP III, 482. Instead of complying, Monetti threw an item into some nearby bushes and then stood there for a moment staring at Hairston. RP III, 483. Monetti only went to the ground when Hairston threatened to let his police dog loose. RP III, 483. After saying that twice, Monetti finally got down on the ground. RP III, 483.<sup>4</sup>

Hairston put Garcia in handcuffs because he believed that Garcia matched the description of the robber reportedly armed with a gun. RP III, 484-85.

Hairston went into the bushes and found the item that Monetti had thrown there; it was Monetti's wallet. RP III, 485.<sup>5</sup> Monetti continued to

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<sup>4</sup> Veteta-Contreras, on the other hand, *did* immediately comply with Hairston's order to go to the ground. RP III, 484.

<sup>5</sup> Hairston never searched Monetti's wallet. RP III, 493. He conceded that if he had searched the wallet and if he had found \$40 in it – the sum that was taken from Cruz -- that would have been relevant. RP III, 507.

be uncooperative; he was laughing, talking, moving, and not following police commands. RP III, 487. Hairston described Monetti's conduct as "what I refer to as flight behavior." RP III, 487. "He was positioning his leg as like a runner would as if he was fixing to push off and --." RP III, 487. Hairston said "It looked to me as if he's preparing and looking for a way to get out, a way to run." RP III, 497.

Two other police officers, Detective Shandy Cobane and Officer Woolum arrived on the scene. RP III, 487. As captured in a video taken by a news reporter, Detective Cobane told Monetti he was going to beat the fucking Mexican piss out of him. RP III, 486, 488-90. Cobane stomped on Monetti's head and Woolum kicked him. RP III, 490-91.

From a distance of about fifty feet, Duran took a look at each of the three detained men. RP III, 432-33. He identified Veteta-Contreras as the man that had the cable and who had hit him. RP III, 431, 432. Officer Schweiger told Officer Woolum to arrest Veteta-Contreras. RP III, 441. Duran identified Monetti "as being there but not an actual participant, but being one of the group of four." Monetti was released and was given his wallet back. RP III, 494. After completing the show ups at the mini-mart location, Officer Schweiger took Duran back to China Harbor where he

intended to reassess Duran's identification of Martinez, but Martinez had already been taken into custody and removed from the scene. RP III, 468-69.

b. **Cruz's Trial Testimony: Actually, He Never Did See Any Gun; The Guy in the White Shirt Never Said Much; and Cruz Simply Assumed That The White Shirt Guy Was With the Black Shirt Guy With the Machete.**

Officer Terry testified that on the night in question, Cruz told him that the detained man in a white shirt (supposedly Martinez) had said that he and the other man were gangsters and that they could kill him. At trial, however, Cruz told a somewhat different story about the conduct of the man in the white shirt.

At trial Cruz said that group of four people approached him and his girlfriend Teresa Hernandez, and that "one of them was asking for money. He told us give me twenty bucks." RP IV, 534. When Cruz asked why, the man simply demanded \$20 again. RP IV, 535-36. Cruz identified defendant Hector Veteta-Contreras as this man. RP IV, 537. Cruz told Teresa to get in her car, and she did that and locked the car doors. RP IV, 536. As for the other three men, Cruz testified as follows:

- Q. (By Mr. Gahan) You said there were four of them. *What were the other three doing?*  
A. *They weren't asking for money.* He was on my right hand side.

I saw another guy walking on the other side of my girlfriend's car. And the other two just, you know, they were standing there. I never saw their faces though.

RP IV, 537 (emphasis added).

Cruz said the man who was asking for money was wearing black and the man who walked to the other side of Teresa's car was wearing a white t-shirt. RP IV, 528. He identified Martinez as the man in the white t-shirt. RP IV, 528. Contrary to what he had previously told Officer Terry on the night of the incident, Cruz testified that Martinez did *not* say anything to him about being in a gang, and that *only* Veteta-Contreras showed him a weapon:

Q. And what did the man in the white shirt say?

A. ***He was all quiet by the time, you know.*** And by the time I decided, you know, I was going to give him money is when he was all demanding and asking for \$20. Give me \$20. And I was like no. No. No. And he pulled his shirt up, and I saw a weapon inside his pants.

Q. ***When you say he pulled his shirt up, are you talking about white-shirt or black-shirt?***

A. ***Black shirt.***

Q. What did you see when Hector Veteta-Contreras pulled up his black shirt?

A. When did I see that?

Q. What did you see?

A. I say [sic]<sup>6</sup> a machete.

Q. ***What did he do with the machete?***

A. ***He just showed it to me.*** And you know, when I refused

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<sup>6</sup> Presumably this is typo and the correct word here is "saw" not "say."

myself to give him money, he pulled it out.

Q. How did he pull it out?

A. Right hand. He pulled it out with his right hand. That's when I decided to give him money, \$20. Threw it on top of my car.

RP IV, 539-540 (emphasis added).<sup>7</sup>

Cruz testified that it was only after he threw money in response to Veteta-Contreras' demand for money that the man in the white shirt – whom Cruz identified as Martinez – spoke to him, chastised him for throwing money, and told Veteta-Cruz to ask for another \$20. RP IV, 540. Cruz said Veteta-Contreras then did ask him for another \$20 and so Cruz gave him another \$20 bill. RP IV, 541. Cruz said Veteta-Contreras then gave Cruz a hug and said “thanks.” RP IV, 544.

When questioned about whether the two men said anything about being in a gang, Cruz gave confusing and internally conflicting testimony. First he said “they” spoke about being in a gang, and that “they” gave a gang sign; but when asked to clarify his testimony he unequivocally testified that the man in the white t-shirt said nothing about being in a

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<sup>7</sup> Strangely, although Cruz' friend Lopez-Pando testified that the short man with the machete *hit* Cruz in the “side of the face” with the machete, RP VI, 615, neither Cruz nor his girlfriend Teresa Sierra ever said that Cruz was hit or even touched by the machete.

gang. RP IV, 541-42.<sup>8</sup> Further questioning revealed that Cruz merely *assumed* that the two men were together. RP IV, 542-43.<sup>9</sup>

Cruz said that the man with the machete spoke Spanish with an El Salvadoran accent. RP IV, 543. When asked, “What about the other

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- <sup>8</sup> Q. Did *they* say anything to you about being in a gang?  
A. Yes.  
Q. What did *they* say?  
A. *They* said – what’s that in Spanish?  
Q. Go ahead. If you want to say it in Spanish, just give the interpreter an opportunity to respond.  
A. *They* say (speaking Spanish), and *they* gave the gang sign.  
Q. THE INTERPRETER: *We* are from law mara, the beast is on the loose, and *he* gave the gang sign.

\* \* \*

- Q. What did you – at what point during this robbery did *they* do that?  
A. When I gave him the first 20 bucks, you know, *they* say oh, *we’re* from la mara or (speaking Spanish).  
A. That’s when I was - -I was like okay. You guys are from the gang. Okay.  
Q. *(By Mr. Gahan) Did they both say that?*  
A. *No, just the one in the black.*  
Q. *Did the guy in the white say anything about being in a gang?*  
A. *No.*  
Q. Other than telling Mr. Hector Veteta-Contreras get another \$20 from him, do you remember anything else he said?  
A. I don’t remember.  
(Emphasis added).

- <sup>9</sup> Q. *How do you know they were together?*  
A. Because one of them asked – told the other guy to give him \$20, and I’m assuming the other two guys were, you know, just looking to see if someone else was around, so *I’m assuming they were together.*  
Q. Did you see them speak to each other?  
A. No.  
Q. Did they arrive together?  
A. Yes, they did.  
Q. Did they leave together?  
A. Yes, they did.  
(Emphasis added).

defendant, Pedro Martinez, the one with the white shirt?” Cruz replied: “I don’t remember since he didn’t talk that much.” RP IV, 543. Cruz never got any closer to the man in the white shirt than being on the other side of his girlfriend’s car from that man. RP IV, 596.

After the two robbers left, Cruz got in his car and drove off, and then made a 911 call to the police to report that he had been robbed. RP IV, 544-45. On the 911 call, Cruz told police that in addition to the machete, he also saw a gun wielded by one of the robbers. RP IV, 546. But at trial Cruz admitted that this statement was a lie, and that he actually never saw anyone with a gun. RP IV, 546.

Q. Well, when you said they’ve got machetes and guns, did you know that wasn’t true?

A. Well, I knew that, you know, they had a weapon – weapons.

Q. All right. But you were just so nervous that you –

A. Yeah, I was like, okay, you know what, I saw a big machete (inaudible), *but I never saw a gun*, you know.

Q. So you were so nervous that you exaggerated what had actually happened?

A. Yeah.

Q. *And you said you saw something that you knew wasn’t true?*

A. *Yes.*

RP IV, 598 (emphasis added).

**c. Testimony of Cruz’ Girlfriend Teresa Sierra**

Cruz’ girlfriend Teresa Sierra testified at trial and said that two

guy approached her and Cruz; that one was short and the other one was a little taller. RP V, 786. The shorter one approached Cruz and pushed him. RP V, 786. Sierra was embracing Cruz when he got pushed. RP V, 787. Cruz reacted by putting his hands up and then the short guy opened his jacket to pull out a machete. RP V, 788. At this point Cruz told Sierra to get in her car. RP V, 788. Sierra identified defendant Veteta-Contreras as the short guy. RP V, 790.

According to Sierra, the taller guy in the white shirt didn't do anything:

After he shoved Walter – well, first of all was the defendant alone? No, **he had another guy, but the guy didn't do anything. He just said don't do anything. It's stupid.** He was standing a couple of yards away.

Q. What was he wearing?

A. White shirt.

Q. Do you remember what he looked like?

A. Yeah, he was taller. Definitely taller. And he did have tan skin, but I didn't pick up his facial features as easily as I did him [short guy] because he was right in front of my face, so I definitely remember him.

RP V, 790 (emphasis added).

Sierra made a courtroom identification of Martinez as this second man. RP V, 791. She reiterated that Martinez “told that little short guy not to do anything stupid.” RP V, 791.

**d. Duran's Trial Testimony That Only Hector Said He Was A Member of Mara Salvatrucha; That Duran Initially Thought the Machete was a Piece of Cable or a Club; and That Duran Was "Pretty Sober".**

At trial Duran testified that he went to China Harbor with his girlfriend Tuyei, and his friends Juan Lopez-Pando and Michael Hacksaw. RP V, 686-87. Duran was drinking Heineken in the parking lot, and standing by Hacksaw's car, when he was approached by four men. RP V, 688, 691, 693. Duran said he "was still pretty sober to the point where I knew what was going on or what I was doing." RP V, 708. The man in front of the group, whom Duran identified in court as Hector Veteta-Contreras, asked Duran for \$5. RPV, 693-94. Duran told Hector he did not have it and Hector responded by getting more aggressive and by touching his pockets. RP V, 694. Duran pushed him away and said he was not going to give him anything. RP V, 694. Standing about a foot, or a foot and a half away from Hector was a taller man in a white t-shirt whom Duran identified in court as Pedro Martinez. RP V, 694-95. The white t-shirt guy told him to give the shorter man whatever money he had. RP V, 696.

Like Cruz, Duran testified that Hector said he was crazy and that he was "Mara Salvatrucha." RP V, 696-97. Duran told him he didn't care what he was. RP V, 697. The prosecutor asked Duran, "Did they [Hector

and Pedro] both say they were Mara Salvatrucha or just Hector? Duran replied, “He [Hector] was the only one that claimed it.” RP V, 706. Neither man said they were going to kill him. RP V, 740.

The prosecutor asked Duran what the other two men in the group of four did, and Duran said “the other one that was behind Hector” had on a dark *blue* shirt and he “was like backing him [Hector] up and just give him what you got. I told him to get Hector away from me, but he didn’t do anything.” RP V, 698.

Duran said Hector then pulled out a machete and struck him with it. RP V, 698-99. Duran then gave conflicting testimony as to who it was who then flashed a gun at him:

A. At that moment I turned around to swing at him. And when I turned around to swing at him, *his friend in the blue shirt* flashed a gun at me.

Q. His friend in what color shirt?

A. *In a white color shirt.*

Q. *You just said blue?*

A. *Oh, sorry, I mean white shirt.*

RP V, 702-03 (emphasis added). Duran said the gun was a revolver and had a wooden handle. RP V, 703.

Duran said that at this point Hector punched him twice in the face. RP V, 705. The “guy with the gun” told Duran to give him whatever you got

but Duran gave Hector nothing. RP V, 706. Duran's girlfriend told a security guard working for China Harbor what was going on and the security guard confronted the robbers and told them to go away. RP V, 707. Duran said "[t]he one with the gun tried flashing the gun at him, but he wasn't scared of it." RP V, 707. Then the robbers left. RP V, 708.

Although Duran said he was sober enough to know what was going on, he acknowledged that he did not realize that Hector had a machete until after he got home and examined his shirt. Because he had his back turned towards Hector and didn't see what he was hit with, he initially thought Hector had hit him with a piece of cable or a club:

Q. Do you remember describing to the officers that *you thought you got hit by a cable*?

A. I thought I got – because what I saw was black, and I'm on my back when he hit me with it so –

Q. *So you actually didn't get that good a look at the machete?*

A. *No.*

Q. And yet you thought –

A. Unless – after I turned around.

Q. Okay. But at the time you remember telling the officer –

A. Yeah.

Q. -- *you thought it was a cable or a club?*

A. *Yeah.*

Q. *So that was a mistake?*

A. *At that moment, yes.*

Q. An honest mistake?

A. Yeah, because *after I saw how it tore my shirt, I was like this could be no club or a cable.*

Q. But you just told us earlier that *you actually didn't know your*

*shirt was torn until you got home later that night –*

A. *Yeah.*

Q. -- correct? Okay. So at the time you mistakenly thought --

A. It was a club or a cable.

Q. -- a club because it was --

A. Yes.

Q. -- hard to see at night?

A. Yeah. No, it was hard to see it at the moment when he hit me. I'm on my back.

Q. Okay. Now, let's talk about that for a second, how he hit you. He hit you with the machete, with the club, or the cable --

A. Uh-huh.

Q. -- on your back; is that right?

A. Yes.

Q. Because you had turned your back to him?

A. Yeah.

Q. *So you didn't see it coming.*

A. *No.*

Q. *You weren't looking at him when he hit you?*

A. *No.*

Q. Okay. And how many times did he hit you with the machete?

A. One time.

RP V, 736-37 (emphasis added).

e. **Duran's Courtroom "Show-Up" Identification of Martinez's Tattoo.**

The prosecutor asked Duran what he could recall about seeing tattoos on the robbers and Duran initially said he recalled that Martinez had some kind of tattoo on his arms; the prosecutor explored the subject further, showed Duran a photograph of the tattoos on Martinez' arm, and elicited testimony that he recalled that the robber's tattoo had flames on it similar

to the flames in the tattoo on Martinez' arm:

Q. Did you notice anything about tattoos on either Hector Veteta-Contreras or Pedro Martinez?

A. I noticed that Pedro had tattoos on his arms. But how they looked, ***I do not remember how they looked.***

Q. If you saw a photograph of the tattoos, would you be able to remember some or all of them?

A. I might remember something.

THE CLERK: State's Exhibit 28 is marked for identification.

Q. (By Mr. Gahan): I'm showing you what's been marked as State's 28. And I know it's been a long time. Looking at the tattoos on the forearm, are you able to recognize those as the tattoos on Mr. Martinez, or are you not sure?

A. I remember – ***I kind of remember the one on the right arm. I remember the flames. I don't remember seeing the rose, but I remember the flames*** because I saw the top side of his arm.

Q. And do you remember also saying that he had tattoos on the inside of his arms?

A. I don't remember the inside. I remember the outside,

Q. Just one moment. That night when you first identified Mr. Martinez, at that point were you able to recognize the tattoos on the person who was on the ground as the same tattoos in the same place –

A. Well –

Q. -- as the person who had had the gun, or do you remember?

A. I remember the tattoo. ***I don't remember how it looked like.*** I remember at first all I said was he had tattoos on his arms. That's all I remember saying.

RP V, 711-712 (emphasis added).

The prosecutor then showed Duran a copy of a transcript of a witness interview that he had done and had him read what he had said about

tattoos on that occasion. RP V, 712. He then asked Duran more questions about tattoos:

Q. All right. And Mr. Duran I'm not asking you if today you can look at those tattoos and say, yeah, those are the ones. What I'm asking is at the time that you saw Mr. Martinez sitting on the ground, you were able to recognize the tattoos on his arms as the tattoos on the arms of the person that had participated in the robbery?

A. Yes.

Q. Okay. So now after looking at that interview, were you?

A. ***Like I said, I did not remember what they looked like, but he had tattoos on his arms.***

Q. And did those, the tattoos that you saw, match your memory ***with respect to the placement?***

A. ***Yes, because as I said, the top part, it looked like a flame, but I did not see the inside that had the rose because I saw him at this point arguing with Hector, he is right here, so I can only see him through the corner of my eye.***

Q. ***Do you remember the tattoos being on his forearm?***

A. On the –

Q. The lower part of his arm?

A. ***No, I do not.*** I did not pay attention to those.

Q. Do you remember the tattoos being on –

A. I remember – because he had – his shirt had kind of big sleeves, so I could see from here down.

Q. So by forearm, I mean the bottom half of the arm. Do you remember the tattoos being on the bottom half of the arm?

A. Yeah.

RP 712-713 (emphasis added).

The prosecutor asked Duran about the basis for his identifying the man in the white t-shirt that police had detained -- Martinez -- as the man who had had the gun:

Q. Were you just relying on the tattoos, or did you remember anything else?

A. I remember his clothing, his haircut at the moment. I remember that.

Q. ***Did you remember his face?***

A. ***No, not really well,*** because like I said I was in the heat of the moment, so I was paying more attention to Hector than to Pedro.

RP V, 713-714 (emphasis added). “I was more into Hector than him. Him[,] I just was looking at him with the corner of my eye.” RP V, 755.

At this point the trial judge stated the court needed to take its morning recess and the jury was excused. RP V, 714. Before the jury returned to the courtroom, Martinez’ attorney noted that the prosecutor seemed poised to show Duran more photos of Martinez, and he raised an objection to the “show-up” procedure which the prosecutor had employed with Exhibit 28, the photo of Martinez’ tattoos:

MR. FLORA: Yes, your Honor. We are – this has to do with the tattoo issues, And I think we already have two pictures marked, and I don’t know if the other three are marked yet. The two that are marked are just arms, and

THE COURT: It’s a separate – this is a single exhibit, 28?

MR. FLORA: Okay. And the other two that we’re going - -Mr. Gahan has those. Those are full body shots with my client in red. And I think Mr. Gahan wants to introduce the other three. And my objection is that it calls into attention that he’s in custody.

But maybe ***more importantly essentially what we’re doing here is having a show-up ID with the tattoos.*** If somebody is asked what did

his face look like, he can just say something like he has a big nose or something. But the tattoos, someone can say what it depicts. *And I don't think we have anything on the record from the witness about what it depicts. And then he's shown the pictures, oh, yes, we've got flames here. I remember the flames.*

THE COURT: He testified I remember the flames.

MR. FLORA: Right, *after he looked at the pictures.* . . .

RP V, 714-15 (emphasis added).

The trial judge indicated he was not impressed with the part of the defense objection which was based on the fact that the photos would show that Martinez was in custody, but said that he didn't understand what the rest of the defense objection was about. RP V, 717. Defense counsel explained that the procedure was "impermissibly suggestive"; the trial judge agreed it was suggestive but found nothing impermissible about the use of such a suggestive procedure:

MR. FLORA: This has all the features of a show-up ID wherein (inaudible) is much more specific. We don't have any information from this witness about what the tattoos looked like, and then he's shown tattoos of – that are obviously on Mr. Martinez and asked are these the tattoos that you remember?

THE COURT: And the problem with that is what?

MR. FLORA: It's a show up ID. It's impermissibly suggestive. Oh, yes, here's the tattoos that I remember attached to the arm and body of the person sitting here in the courtroom.

THE COURT: *Well, it's clearly suggestive, but I don't see what's impermissible about it, so I'll allow the State to proceed that way.*

RP V, 717-18 (emphasis added).

The jury returned to the courtroom and the prosecutor continued to question Duran about more photos contained in Exhibit No. 30 which also showed parts of Martinez' arm bearing a tattoo that included some flames:

Q. What do you see?

A. I see a tattoo.

Q. Of what?

A. Of a flame.

Q. *Is that consistent with the flames that you described to us?*

A. *Yeah.*

Q. *Is that what you remember?*

A. *Yeah.*

MR. GAHAN: State moves to admit 30.

THE COURT: Defense.

MR. FLORA: No further objection.

MR. DUBOW: No objections.

THE COURT: 30 is admitted.

RP V, 719 (emphasis added).

**f. Monetti's Denial That He Was Involved in Either Robbery and Admission of the Immunity Agreements Between Monetti and Deputy Prosecutor Gahan.**

The prosecution called Martin Monetti as a witness at trial. Monetti said he was from Mexico and that Denis Garcia was a friend he went to high school with. RP V, 809-810. Robin Barrera was a friend of Garcia's. RP V, 812. On the night in question Garcia and Barrera picked him up at

his house and they all went to China Harbor. RP V, 817-819. Monetti testified that he had nothing to do with any robbery at China Harbor that night and denied that he ever told anyone to give the short guy some money. RP V, 859-860, 864.

Monetti did admit to a lot of drinking. He said he consumed five or six beers at his own house before he was picked up, and that and Barrera consumed some Lokos, a caffeinated alcoholic drink, in the car when they got to China Harbor. RP V, 818, 820-822. He described himself as very drunk that night. RP V, 848.

According to Monetti, while he was at China Harbor he was approached by a short guy who said he was from El Salvador and that he was a member of Mara Salvatrucha. RP V, 824. The short guy showed Monetti “a long stick with pointy things” on it which Monetti said he called a machete because that’s what everyone else was calling it:

Q. What did he show you?

A. A machete.

Q. How did he go about showing you a machete?

A. I don’t know. I just remember he pulled out the machete, and he had a long stick.

Q. How did you go from thinking it was a long stick to realizing it was a machete?

A. Oh, just because what I heard in the news.

Q. So you never saw it in a way you could identify it as a machete?

A. Yeah, probably a kind of machete, a long stick with pointy things

so –

Q. What do you mean a long stick with pointy things?

A. That's what I saw, a long stick with pointy things.

Q. Well, did it look like – did it look like one of these?

A. No.

RP V, 826-27.

In response to leading questions Monetti said the pointy things were “like teeth” and “like serrated edges.” RP V, 827. The prosecutor asked:

Q. You describe that as a stick or a knife?

A. I don't know. Just like it's called (inaudible) a machete because that's what everybody is calling it.

RP V, 827.

The short guy was accompanied by a taller guy. RP V, 825. Monetti said he could not remember what the taller guy said to him but he recalled the taller guy showed him a gun. RP V, 829. After reviewing a written statement he had given previously, Monetti testified that the taller guy was wearing a white t-shirt. RP V, 831. Monetti identified defendant Veteta-Contreras as the short guy and defendant Martinez as the taller guy. RP V, 832-33. According to Monetti, Veteta-Contreras was walking up to people, and flashing the “machete” he had. RP V, 834, 836. He never heard the short guy ask anyone for money, but he “assumed” that the short guy was using the machete to get money from people. RP V, 835-36.

When Monetti and his friends decided to leave the area and started walking towards Garcia's car, the short guy started walking with them, and he was with them when the police stopped the three of them. RP V, 839. According to Monetti, when the short guy saw that police were coming he pulled out his "machete" and placed it behind the bumper of a truck. RP V, 840. As the police approached, Monetti threw his wallet into the bushes, RP V, 844. He claimed he did this because he had some marijuana in his wallet and he didn't want to get caught with it. RP V, 844. Initially Monetti denied that he was planning on smoking it but after the prosecutor told Monetti, "I'm not going to charge you with possession of marijuana, and instructed him to "tell the truth," Monetti admitted that he was planning on smoking it. RP V, 845-46.

Monetti said the short guy, whom the prosecutor referred to as "the machete guy," was wearing a black shirt. RP V, 847. Even though he made a courtroom identification of Veteta-Contreras as the short guy with the machete, twice during his trial testimony Monetti he referred to the shorter guy as "Pedro."<sup>10</sup>

Monetti admitted that both Martinez and Monetti's friend Denis

Garcia were wearing white shirts that night. RP V, 868. When it was suggested that Monetti might lie to protect his friend Denis Garcia, Monetti responded as follows:

Q. Would you lie for Denis?

A. No.

Q. Not at all? Never?

A. Well, he wouldn't do anything bad, so I wouldn't have to lie so --

Q. In general would you lie for Denis to protect him?

A. Right. Right, he's my friend. No. Yes, no. No.

RP V, 890.

On direct examination the prosecutor elicited testimony from Monetti that he --- the trial prosecutor -- had given Monetti immunity from prosecution so that he could force Monetti to testify at the trial. The prosecutor showed Monetti Exhibit 32, which consisted of two separate immunity agreements. RP V, 813. Questioning Monetti the prosecutor elicited testimony about the immunity that he personally had given to him:

Q. Did you sign those?

A. Yes.

Q. Okay. Is there also a signature for prosecuting attorney Thomas Gahan?

A. Yes.

Q. *And did I sign those as well?*

A. *Yes.*

Q. And is there an area where attorney Robert Grenault II also signed

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<sup>10</sup> "Q. When you say the shorter? A. Pedro. Yeah, Pedro." RP V, 839. "Q. Who was next to you? A. Robin and -- I mean Robin -- Denis and Pedro." RP V, 847.

- it?
- A. Yes.
- Q. ***Do you know what those papers are?***
- A. ***They're for immunity.***
- Q. ***Is that an immunity agreement?***
- A. ***Yes.***
- Q. ***Did you meet with the State of Washington, with me in this case?***
- A. Yes.
- Q. And when you met with me, was there also defense attorneys; were they present as well?
- A. Yes.
- Q. And at that time did you tell us what you remembered from the late night/early morning of April 16<sup>th</sup>/April 17<sup>th</sup>?
- A. Yes.
- Q. Now, Mr. Monetti, I'll cut to the chase. Were you kicked by police officers as part of the investigation of this case?
- A. Yes.
- Q. And after being kicked, did you acquire the services of an attorney?
- A. Yes.
- Q. And after conferring with an attorney, did you communicate to me that you would only testify if you were offered immunity?
- A. Yes.
- Q. And was that your decision or your attorney's decision? Let me ask you this way: Did your attorney counsel you in that direction?
- A. No, I just wanted immunity.
- Q. How did you know about immunity? Did your attorney tell you about immunity?
- A. Yes.
- Q. And are those letters the product of our immunity agreement?
- A. Yes.
- Q. ***And in those letters, did the State offer you immunity in exchange for your testimony?***
- A. ***Yes.***
- Q. In order to prohibit you from claiming a Fifth Amendment right and remaining silent on the stand; is that right?
- A. Yes.
- Q. So you understand you no longer have that right by testifying today?

A. Yes.  
Q. You cannot plead the Fifth, correct?  
A. Uh-huh.  
Q. Is that right?  
A. Yes.

RP V, 813-815 (emphasis added).

Further questioning elicited the fact that Monetti would not be charged with either robbery, or with possession of drugs, provided he testified truthfully.

Q. Did all parties sign that paperwork indicating that *as long as you testified truthfully*, you would not be charged for crimes in connection with the robberies of the individuals involved?  
A. Yes.  
Q. You would also not be charged with any crimes related to possession of drugs on that night; is that right?  
A. Yes.  
Q. And was that understanding memorialized in that immunity agreement?  
A. Uh-huh. Yes.

RP V, 815-816 (emphasis added).

The prosecutor then offered the two immunity agreements in evidence and they were admitted. RP V, 816.<sup>11</sup>

The two immunity letters in Exhibit 32 contain nearly identical

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<sup>11</sup> Initially, Martinez' attorney indicated that he had an objection but said that it could be taken up later at the conclusion of Monetti's testimony. RP Vi, 816. However, at the conclusion of Monetti's testimony no objection was raised, and thus no argument was ever made to the trial judge as to why Exhibit 32 should be excluded.

language expressing the trial prosecutor's opinion that Monetti was telling the truth and that he was not guilty of being a participant in either robbery. The first letter gave Monetti use immunity for anything that said when he was interviewed by the defense attorneys representing Martinez and Veteta-Contreras. The first paragraph of the first letter states:

I have met with your attorney, Robert Flennaugh II, concerning your observations outside of China Harbor on the early morning of April 17, 2010. I have watched the video of your detention and subsequent injury by Seattle Police Officers during the course of the investigation, and have spoken with your friends Robin Barrera and Denis Garcia Garcia, as well as the victims of the robberies. I have also reviewed the police reports and other videos in this case. ***Based on my review of these items, I do not believe that you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz (the two robbery victims) on the night in question.*** Based on my conversations with your attorney, my personal interviews with the myriad witnesses in this case, and my review of all the other evidence, I do believe that your testimony at trial is material to the case. Because ***I do not believe, based on this review, that the State can prove you played any role in the robbery,*** and because you have material evidence of the crimes, I am willing to offer you immunity to prohibit you from making any 5<sup>th</sup> amendment claims to silence either for defense interviews or for trial testimony.

Exhibit 32 (Appendix A) (emphasis added).

The second paragraph of the first immunity agreement promised to provide additional transactional immunity if, after completing the defense witness interviews, the prosecutor still believed that Monetti had nothing

to do with the robberies:

In exchange for a complete truthful account of any knowledge you may have relevant to the case, nothing that you say during the defense interview will be used against you in any criminal proceeding, I have received a brief proffer from your defense counsel which contributes to my belief that the evidence you can provide is relevant to the case. Should I still feel this way following the interview, and ***should I remain convinced of the lack of evidence against you on the charges, I will provide you with transactional immunity in order to secure your testimony at trial.*** This means that as long as you testify truthfully at trial, the State will not file charges of robbery related to this criminal investigation, or to any other charges related to the robbery of Eliezer Duran or Walter Flores Cruz. . . .

Exhibit 32 (Appendix A) (emphasis added).

The second immunity agreement recited that after listening to what Monetti was able to remember about the incident, the prosecutor remained convinced that Monetti had nothing to do with the robbery. The following sentence from the first letter was repeated in the second letter:

Based on my review of these items, ***I do not believe that you played a criminal role*** in the robbery of either Eliezer Duran or Walter Flores Cruz (the two robbery victims) on the night in question.

Exhibit 32 (Appendix A) (emphasis added). The second letter also repeated the statement contained in the first letter, that “In order to secure the State’s offer of immunity, you must speak truthfully in interviews and during your testimony.” *Id.*

g. **Barrera's Denial That He Was Involved In Either Robbery.**

Barrera confirmed that Garcia and Monetti had picked him up at his house and that he went with them to China Harbor. RP VI, 906. He too claimed he had nothing to do with the robberies of Cruz and Duran. But he testified that he did interact with Veteta-Contreras and Martinez. Barrera said Veteta-Contreras had a machete, and that Martinez showed him a gun that he had tucked into his pants. RP VI, 914-15, 918-19. He said they both said they were in a gang called Salvatrucha and that they made gang signs with their hands. RP VI, 912-13. He denied that he shared any alcohol with the two men or that they drank together. RP VI, 917. But he said that the two men were friendly and that they never asked him for any money. RP VI, 946. According to Barrera, Martinez was wearing long pants, not shorts. RP VI, 936-37.

At one point Barrera thought about entering the China Harbor to go dancing, and during that period of time he was not with Monetti. RP VI, 956. He conceded that it was possible that Monetti could have gotten the machete and robbed somebody during that period of time, and Barrera would not have seen it. RP VI, 956-57.

When police cars arrived on the scene, Monetti and Garcia ran away.

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RP VI, 938-39, 945. Barrera did not run. RP VI, 939. The police detained Barrera because they suspected him of being involved in the robberies. RP VI, 925. They told him to get down on the ground and he complied. RP VI, 935. The police detained Martinez at the same time and had Barrera and Martinez right next to each other. RP VI, 928. After questioning Barrera for about ten minutes they let him go. RP VI, 927. Barrera never told the police that the guy next to him, Martinez, had a gun. RP VI, 928. Barrera said he never mentioned that because the police never asked him that. RP VI, 928. They asked if he knew Martinez and he told them no. RP VI, 928.

Barrera said he did *not* get a ride home with Garcia and Monetti. RP VI, 940.

**h. Garcia's Denial That He Was Involved In Either Robbery.**

Garcia, who was born in Guatemala, met Monetti and became his friend in high school. RP VI, 1007. He acknowledged that he went to China Harbor on the night of April 16<sup>th</sup> with Monetti and Barrera. RP VI, 1011. In the parking lot they were approached by two guys. RP VI, 1015.

Garcia identified Veteta-Contreras as the short guy who had a machete, and Martinez as the taller guy with a gun. RP VI, 1023-24,

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1028-29. Garcia said the two men were being friendly and said they were from El Salvador. RP VI, 1022. Both said they were members of MS-13 and were making gang signs with their hands. RP VI, 1016.

Like Barrera, Garcia testified that he had nothing to do with either robbery. In fact, he claimed to have left the scene altogether for a period of time. He claimed that he told Monetti and Barrera that he was going to get something to eat, and that he left the China Harbor parking lot and drove off to a nearby Subway restaurant where he got a sandwich to eat. RP VI, 1035, 1037. On his way back from the restaurant, Garcia claimed he saw his cousin's car parked outside the Rock Salt restaurant, so he parked there. RP VI, 1038. He talked to his cousin for about five minutes and then walked back to China Harbor. RP VI, 1041-42.

On direct examination Garcia testified that when he got back to China Harbor he saw Monetti and that the two of them "tr[ied] to find Robin [Barrera] but we couldn't find him." RP VI, 1043. Since they couldn't find him, they decided to walk back to where Garcia's car was parked at the Rock Salt restaurant. RP VI, 1043.

On cross-examination, Garcia told a different story. On cross he acknowledged that when he got back to China Harbor he saw that the

police were holding a gun on Martinez and were telling him to get on the ground. RP VI, 1087. When asked if he did not see Robin Barrera there as well, Garcia said [h]e was kind of close, but I don't know if it was him. I couldn't tell." RP VI, 1089. Garcia said "[i]t could have been him," and that "it looked like somebody that was like Robin, but I'm not saying it was him." RP VI, 1089.

Q. Okay. So you see someone who you think is Robin who's going to need a ride home, and you don't go up to him and say – check to make sure if that's Robin or not?

A. I didn't check. I didn't want to check because it was kind of close to where the cops were right there telling the other guy to get on the ground.

Q. Okay. So this guy who kind of looked like Robin is right there with the guy who was getting arrested?

A. Yeah.

RP VI, 1090. On cross examination Garcia also conceded that Monetti seemed eager to leave the scene and to get out of there. RP VI, 1071.

On their way to Garcia's car, which was parked at the Rock Salt restaurant, the short guy with the machete, whom Garcia identified as Veteta-Martinez, came "sneaking towards where we were walking, and then he just approached us again," and asked them for a ride; Garcia said he refused to give him a ride. RP VI, 1045.

Garcia said the short guy said he lived in Ballard and Garcia said he

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could not take him there but the short guy kept insisting. RP VI, 1048. Then the police gang unit arrived and ordered the three men (Garcia, Monetti and the short guy) to get on the ground. RP VI, 1048, 1050.

They were detained for about 20 minutes. RP VI, 1057. They were each told to get up and a spotlight was shone on them as they tried to see if a witness would identify any of them as one of the robbers. RP VI, 1057. Eventually, Garcia and Monetti were released. RP VI, 1058.

Although Barrera testified that he did *not* get a ride home that night with Garcia, Garcia testified that after the police released him he called Barrera on the phone, spoke with him, drove back to China Harbor, picked him up and drove him home. RP VI, 1059-1060, 1091.

Garcia never told the police that he had seen the third man -- Veteta-Contreras -- in possession of a machete that night. RP VI, 1060. Like Barrera, he said he never told them because they never asked him that. RP VI, 1060. He also said, "I didn't want to snitch on people that I don't know." RP VI, 1061.

Garcia also testified that when he got back to China Harbor after going to the Subway restaurant and found Monetti, Monetti told him that "a guy had given him \$40." RP VI, 1065. Garcia said he thought he recalled

telling a police detective that Monetti had told him he got \$40 from someone. RP VI, 1067.

But Monetti testified that he had less than \$30 in his wallet that night. RP V, 884. Monetti testified that from a distance of 30 feet, he saw Veteta-Contreras ask someone for money; he saw someone hand Veteta-Contreras money; and later Veteta-Contreras showed him the money. RP V, 883. Contradicting his friend Garcia, Monetti denied that Veteta-Contreras ever gave him the money. RP V, 883.

Garcia acknowledged that he was wearing a *white shirt and shorts* that evening. RP VI, 1051.

**i. Descriptions of The Robbers Given By Witnesses & Victims**

**Machete Guy.** On the night of the incident, Duran told Officer Terry that the man with machete was wearing a black hat, a black coat and black pants. RP III, 397. He also told Officer Schweiger that the man who tried to rob him was wearing a black t-shirt. RP III, 426.<sup>12</sup> At trial Duran said that this robber was also wearing a black baseball cap. RP V, 730.

Initially Officer Terry testified that Duran told him that the man with

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<sup>12</sup> Officer Schweiger agreed that when he arrived at the China Harbor there were lot of people wearing black shirts, and that Duran himself was wearing a black shirt. RP III, 447-448.

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the machete was between 5 feet 2 inches and 5 feet 5 inches. RP III, 402. However, upon listening to a videotape of his on-scene interaction with Cruz, Terry acknowledged that Duran described the robber with the machete as 5 feet 5 to 5 feet 6 inches, and that he did not say 5 feet 2 inches. RP III, 409-410. Later a police measurement established that that Veteta-Contreras was 5 foot 3 inches tall. RP VII, 1239. The police never measured Monetti. RP VII, 1239.

At trial Cruz testified that the robber with the machete was wearing a black shirt and a hat, and that he was about 5 feet 6 inches tall. RP IV, 553, 578. Cruz said that the man with the machete was acting weird and that he may have been drunk. RP IV, 583-84.

**Gun Guy.** Duran told Terry that the “other man” with the gun was tall and skinny and wearing *a white t-shirt*. RP III, 424. Duran said the man with the gun was wearing *blue shorts*. RP V, 695.

Duran’s friend Lopez-Pando said that the man with the gun was wearing *a white shirt* and *black shorts*. RP IV, 649. Cruz simply said he was wearing a plain *white shirt*. RP IV, 538.

**j. Physical Appearances of Monetti and Garcia Match the Descriptions of the Robbers.**

While Veteta-Contreras matched the description of the machete man to

some degree, so did Monetti. Monetti was wearing a black shirt and dark pants. RP III, 455, 491. Veteta-Contreras was wearing a black shirt. RP III, 492.

The witnesses consistently described the man with the machete as acting as if he were high on something or drunk. RP III, 499; RP IV, 547, 583-84, 658; RP V, 732. Monetti himself acknowledged that he was “very drunk” that night. RP V, 848.

To the extent that he was “taller” than the machete man and wearing a white shirt (RP III, 393), Martinez matched the description of the man with the gun. But Garcia was also wearing a white shirt. RP V, 853.

The gun man was described as wearing shorts: black according to Pando-Lopez and blue according to Duran. RP IV, 649; RP V, 695. But Martinez was not wearing shorts when he was arrested. Exhibit 45; RP IX, 1538.<sup>13</sup> But Officer Hairston stopped Garcia precisely because Garcia matched the broadcast description of the man with the gun: Hispanic male, white t-shirt and black shorts. III, RP 480-81. So Garcia was a better match than Martinez. Moreover, Garcia and Monetti both ran from

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<sup>13</sup> See the discussion of Exhibit 45 in the closing argument of Martinez’ counsel: “what’s the first thing we notice about these shorts that I’m pulling out of the bag? They’re not

the scene when police arrived. RP VI, 938-39, 945. Martinez did not run but was instead compliant with the directions of responding police and got on the ground when ordered to do so. RP III, 339. Monetti was not fully compliant with Officer Hairston and it looked to Hairston as if he was preparing to flee. RP III, 487.

The man with the machete took \$40 away from Cruz; Monetti told Garcia that he had received \$40 from another guy. RP VI, 1065. Monetti threw his wallet in the bushes to prevent police from searching it. RP V, 844. And Monetti asked the prosecution for immunity from prosecution for robbery and said he only testify if he were given immunity. RP VI, 973-74; RP V, 814.

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shorts. They're long pants. So why was the guy with the gun in shorts? And lo and behold its Mr. Martinez who not only doesn't have a gun but he doesn't have shorts."

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**k. Testimony About the Mara Salvatrucha 13 Gang**

Both Walter Cruz and Detective Joe Gagliardi testified for the State about the gang Mara Salvatrucha, also known as MS-13. Cruz testified that he spent the first 14 years of his life in El Salvador where murders were committed every single day by members of MS-13. RP IV, 520. According to Cruz, Mara Salvatrucha “is the most dangerous gang in central America.” RP III, 522. Cruz said that in El Salvador he had lots of friends who were gang members and that he witnessed people being killed, but he himself did not ever join a gang. RP IV, 521-522. Cruz was happy to leave El Salvador and to come to the United States, because he wanted to get away from all the gang violence there. RP IV, 525.

Detective Gagliardi, testifying as an expert witness, said that MS-13 was a Soreno gang that was started in Los Angeles in 1984, at a time when El Salvador was in the middle of a civil war and large numbers of people emigrated from there to Los Angeles. RP VII, 1132. According to Gagliardi, these immigrants were easy prey for LA gangs that were already established, so they had to form their own gang for self-protection against Mexican gangs. RP VII, 1133. MS-13 adopted the devil’s pitchfork as their hand signal (a hand sign that looks much like the

University of Texas' "hook'em horn" symbol for the Texas Longhorn mascot). RP VII, 1133.

After ten years Mara Salvatrucha made a deal with the Mexican mafia; they agreed to pay the Mexican mafia taxes and in return the Mexican mafia provided protection to their members who were in prison. RP VII, 1134. At this time Mara Salvatrucha tacked the number 13 on their name and started using the gang color blue. RP VII, 1134, Gagliardi agreed with Cruz' assessment of the gang, stating that MS-13 was a super-gang which was one of the most violent in the United States. RP VII, 1136.

MS-13 is also very active in El Salvador; according to Gagliardi, in that country if a person has a Mara Salvatrucha tattoo, the government simply picks you up and takes you to jail. RP VIII, 1135. Alternatively, the El Salvadoran government has a "non-sanctioned" program of allowing "black shadow" policed to simply shoot a person with Mara Salvatrucha tattoos. RP VII, 1136.

Gagliardi agreed that not all tattoos are gang tattoos. RP VII, 152. He described a "typical" MS-13 tattoo as follows:

It would be MS-13. Very rarely will Mara Salvatrucha gang members tattoo themselves with the general Soreno tattoo because MS believes – they give themselves the warrior cast of the Soreno street gangs, so they view

themselves as a step above all the other Sorenos, so they'll usually do MS-13, Mara Salvatrucha, or El Salvador or Salvadoran pride or an image of the El Salvadoran flag or that devil pitchfork hand sign.

RP VII, 1152.

### **I. Prosecutor's Closing Argument**

The prosecutor began his closing argument with a fairly lengthy speech about the dangers to America posed by La Mara Salvatrucha. RP IX, 1471-73.<sup>14</sup> Then, after discussing the general legal concept of accomplice liability, the prosecutor began to discuss the charge of first

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<sup>14</sup> “When 14 year old Walter Flores-Cruz first saw the Space Needle from the airplane, remember what he told us? He said it was Heaven, and it was Heaven not so much because of what lay before him right? The idea of America and his freedom and the “land of the free” and all the clichés that we’re used to, but it was Heaven because of what was behind him. Because where he grew up in Santa Ana, El Salvador, Walter Flores-Cruz was surrounded by violence. The streets were owned by La Mara Salvatrucha, and there was perpetual war, right? The MS-13s and the 18<sup>th</sup> Street Gang were outside his front door and he said things would turn from normal to violence like that. They’d be drinking, talking and laughing and then suddenly there would be a rival – or there would be a discussion or something would accumulate and before you’d know it machetes were drawn. But his family did it right. His dad came here and worked, and worked for years as a janitor to get Walter Flores-Cruz and his family over there. And it only took 14 years, and he finally did it. He pulled it off.

“Do you remember Detective Joe Gagliardi’s description of the reign of the MS-13 in El Salvador?”

[Defense objection to “improper argument” overruled].

“MR. GAHAN: He said they’re the greatest threat to the national security of the country. So when he was here, he was free. That life was thousands of miles behind him, or so he thought, right? Because even in the safe shadow of the Space Needle that he had imagined, that whole sense of safety created by distance was eviscerated in a few

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degree robbery pertaining to Cruz. He reminded the jury that Veteta-Contreras had said “We’re from La Mara,” and then said:

Everything now changes, right? Especially for Walter Flores-Cruz because this is what he knows; this is what he got away from. This is why he’s here in the States is to get away from these guys.

RP IX, 1476.

Although Cruz never said that Martinez threatened him in any way, the prosecutor argued that Martinez joined in Veteta-Contreras’ robbery as an accomplice after he saw Cruz throw a \$20 bill:

He joins Hector in the robbery completely. He says, “Why did you throw it? Why did you throw the money.” And then he looks at Hector and he says, “Ask him for another 20.” That’s aiding, that’s encouraging, that’s soliciting, that’s accomplice liability because he sees the machete, right? He could have turned and left right then and there.

RP IX, 1477. Similarly, on the attempted robbery charge involving Duran, the prosecutor argued that Martinez acted as Veteta-Contreras’ accomplice by showing Duran the handle of a gun tucked in his waistband. RP IX, 1482-83.

Eventually, the prosecutor took up the critical subject of credibility, and acknowledged that the key issue in the case was who to believe:

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seconds in a public parking lot in our city outside a Chinese restaurant on our waterfront. It became just for a few minutes as lawless and as frightening as the streets of Santa Ana.

The real question, though, in this case is *who do we believe and do we believe them enough?* Because ultimately, how do we know that our eyewitnesses are reliable?

RP IX, 1488 (emphasis added). The prosecutor asked rhetorically,

*So how do we know our witnesses are reliable?* How do we know that their eyewitness testimony is something we can trust. That is really at the issue of this case, right? It's not the ability of Martin Monetti to be a criminal mastermind and forge conspiracies. It's not –

[Objection overruled].

MR. GAHAN: *It's do we believe him?* Do we believe the eyewitnesses and why? . . .

RP IX, 1490.

The prosecutor suggested that Cruz was reliable because unlike some academic exercise, this was the real world and he was in danger. RP IX, 1494.<sup>15</sup> According to the prosecutor, Cruz' act of identifying Martinez was "an act of freedom and conscious [sic], it's an act that defies everything that he had to learn for 14 years" when he lived in El Salvador.

RP IX, 1494.

Turning to the charge of attempted robbery of Duran, the prosecutor

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<sup>15</sup> "Because Walter Cruz could tell you it's not the same because he has everything to lose. He's looking at Pedro Martinez. He's a few feet away from him, and he says, 'That's him.' Do you think he would have had the chutzpah or the naïveté to say that in front of an El Salvadoran death squad?"

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asked: “How do we know we can trust Eliezer Duran?” RP IX, 1504. He then answered his question by arguing that Duran proved his reliability by accurately recalling that the man with the gun had a tattoo with flames:

He also remembers something else. He says the gun guy, and he says it to the police and he said it to us, had tattoos on his arm. “And I don’t remember what was on his inside, but *there were flames that licked up his forearm.*” *He remembered that. He remembered it specifically enough to nuance, “Well, I don’t remember this part, but I remember this part.” Well, what do you know, Pedro Martinez has flames that lick up his forearm. He matches in description and in tone and tenor of the event what Walter Flores-Cruz says* and he remembers another detail because he was looking at that guy, man. . . .

RP IX, 1504-1505 (emphasis added).

The prosecutor finished his argument by suggesting that “we” cannot act in a sloppy fashion like the police did in this case:

Why can’t we act like the police acted at first? Why can’t we turn our backs on Walter Flores-Cruz, not take a statement from him, not search the car, take a couple of words from Eliezer Duran, not search the car, let a detective follow up? Why can’t we be dismissive about it?

RP IX, 1517. The prosecution witnesses “all stood up to what [the defendants] thought they do with absolute impunity.” RP IX, 1517. “Walter Flores stood up. . . and so did Eliezer Duran and so did Juan Lopez-Pando, and even Martin Monetti and Robin Barrera and Denis Garcia. They stood up in their own little ways . . .” RP IX, 1517.

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Concluding his argument, the prosecutor said the State's witnesses "all have done their duty. The rest is up to you." RP IX, 1518.

**m. Defense Counsel's Closing Argument for Martinez**

In his closing argument defense counsel responded to the prosecutor's contention that Duran had accurately remembered the flames in the tattoo of the man with the gun, and pointed out that he only remembered them *after* he had been shown a photo of the tattoo on Martinez' arm:

We have pictures of Mr. Martinez's tattoos, and he's a young man. I don't know how many of you have not seen a college or a professional basketball game lately, but I think it's a two-stroke or a two-shot penalty if you don't have your arms covered with tattoos. It's not unusual for young people to have tattoos.

*So what we get with the witness who was on the stand, I think it was Mr. Duran, is not something that is reliable or credible sounding identification of tattoos. What we get is him being shown a picture of tattoos and him saying, "Yeah, I remember the flames." What would have been different, what would have been reliable, is at some point in all these interviews with the police, or even out at the scene or at some point before he was shown a picture of the tattoos, "What was it that the tattoos depicted?" And if he had said at that point, "Well, they depicted some flames," I think he said when he was on the stand. And then lo and behold we get some pictures of Mr. Martinez's arms and it has pictures of tattoos and flames. I mean, flames aren't really all that unusual, but I think you – with just that example, I think that you have a way of understanding a lot of what Dr. Loftus was talking about. That is that there's post-event information, the picture of the – of Mr. Martinez's arms, and Mr. Martinez is here, and by the process of elimination it's pretty easy to – for a witness to say – or maybe it's impossible for a witness not to do this, to go*

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around the table and say, “Well, okay, yeah, that’s the guy.”

What we have with these tattoos is post-event information, we have suggestibility, and we have what I think Dr. Loftus alluded to, which I think maybe is in everyone’s understanding, that the pressure of being a good witness, being a good citizen, being able to give information that’s going to help the prosecution, help the police resolve this case. . .

RP IX, 1524 (emphasis added).

Defense counsel argued that the State was prosecuting the wrong man, and that in fact the State’s own witnesses, were actually participants in the robberies:

Let me talk about these three people: Denis Garcia, Martin Monetti and Robin Barrera . . .

Let me throw this out there. These three had much more to do with these events than they’re letting on. . . .

RP IX, 1527.

He argued that Garcia’s memory was *too* good; he not only remembered that he *left* the scene of the China Harbor parking lot to get something to eat, “his memory is so good that he could tell us what kind of sandwich” he ate. RP IX, 1527. Defense counsel suggested that Garcia had a reason for falsely claiming to have left the scene:

[H]e needs to put as much distance from himself between the events at China Harbor and himself. He needs to be out of the scene altogether, and he needs his car to be parked not by China

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Harbor, where Mr. Barrera says it was, but it needs to be away from China Harbor.

RP IX, 1528. Counsel also noted that Garcia claimed to have given Barrera a ride home that night, but Barrera said no one gave him a ride home. RP IX, 1529. Why would Garcia claim to have given Barrera a ride if in fact he had not? Counsel suggested that Garcia was trying to protect his friends:

[H]e certainly has the motive for wanting to watch out for his friend, Mr. Monetti, who was certainly involved in this, and Mr. Barrera, and maybe even himself. There's certainly reason to think that those three know a lot more about what happened than they're letting on.

RP IX, 1529.

Counsel argued that Monetti threw his wallet away because he knew it contained incriminating evidence – the money that had been taken away from Cruz:

The officer was following him, and Mr. Monetti sees that he's being followed and he takes his wallet and he throws it in the bushes. Why on earth would he do that? ***Because he had \$40 in it that he had taken in a robbery.*** Because he knew perfectly well that he was going to be a suspect in this robbery.

RP IX, 1530-1531 (emphasis added).<sup>16</sup>

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<sup>16</sup> Counsel for Veteta-Contreras also argued in his closing that the robber with the machete was Monetti and not Veteta-Contreras. RP IX, 1562-63. "We can see that

Finally, Martinez' counsel noted that the description of the man with the gun did not fit Martinez (although it did fit Garcia) for several reasons:

And what do we know about Mr. Duran and his friend, Pando-Lopez [sic]. Well they've described a couple of things to us that is that the guy with the gun had – was wearing shorts. And Mr. Duran, according to Officer Schweiger at the scene, said, about Mr. Martinez who was there under arrest, "It looks like him." Officer Schweiger said that the identification was hesitant.

RP IX, 1534.

Now I'm getting into State's Exhibit 45. These are the clothes that Mr. Martinez was wearing. What's the – what's the first thing that we notice about these shorts that I'm pulling out of the bag? *They're not shorts.* They're long pants. So why was the guy with the gun in shorts. And lo and behold it's Mr. Martinez, who not only doesn't have a gun but he doesn't have shorts.

RP IX, 1538.

And let's look at the clean white shirt that Mr. Flores [Cruz] described. . . . So this is a – this a white t-shirt. It's about as unclean as you can get and still be a white T-shirt.

RP IX, 1539.

So why would it be that Mr. Martinez, who was arrested, didn't flee? He was cooperative. He obviously wasn't wearing shorts. I mean it's not like that's the default description for something that you wear over your legs. I mean if you don't know what he's wearing or if you don't remember, that [sic] you wouldn't say anything.

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objectively speaking Monetti fits the description on the 911 call better than Hector does." RP IX, 1563.

I thought about wearing shorts today for my closing, just to see if anybody would notice. . . . But describing something as shorts really has to mean this, that the guy with the gun was wearing shorts. Why else would people say that if it wasn't true?

And why wasn't Mr. Martinez wearing a plain white shirt? And I think most significantly, why didn't he have a gun? There's actually an answer to all of these questions: Because he wasn't the guy with the gun. He was misidentified. They've got the wrong guy.

RP IX, 1539-1540.

**n. Defense Counsel's Closing Argument for Veteta-Contreras**

Counsel for Veteta-Contreras then gave his closing argument, and he devoted a portion of his closing to a discussion of the immunity agreement entered into by Monetti and the trial prosecutor, which he invited the jurors to read:

Monetti's testimony was full of lies. His actions that night are totally consistent with someone who robbed two people: running when he sees the police, throwing a wallet, in flight position. ***Then we come to the business of this immunity agreement, which is also – you'll be able to read. There's two separate letters, State's Exhibit 32, which will be in evidence.*** He said – this is on direct examination, he said it was his idea to ask for immunity. He wanted to "exchange" immunity, that was the word he used. Exchange immunity for his testimony. ***And you can read the letter*** and what – the discussions that led to that immunity agreement, but that – he told us on direct that was his idea. Why would he need immunity if he wasn't involved at all.

RP IX, 1572 (emphasis added).

o. **The Prosecutor's Rebuttal Argument**

In his rebuttal argument, the prosecutor simultaneously argued that (1) Martin Monetti was not involved with either of the robberies; (2) that it was somewhat understandable that police officers kicked Monetti while he was on the ground; and (3) that his prosecutorial decision to give Monetti immunity against prosecution for robbery was a just decision. First, the prosecutor derisively mocked the defense attorneys' arguments about the "mounting evidence" that showed Monetti was one of the robbers:

And remember all of this mounting evidence shows what the great injustice is giving Martin Monetti immunity was. All of this mounting evidence was, well, someone said the guy had a black jacket on, and Martin Monetti remembered that at some point he had a blue sweater. Someone said the guy with the machete was acting crazy, and Martin Monetti had Four Lokos. And someone said that he looked like he was five-five, and Martin Monetti's five-five. So based on those three things, we should be hammering Monetti. We got the wrong guy.

RP IX, 1582.

Second, the prosecutor commented that it was sort of understandable that the police kicked and mistreated Monetti when they stopped him, because Monetti did not comply with their commands and the police thought Monetti was the robber who had had the machete:

You know the beauty of the argument from Defense's standpoint is the cops would have loved it. If they had been right – *if Martin*

*Monetti was the machete guy, then kicking him in the head doesn't look that bad. Not that it looked that bad anyway, because after listening to Martin Monetti for two hours I think all of us understood why the cops were a little impatient with him.*

But what about, "I'm going to kick the Mexican piss out of you, homey. Do you feel me?" That's hard to justify from any standpoint, but it's a little easier to swallow if we think that guy on the ground just robbed three other Latinos with a machete. The cops would have loved it. They would have loved it. They live for it.

RP IX, 1585.

And then the prosecutor defended his immunity agreement with Monetti:

Whatever he [Monetti] was doing it wasn't great. It's not a great taste in my mouth to give the guy immunity, but what are we going to charge him with? Being a drunken idiot?

MR. FLORA: Objection, Your Honor. Testifying.

THE COURT: Overruled.

MR. GAHAN: Are we going to charge him with being stupid? Charge him with hanging out? Charge him with lying about how many feet he was away. No. We charge the people – well, there's evidence that he's [apparently referring to defendant Veteta-Contreras] the one that held the machete, and that evidence is everybody that saw him holding the machete.

RP IX, 1585.

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**C. APPELLATE STANDARDS OF REVIEW**

Determinations of mixed questions of law and fact are reviewed *de novo*. *State v. Dearbone*, 125 Wn.2d 173, 178, 883 P.2d 303 (1994); *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2003). Most of the issues raised in this appeal present mixed issues of law and fact.

Whether a witness opinion on the veracity of another witness violated the constitutional right to a jury trial is a mixed question of law and fact, which is subject to *de novo* review. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007).

The constitutionality of identification procedures is a mixed question of law and fact. *Sumner v. Mata*, 455 U.S. 591, 597 (1982); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Thus, it is subject to *de novo* review. *United States v. Love*, 746 F.2d 477, 478 (9<sup>th</sup> Cir. 1984).<sup>17</sup>

Whether a requested jury instruction on an inferior degree offense should be given turns upon whether “the evidence would permit a rational jury to rationally find [the] defendant guilty of the lesser offense . . .”

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<sup>17</sup> Division One of this Court has held that a decision whether to suppress an identification due to suggestive procedures is subject to *de novo* review. *State v. Rogers*, 44 Wn. App. 510, 722 P.2d 1349 (1986). But Division Three has held it is subject to abuse of discretion review. *State v. Kinard*, 109 Wn. App. 428, 36 P.3d 573 (2001). Neither case explicitly recognizes that the ultimate question is a mixed question of fact and law and neither one mentions the holding *Sumner v. Mata, supra*.

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*State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

This is a mixed question of law and fact and therefore subject to *de novo* review.

Whether a judicially imposed limitation on the right to a jury determination of an issue violates the state constitutional guarantee that the right to jury trial will be preserved inviolate is a question of constitutional law, and “[q]uestions involving allegations of constitutional violations are also reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009).

Whether a person was in custody for purposes of receiving *Miranda* is a mixed question of law and fact which is reviewed *de novo*. A “trial court’s CrR 3.5 conclusions of law address whether a reasonable person in the defendant’s situation would have believed ‘he or she was not at liberty to terminate the interrogation and leave.’” *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). “*De novo* review applies to this legal question to the extent that the trial court must apply ‘the controlling legal standard to the historical facts.’” *Id.*, quoting *Thompson*, at 113.

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**D. ARGUMENT**

**1. THE ADMISSION OF THE IMMUNITY AGREEMENTS, WHICH CONTAINED THE PROSECUTOR'S TWO EXPLICIT STATEMENTS THAT HE BELIEVED MONETTI HAD NOTHING TO DO WITH THE ROBBERIES, VIOLATED MARTINEZ' CONSTITUTIONAL RIGHT TO A JURY TRIAL.**

**a. No Witness Is Allowed to Give His Opinion Regarding the Veracity of Another Witness or the Guilt of the Defendant.**

An opinion that the defendant is guilty, or that a witness is or is not telling the truth, is inadmissible. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). “[N]o witness may give an opinion on another witness’ credibility . . .” *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).<sup>18</sup> “Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), at 927; *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d

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<sup>18</sup> “Washington cases have held generally that weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth.” *State v. Castenada-Perez*, 61 Wn. App. 354, 360, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991). “Asking a witness to judge whether or not another witness is lying invades the province of the jury.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

1278 (2001); *State v. Black*, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987) (testimony that witness suffered from rape trauma syndrome and fit the profile for it was inadmissible because it “carries with it an implied opinion that the alleged victim is telling the truth” and “constitutes, in essence, a statement that the defendant is guilty of the crime of rape.”); *State v. Dolan*, 118 Wn. App. 323, 329-330, 73 P.3d 1011 (2003) (caseworker’s opinion that the mother “wasn’t really the person in question” who assaulted the child was “improper opinion testimony [which] violates the constitutional right to a trial by jury, [and therefore] it may be raised for the first time on appeal.”).

**b. Notwithstanding a Failure to Object, Improper Opinion as to the Defendant’s Guilt or a Witness’ Veracity May Be Raised for the First Time on Appeal if it Constitutes Manifest Error. Manifest Error Requires a “Nearly Explicit Statement” of Belief That a Witness is Telling The Truth.**

“In general, appellate courts will not consider issues raised for the first time on appeal.” *King*, 167 Wn.2d at 329. “But a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right.” *Id.* In *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) the Court held that “manifest error” in the admission of an opinion regarding witness veracity “requires a nearly explicit statement by the witness that the

witness believed” another witness. *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), 159 Wn.2d at 936. “Requiring an explicit or almost explicit statement by a witness is . . . consistent with this court’s precedent that it is improper for any witness to express a personal opinion on the defendant’s guilt.” *Id.*, 159 Wn.2d 918, 155 P.3d 125 (2007)

In *King* an officer testified that in his opinion what the defendant did satisfied all the elements of the offense of reckless driving. Because there was no objection to this testimony, the Court of Appeals declined to consider the claim that admission of this testimony was error. But the Supreme Court reversed the Court of Appeals and held that it should have undertaken a RAP 2.5 manifest constitutional error analysis.<sup>19</sup>

**c. The Prosecutor’s Statement in the Two Immunity Agreements Was An “Explicit Statement” That He Believed Monetti Was Telling The Truth and Had Nothing to Do With the Robberies.**

The prosecutor’s statement in Exhibit 32 satisfies the *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) requirement of an “explicit statement” of personal belief in the credibility of a witness. Thus, the admission of the trial prosecutor’s opinion, which was actually stated *twice* in an

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<sup>19</sup> “That decision erred by foreclosing review simply because King’s attorney did not object at trial and failing to mention, let alone engage in, manifest constitutional error analysis.” *King*, 167 Wn.2d at 332.

admitted trial exhibit, is a manifest constitutional error which can be raised for the first time on appeal.

The facts of this case are *not* like the facts of *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). There a doctor testified that the history given by a child claiming to have been molested by Kirkman was “‘clear and consistent’ with plenty of detail.” *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), 159 Wn2d at 923. The Supreme Court held that “Dr. Stirling did not come close to testifying that Kirkman was guilty or that he believed A.D.’s account.” *Id.* , 159 Wn.2d 918, 155 P.3d 125 (2007) at 929.<sup>20</sup>

In the present case, however, the prosecutor did more than “come close” to saying that he believed Monetti; he unequivocally said he believed Monetti:

***I do not believe*** that you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz (the two robbery victims) on the night in question.

Exhibit No. 32.<sup>21</sup>

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<sup>20</sup> Similarly, in *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007) this Court held that “the witness did not explicitly state that she believed B.G.” She said only that her medical findings were “consistent with” the child’s accusation of sexual abuse, and this was not explicit enough to constitute manifest error.

<sup>21</sup> Recently, in *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010), the Court held that the admission of testimony about the fact that an immunity agreement existed and that it

**d. The Error Had Practical and Identifiable Consequences.**

To be “manifest” error, there must also be a plausible showing that the error had practical and identifiable consequences in the trial. *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), at 935. If the defendant makes such a showing, reversal is required unless the prosecution carries its burden of showing “beyond a reasonable doubt that the error did not contribute to the defendant’s conviction.” *King*, 167 Wn.2d at 333, n.2.

In the present case, what was “really at the issue of this case,” “the real question,” as the prosecutor himself conceded, was the credibility of Martin Monetti:

The real question, though, in this case is *who do we believe and do we believe them enough?* . . . How do we know that their eyewitness testimony is something we can trust. *That is really at the issue of this case, right?* It’s not the ability of *Martin Monetti* to be a criminal mastermind and forge conspiracies. . . *It’s do we believe him.*

RP IX, 1488 (emphasis added).

Monetti said he played no role in committing the robberies, and in the

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conditioned the grant of immunity on the requirement that the witness “testify truthfully” was improper and should not have been admitted. The immunity agreement itself was not admitted into evidence, and it did not contain anything even remotely similar to the express statement of prosecutorial belief that both the immunity agreements in this case contained. Applying the prejudice standard applicable to claims for prosecutorial misconduct, the Court held that that since “the impact of the error, if any, was slight,” the

immunity agreements the prosecutor stated (twice) that he believed Monetti. But the defendants argued that Monetti himself was one of the robbers. In closing argument the attorneys argued at length about whether Monetti was telling the truth or, as whether his testimony was “full of lies.” RP IX, 1572. The defendants argued that Monetti made an immunity deal with the prosecutor so that he could place the blame for the robberies on Martinez and Veteta-Contreras, and thus escape prosecution for the crimes that he himself committed with the aid of his friend Garcia, and possibly also Barrera. They argued about Monetti’s real motive for throwing his wallet into the bushes, for running away when the police arrived at China Harbor, and for being slow to comply with Officer Hairston’s command to get on the ground. If Monetti was telling the truth – and really did see Martinez carrying a pistol and accompanying the man with machete – then Martinez was guilty. If Monetti was lying, then Monetti himself was the man with the machete, his friend wearing shorts and a white shirt, Denis Garcia, was the man with the gun, and Martinez was innocent.

In this battle to persuade the jurors that Monetti was credible, the

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error was harmless. *Id.* at 200. “The prosecutor asked only two questions about this part

prosecutor had a completely unfair and constitutionally impermissible advantage – he was allowed to testify – through Exhibit No. 32 – that he believed Monetti. The identifiable prejudicial effect of the admission of Exhibit No. 32 is obvious.

The prejudice is far *greater* than it would be in a case where the improper opinion comes from a mere lay witness. Courts have repeatedly recognized that “[a] law enforcement officer’s opinion testimony may be especially prejudicial because the ‘officer’s testimony often carries a special aura of reliability.’” *King*, 167 Wn.2d at 331; *Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), 159 Wn.2d at 928; *State v. Hager*, 171 Wn.2d 151, 159, 248 P.3d 512 (2011); *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159 (1973).

In the present case, the law enforcement officer whose opinion was admitted was the trial prosecutor himself, thus making the prejudice in this case more extreme than in those cases where the opinion was that of a police officer. Indeed, it is well established that it is misconduct for a prosecutor to vouch for the credibility of a witness *in closing argument*. See, e.g., *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598

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of the agreement and did not dwell on the issue.” *Id.* at 201.

(1985)(“It is improper for a prosecutor to express his personal opinion about the credibility of a witness and the guilt or innocence of the accused in closing argument.”). The improper statement in *Sargent* (“I believe Jerry Brown . . .”) is virtually identical to the improper statement in this case “I do not believe that you played a criminal role . . .”). But the prejudice in this case is far worse because in *Sargent* the statement was made during *argument*, and in virtually all cases – and in this case as well -- the jurors are instructed that the lawyers’ remarks in argument “are not evidence” and should not be considered as such. CP 325. But in this case, the prosecutor’s explicit statement vouching for the credibility of Martin Monetti was contained *in an exhibit* which was admitted into evidence. And here, as in virtually all cases, the jurors were instructed that the evidence that they *could* consider included “the exhibits admitted into evidence.” CP 325. Thus the jurors were explicitly told that they *could* consider the prosecutor’s opinion that Monetti was a truthful witness.

In sum, the prosecutor’s inadmissible opinion (1) was an “explicit statement” of his personal belief in the veracity of a witness; (2) the prosecutor conceded that the veracity of this witness was critical to the outcome of the trial; (3) the prosecutor’s opinion was stated twice, both

before and after the witness had been interviewed; (4) his opinion was contained in an exhibit that was admitted into evidence; (5) the jury was instructed that they could consider all admitted exhibits; and (6) because the prosecutor was the chief law enforcement officer who was in charge of the defendant's trial, his opinion carried "a special aura of reliability." For all of these reasons, the admission of the prosecutor's opinion constitutes manifest constitutional error which requires reversal of the appellant's convictions.

**2. THE ERROR OF ADMITTING THE PROSECUTOR'S OPINION INTO EVIDENCE WAS COMPOUNDED BY THE TRIAL PROSECUTOR'S IMPROPER CLOSING ARGUMENT COMMENTS THAT (a) HE COULD NOT CHARGE MONETTI WITH ANYTHING BECAUSE HE HAD NOT COMMITTED ANY CRIME, AND (b) THAT HIS OFFICE HAD CHARGED THE RIGHT PERSON.**

Compounding the error committed by allowing the jury to consider the prosecutor's written opinion regarding Monetti's veracity and innocence in the form of an exhibit admitted into evidence, the jury *also* heard the prosecutor vouch for Monetti's innocence during closing argument. The prosecutor expressly argued that he could not charge Monetti anything with anything *because he had not committed any crime*. Deriding the defense argument that Monetti was a criminal, the prosecutor argued that

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he could not charge Monetti “with being a drunken idiot” because that was not a criminal offense. RP IX, 1585.

Defense counsel *did* make an immediate objection to the prosecutor’s remarks stating that the prosecutor was “testifying,” but his objection was overruled. RP IX, 1585. The prosecutor said “we charge the people” and then noted that the prosecution had charged Veteta-Contreras because Veteta-Contreras -- not Monetti – was the guy with the machete. RP IX, 1585.

It is improper for a prosecutor to argue that his office only charges guilty people. In *United States v. Lamerson*, 457 F.2d 371, 372 (5<sup>th</sup> Cir. 1972), the prosecutor said the Government is prosecuting Clyde Lamerson . . . [a]nd, Mr. Lamerson, had [he] not committed a crime, we would not be doing so. It’s as simple as that.” This was held to be error because “[i]n effect, he stated that the Government prosecutes only the guilty.” *Id.* In *United States v. Hall*, 419 F.2d 582, 587 (5<sup>th</sup> Cir. 1969), the prosecutor made “the lesser suggestion” that “the Government *tries* to prosecute only the guilty” and even that was held to be reversible error. *Lamerson*, at 372. As noted in *Hall*, such a statement “is not defensible.” *Hall*, at 587.

This statement takes guilt as a predetermined fact. The remark is, at the least, an effort to lead the jury to believe

that the whole governmental establishment had already determined appellant to be guilty on evidence not before them. [Citation]. Or, arguably, it may be construed to mean that as a pretrial administrative matter the defendant has been found guilty as charged else he would not have been prosecuted, and that the administrative level determination is either binding upon the jury or else highly persuasive to it.

*Hall*, 419 F.2d at 587.<sup>22</sup>

In the present case, the prosecutor's closing argument remarks about who he decided to charge echoed his comments set forth in Exhibit 32 where he explicitly referred to the administrative process that he personally went through before deciding not to charge Monetti. In his letter granting Monetti immunity from prosecution the prosecutor detailed the basis for his conclusion that Monetti was not guilty of any robbery:

I have met with your attorney, Robert Flenbaugh II, concerning your witness of the events outside of China Harbor on April 17, 2010. I have watched the video of your detention and subsequent injury by Seattle Police Officers during the course of your detention, and have

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<sup>22</sup> In *Lamerson* defense counsel objected at trial to the prosecutor's closing argument remarks. Occasionally this same type of improper argument has been found to be plain error necessitating reversal even though no objection was made. See, e.g., *United States v. Garza*, 608 F.2d 659 (5<sup>th</sup> Cir. 1979). There the prosecutor argued that "the Government has no interest whatsoever in convicting the wrong person," and he protested that "if I ever thought that I had framed an innocent man and sent him to the penitentiary, I would quit." The appellate court found this to be a "particularly egregious form of argument." Despite the lack of an objection, the Court noted that "If you throw a skunk into the jury box, you can't instruct the jury not to smell it," and found that the improper argument was plain error which required reversal. *Id.* at 664-65, 666.

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spoken with your friends, Robert Barrera and Denis Garcia Garcia as well as the victims of the robberies. I have also reviewed the police reports and other police videos in this case. I also met with you and your attorney and the defendants' attorneys for an interview in this case, and I listened to what you were able to remember of this incident. Based on my review of these items, I do not believe you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz . . .

Exhibit 32.

As the *Hall* Court noted, reference to the investigatory process of government improperly suggests to the jury that the prosecutor knows more than the jurors know:

The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. The same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

*Hall*, 419 F.2d at 583-84.

Similarly, in the present case it was misconduct for the prosecutor to argue that his office only charges the people who are guilty and that he could not charge Monetti because Monetti had not committed any crime. Moreover, these improper arguments reinforced the gross impropriety of having admitted into evidence that the prosecutor's opinion that Monetti

was innocent. This opinion was explicitly based on an exhaustive, prosecutorial investigatory process which included witness interviews that the prosecutor had personally attended, thus giving him access to additional information which the jurors did not have. Either separately, or taken together<sup>23</sup> with the error in the admission of Exhibit 32, the prosecutor's improper closing argument remarks deprived the appellant of a fair trial in violation of the due process clause and require a reversal.

**3. THE TRIAL COURT'S FAILURE TO EXCLUDE WITNESS DURAN'S IDENTIFICATION OF MARTINEZ' TATTOO AS THE TATTOO THAT HE SAW ON THE ARM OF THE ROBBER WITH THE GUN VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

**a. Impermissibly Suggestive Identification Procedures Violate The Due Process Clause.**

A photographic identification procedure violates due process if it is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). "To establish a due process violation, a defendant

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<sup>23</sup> Under the cumulative error doctrine of *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963), the cumulative effect of multiple errors may be require reversal even when considered separately no one error would. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

must first show that an identification procedure is suggestive.” *Id. Accord State v. Ramirez*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). “If he proves the procedure was suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.” *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); *Linares*, 98 Wn. App. at 401. Under *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) some of the factors to consider are the witness’ (1) opportunity to view, (2) his degree of attention; (3) the accuracy of his prior description; (4) the level of certainty demonstrated at the time of the identification; and (5) the passage of time between the crime and the identification.

**b. A One-Photo Identification Procedure is Inherently Suggestive.**

It is settled that “the presentation of a single photograph is, as a matter of law, impermissibly suggestive.” *State v. Maupin*, 63 Wn. App. 887, 896, 822 P.2d 355, *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992); *State v. Hendrix*, 50 Wn. App. 510, 513, 749 P.2d 210 (1988), citing *United States v. Simmons*, 390 U.S. 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (“danger [of misidentification] will be increased if the police display to the witness only the picture of a single individual.”).

c. **The Trial Judge Acknowledged That The Procedure Employed Was Clearly Suggestive.**

In this case, the trial judge acknowledged that the prosecutor's procedure of showing witness Duran a single photo of the defendant's tattoo was "clearly suggestive," but at the same time he said he did not see what was impermissible about it. RP V, 717-18. The trial judge made no attempt to analyze the *Brathwaite* reliability factors of and never determined whether there was a substantial danger of misidentification.

d. **As the Decision in *Rawlings v. State* Demonstrates, Suggestive Tattoo Identification Procedures are Just as Unconstitutional as Suggestive Face Identification Procedures. The Core Protection of the Due Process Clause's Prohibition Against Unreliable Evidence Is Disregarded in Both Situations.**

It is possible that the trial judge believed that the due process principles of cases like *Manson* and *Simmons* simply did not apply to photographs of a defendant's arm tattoo. But there is no logical reason why the Due Process Clause should apply to suggestive "show-up" face identification procedures but not to suggestive "show-up" arm tattoo identification procedures. It is true that the face and the arm are different parts of the body. But in both cases a witness is being asked to make an identification of the defendant as the perpetrator of a crime based on his view of a single photo of a part of the defendant's body.

If the trial judge's ruling was based on his belief that the Due Process Clause is inapplicable to suggestive tattoo identification procedures, appellant Martinez submits that *Rawlings v. State*, 720 S.W.2d 561 (Ct. App. Tex. 1986) demonstrates that this reasoning is incorrect.

In *Rawlings* the crime charged was aggravated sexual assault. The perpetrator was not apprehended at the time of the crime. The victim said the perpetrator had a tattoo on his hand. The investigating detective noted that one suspect (the defendant) had a tattoo on his hand, The defendant was arrested and the detective took two photos of the defendant's tattoo:

James, using a Polaroid 600 camera, took pictures of Rawlings' left hand (attached as State's exhibits 1 and 2). . . . James called [the victim] and asked her to come to the police station. He said that before he showed the pictures to her, "I explained to her that I was going to show her two *photos of the tattoos on the suspect's hand*," and asked her if she could identify them as being "the one" that was on the hand of the assailant.

*Rawlings*, 720 S.W.2d at 569 (italics in original). The victim testified:

All they wanted me to do was *identify the tattoo*, period. I identified the tattoo, period, as being similar to the tattoo that I remembered.

*Id.* at 568 (italics in original).

Detective James testified that "[h]e never showed [the victim] photos of anyone else's hand." *Id.* at 569. Although he said on redirect that "he

did not have any other tattoo pictures to show” her, “[o]n recross, he admitted that he *did* have other tattoo pictures, but said,” he did not have any of the left hand. *Id.* (Italics in original).

The defendant’s motions to suppress the victim’s pretrial identification of his tattoo and to preclude her from making an in-court trial identification of his tattoo, were denied. At trial she testified and she “identified the photos of Rawlings’ hand as “the hand of the man who attacked me.” *Id.* at 574. The jury convicted Rawlings and he appealed.

The appellate court noted that by showing the witness photos of only one suspect’s tattoo, Detective James had employed exactly the same kind of “show up” procedure that the U.S. Supreme Court had condemned in the *Simmons* case. Since the procedure employed was highly suggestive, the appellate court analyzed the *Manson* factors and concluded that a reversal of the defendant’s conviction was required because the danger of mistaken witness identification was substantial. The court held that the tattoo photographic identification procedure “was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification and that such impermissibly suggestive procedures tainted [the witness’] in-court identification of the tattoo. *Id.* at 577.

In the present case, the trial prosecutor employed *exactly* the same procedure that was condemned in *Rawlings*. First, he showed witness Duran Exhibit No. 28 and asked him: “Looking at the tattoos on the forearm, are you able to recognize those as the tattoos on Mr. Martinez, or are you not sure?” RP V, 711. After the trial judge overruled defense counsel’s objection to the procedure of just showing Duran photos of Martinez’ tattoo, the prosecutor then showed Duran a “better” photo of Martinez’ tattoo (Exhibit No. 30). Duran then said this photo of Martinez’ tattoo was “consistent” with the tattoo he saw on the robber with the gun. RP V, 719. Thus, the prosecutor showed Duran photos of *only* one tattoo – defendant Martinez’ tattoo -- and he asked if he could testify that Martinez’ tattoo matched the tattoo he saw on the arm of the robber with the gun. By definition, this type of “show-up” identification procedure is, “as a matter of law,” impermissibly suggestive when it involves a photo of a suspect’s face. It is just as impermissibly suggestive when it involves a photo of a suspect’s tattoo (regardless of what part of the body it is on).

e. **Analysis of the Braithwaite Factors Show That There Was a Substantial Likelihood of Irreparable Misidentification.**

The second part of the test for determining whether there has been a due process violation is to consider the *Manson* factors to see whether

there are reasons to accept the reliability of the procedure despite the suggestiveness of the procedure. All of the *Manson* factors in this case weigh in favor of the defendant and against the State.

(1) **Opportunity to view.** Witness Duran acknowledged he did not have a good view of the robber. “I can only see him through the corner of my eye,” he said. RP V, 713. It was nighttime, it was dark, and Duran had been drinking and said he was “still pretty sober” when the attempted robbery occurred. RP V, 708.

(2) **Degree of attention.** Duran admitted that he did not pay attention to the robber with the gun and agreed that he was focusing his attention on the man with the machete (Hector). RP V, 714 (“I was paying more attention to Hector than to Pedro.”); RP V, 755 (“I was more into Hector than him. Him[,] I just was looking at with the corner of my eye.”).

(3) **Accuracy of prior description.** There was no prior description. Duran repeatedly testified, “I do not remember how they [the tattoos] looked.” RP V, 711. All he could do was describe the location of the tattoo – on the robber’s arm. “Like I said, I did not remember what they looked like, but he had tattoos on his arms.” RP V, 713.

(4) **The level of certainty.** Duran was *not* certain that Martinez’

tattoo was the same tattoo that he saw on the robber. He said, “I kind of remember the one on the right arm.” RP V, 711. When shown another photo of Martinez’ forearms he would only say that Martinez’ tattoo had flames that were “consistent” with the robber’s tattoo. RP V, 719.

(5) **Passage of Time.** Between the time of the robbery (April 17<sup>th</sup>) and the day of trial (December 15<sup>th</sup>) when Duran was shown the photo of the tattoo on Martinez’ arm, 8 months elapsed.

In sum, all five of the *Manson* reliability factors indicate a profound *absence* of reliability; none of them “cure” the inherent suggestiveness of the identification procedure employed. Here, as in *Rawlings*, the conclusion that the defendant’s due process rights were violated is virtually inescapable and the appellant’s conviction should be reversed.

**4. INSTRUCTION NO. 14 VIOLATED THE SIXTH AMENDMENT BY PERMITTING THE JURY TO CONVICT MARTINEZ OF A TYPE OF FIRST DEGREE ROBBERY WHICH WAS NEVER CHARGED.**

- a. **In Count I Martinez was *Only Charged With Displaying a Machete. But Instruction No. 14 Permitted the Jury to Convict Him Of First Degree Robbery on Counts I If He Displayed “What Appeared to be A Firearm or Other Deadly Weapon.” Thus Instruction No. 14 Permitted the Jury to Convict the Defendant on Count I On a Theory That Was Never Charged.***

In counts I and II, Martinez was charged with first degree robbery and

attempted first degree robbery. CP 20-21. Subsection (1)(a) of the first degree robbery statute provides three different ways in which a second degree robbery can be elevated to a first degree robbery. The second way is when in the commission of a robbery or of immediate flight therefrom, the robber “displays what appears to be a firearm or other deadly weapon. . .” RCW 9.94A.200(1) subsection (a)(ii). In this case, Count I of the Amended Information upon which Martinez was tried alleged *only* the display of a machete, and did not make any mention of display of a firearm. Count I alleged:

That the defendants, PEDRO JOSE MARTINEZ and HECTOR VETETA-CONTRERAS, and each of them, in King County, Washington, on or about April 17, 2010, did unlawfully and with intent to commit theft take personal property of another, to wit: U.S. currency, from the person and in the presence of Walter Flores Cruz against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and to the person or property of another, and in the commission of and in immediate flight therefrom, the defendants displayed what appeared to be ***a deadly weapon, to wit: a machete.***

CP 20 (bold italics added).

Count II was *different* from Count I. Count II explicitly alleged that in the commission of an attempted first degree robbery perpetrated against Eliezer Duran “the defendants displayed what appeared to be ***a firearm***

*and* a deadly weapon, to wit: a machete.” CP 21 (bold italics added).

Despite the fact that no charge of display of *a firearm* had been made in Count I, Instruction No. 14 (the to-convict jury instruction) explicitly advised the jury that to convict defendant Martinez the State could prove that in the commission of the robbery of Walter Flores Cruz, defendant Martinez “displayed” *either* “what appeared to be *a firearm or* other deadly weapon. . .” CP 339 (Appendix C).

The jury found Martinez guilty on Count I by returning a general verdict which did not specify whether it was predicated on a finding that Martinez displayed a firearm or a machete. CP 360. Thus, there is no way to know which weapon this general verdict was based upon.<sup>24</sup>

**b. Article 1, § 22 and the Sixth Amendment Are Violated When a Jury Instruction Permits a Defendant To Be Convicted of a Charge Which Was Never Brought.**

The Sixth Amendment right to notice (and the comparable art. 1, § 22 right) is violated when a jury instruction permits a defendant to be convicted of a crime that was never charged. In *Cole v. Arkansas*, 333

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<sup>24</sup> *Unlike* the *general* verdict form for the substantive offense of robbery 1, the *special* verdict form which the jury used for purpose of the deadly weapon sentencing enhancement (which was also charged in the amended information), specifically asked the jury questions about the machete, and the jury answered affirmatively the questions of whether Martinez was “armed with a machete” and whether a machete was “a deadly weapon” for purposes of RCW 9.94A.533(4).

U.S. 196 (1948), the defendants were charged with violating subsection (2) of a state statute and yet their conviction was upheld on the basis of a determination that they had violated subsection (1) of the statute. The Supreme Court held this was unconstitutional. *Regardless* of whether there was sufficient evidence to support a conviction under subsection (1), since they were never charged with it, they could not be found guilty of it. *Cole* holds it is a violation of due process to convict a person upon a charge that was never made. *Id.* at 201. *Accord State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) (“One cannot be tried for an uncharged offense”; instruction setting forth two statutory means of committing the crime of forgery was reversible error in case in which defendant was charged only pursuant to one statutory alternative);<sup>25</sup> *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (instruction permitted jury to consider two alternative statutory means of committing rape when only one was charged); *State v. Brown*, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (conviction for conspiracy to commit theft reversed because jury instruction allowed defendant to be convicted for conspiring with a person

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<sup>25</sup> “When the information charges only one of the alternatives, however, it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed, regardless of the range of evidence admitted at trial.” *Id.* at 34.

other than one of the persons named in the information; “an accused must be informed of the charge against him and cannot be tried for an offense not charged”); *State v. Rhinehart*, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979) (defendant charged with possession of a particular stolen car cannot be convicted of possession of a stolen car *part* even if the part comes from the named car); *Schmuck v. United States*, 489 U.S. 705, 717 (1989); *Gray v. Raines*, 662 F.2d 569, 572 (9<sup>th</sup> Cir. 1981).

Since Martinez was never charged with first degree robbery of Cruz based upon the display of *a firearm*, it was error to permit the jury to convict him based on that uncharged theory. Accordingly, the conviction on Count I must be reversed.

**5. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ROBBERY. THEREFORE THE CONVICTION ON COUNT I VIOLATES THE ARTICLE 1, § 21 RIGHT TO A UNANIMOUS JURY VERDICT.**

There is a good reason why the State never charged display of a firearm in the commission of the robbery of Walter Flores Cruz: There was zero evidence to support such a charge. At trial witness Cruz *admitted*, “I never saw a gun”; he also admitted that he had lied to the police when he told them he had seen one. RP IV, 598 (“Q. . . you said

something you knew wasn't true? A. Yes.”).

Thus, the omission of the firearm display alternative means of committing first degree robbery from the amended information was quite logical and proper. The mistake was made by including mention of the firearm alternative means in Jury Instruction No. 14 for Count I. There *was* evidence that a firearm was displayed in the commission of *Count II*, the attempted robbery of Duran. The firearm alternative – properly charged in Count II – erroneously found its way into the jury instruction for Count I, the robbery of Cruz.

When there is insufficient evidence to support one of two charged alternatives, and a general jury verdict does not permit one to know which alternative means the jury relied upon, due process requires reversal. In this State criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “In certain situations, the right to a unanimous jury trial includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime.” *Id.*

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the

alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. [Citations]. On the other hand, **if the evidence is insufficient** to present a jury question **as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.**

*Ortega-Martinez*, 124 Wn.2d at 707-08 (bold emphasis added; italics in original). *Accord State v. Boiko*, 131 Wn. App. 595, 599 ¶ 11, 128 P.3d 143 (2006); *State v. Kinchen*, 92 Wn. App. 442, 451, 963 P.2d 918 (1998); *State v. Allen*, 127 Wn. App. 125, 130 ¶ 13, 110 P.3d 849 (2005).

“A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” *State v. Kintz*, 169 Wn.2d 537, 552 ¶ 33, 238 P.3d 470 (2010). Washington courts have often applied this rule by reversing convictions where there was insufficient evidence of one of the alternative means of committing an offense which was charged and then argued to the jury. *See, e.g., State v. Boiko*, 131 Wn. App. 595, 601, 128 P.3d 143 (2006) (“Because there was insufficient evidence to support a conviction on at least two of the alternative means set forth in the statute, Mr. Boiko’s conviction [for intimidating a witness] must be reversed.”); *State v. Lobe*, 140 Wn. App. 897, 167 P.3d 627 (2007) (reversing two

witness tampering convictions because the evidence was not sufficient to support some of the alternative means charged); *State v. Kinchen*, 92 Wn. App. at 452 (reversing unlawful imprisonment convictions because evidence was insufficient on one of two charged alternative means); *State v. Maupin*, 63 Wn. App. 887, 893-94, 822 P.2d 355 (1992) (felony murder conviction for murder committed either in the course of kidnapping or rape reversed because there was insufficient evidence to find murder in the course of rape and the jury was not given a special verdict form which showed which of the alternative means the jury was relying upon).

In sum, even if the amended information in this case *had* charged both the firearm alternative and the “other deadly weapon” (the machete) alternative, it would not have made any difference. Because there was no evidence that a firearm was displayed in the commission of the first degree robbery charged in Count I, the conviction on Count I must be reversed.

**6. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE INFERIOR DEGREE OFFENSE INSTRUCTIONS ON ROBBERY 2 AND ATTEMPTED ROBBERY 2.**

**a. Under the Rule of *Fowler* There Need Only Be Some Affirmative Evidence From Which A Rational Jury Could Conclude That Only The Lesser Offense Was Committed.**

Martinez requested lesser degree instructions on second degree

robbery and attempted second degree robbery, but the trial judge refused to give such instructions. RP VIII, 1277-78. The trial court purported to rely on *State v. Fowler*, 114 Wn.2d 59, 785 P.2d 808 (1990). In *Fowler* the Court held that the fact that the jurors might not have believed the testimony of the State's witnesses is not enough to justify a lesser offense instruction. *Id.* at 67. "Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *Id.*

As stated in *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000):

More specifically, a requested jury instruction on a lesser included or inferior degree offense should be administered "[i]f the evidence would permit a rational jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense."

*Accord State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

- b. **As the Supreme Court Recently Held in *In re Martinez*, To Prove This Element The State Must Prove That The Defendant Used, Attempted to Use, or Threatened to Use, the Weapon or Instrument Under Circumstances Where It was Readily Capable of Causing Death or Substantial Bodily Injury.**

Recently, in *In re Restraint of Martinez*, 171 Wn.2d 354, 256 P.3d 277

(2011),<sup>26</sup> the Court noted that the definition of “deadly weapon” for purposes of a substantive offense was *not the same* as the definition of the same term for purposes of a sentencing enhancement. *Id.* at 365, n.4. For purposes of substantive offenses such as first degree robbery, the criminal code defines the term “deadly weapon” in RCW 9A.04.110(6). As the *Martinez* Court noted, that statute provides:

“Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, which, under the circumstances in which it is *used, attempted to be used, or threatened to be used*, is readily capable of causing death or substantial bodily harm.

(Italics added by *Martinez* Court).

“This definitional statute creates two categories of deadly weapons . . . deadly weapons per se . . . and deadly weapons in fact . . . “ *Martinez*, at 365. The *Martinez* case involved a knife that had fallen out a sheath. The Court noted: “If Mr. Martinez’s knife is a deadly weapon for purposes of first degree burglary, it must fall within the latter category.” *Id.*

Under the plain meaning of this statute, mere possession is insufficient to render ‘deadly’ a dangerous weapon other than a firearm or explosive. To interpret the statute otherwise would eliminate the distinction between deadly weapons per se (firearms

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<sup>26</sup> The petitioner in that case was *Raymond* Martinez, *not* the appellant in this case, *Pedro Jose* Martinez.

and explosives) and dead weapons in fact (other weapons). Likewise, it would render meaningless the provision as to the circumstances of use, attempted use, or threatened use.

Thus, we hold that RCW 9A.04.110(6) requires more than mere possession where the weapon in question is neither a firearm nor an explosive. . . .

*Id.* at 366.<sup>27</sup>

**c. A Machete is Not a Deadly Weapon Per Se.**

The *Martinez* Court analyzed several prior reported decisions involving the *use* of weapons in the second category (deadly weapons in fact), and in so doing it expressly disapproved of *State v. Gamboa*, 137 Wn. App. 650, 154 P.3d 312 (2007):

In *State v. Gamboa*, 137 Wn. App. 650, 154 P.3d 312 (2007), Division Three adopted a strikingly different standard for deadly weapons in fact under RCW 9A.04.110(6). Specifically, the court held that a machete used to forcibly enter a home was a deadly weapon, despite the lack of evidence that it was used or intended to be used as a weapon. *Gamboa*, 137 Wn. App. at 651, 154 P.3d 312. The court held that “[i]t is the potential as a weapon and not how the machete was actually used that is important. . . . A machete is readily capable of causing great harm by its very size.” *Id.* at 653, 154 P.3d 312 (citations and footnote omitted). ***We disapprove Gamboa to the extent that it rejected a totality of the circumstances test for determining whether a weapon other than***

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<sup>27</sup> For purposes of sentencing enhancement pursuant to RCW 9.94A.533(4), the legislature provided a *different* definition of “deadly weapon.” That definition is found in RCW 9.94A.825. While a firearm is a *per se* “deadly weapon” under RCW 9A.04.110(6), it is not a *per se* “deadly weapon” under RCW 9.94A.825. In fact, there is no such thing as a *per se* “deadly weapon” under 9.94A.825.

*a firearm or explosive is deadly under the first degree burglary statute. By characterizing a machete as a deadly weapon on the basis of its dangerousness and without regard to its actual, attempted or threatened use, the Gamboa court essentially read the circumstances provision out of the statute and treated the machete as if it were a deadly weapon per se.*

*Martinez*, 171 Wn.2d at 368, n.6 (emphasis added).

**d. In This Case, There Was Some Evidence That The Weapon Used Was Not a Machete at All, That it Was a Piece of Cable or A Club, and That Whatever It Was, It Was Used to Hit Duran Once in The Back.**

In the present case, there was some affirmative evidence that the weapon used by the robber dressed in a black shirt (whether that was Veteta-Contreras or Monetti) was not a machete at all. There was explicit testimony by Eliezer Duran that he did not see what he was hit with. Both Duran and Officer Schweiger testified that on the night in question Duran told Schweiger that he had been hit on the back with “what he described as a piece of cable or a club.” RP III, 419; RP V, 735. Duran agree that he “actually didn’t get that good a look at the machete.” RP V, 736. He “didn’t see it coming.” RP V, 737. He wasn’t looking at the man in black when he got hit,” and he only got hit one time. RP V, 737. He “thought it was a cable or a club,” and that’s what he told the police, but *later* he realized that “that was a mistake.” RP V, 736. It was only after he got

home that night and discovered that his own shirt had been torn that Duran inferred that it was a machete: “because after I saw it tore my shirt, I was like this could be no club or cable.” RP V, 736. But he did not even know his shirt had been torn until he got home. RP V, 736.

e. **The Trial Judge Ignored The Testimony That Duran First Believed That the Weapon Was a Piece of Cable, and That Whatever It Was, the Circumstances of Its Use Against Duran Showed That It Was *Not* Readily Capable of Causing Death or Substantial Bodily Harm.**

When the trial judge denied the defense request for instructions on the lesser degree offenses, he made no mention of the fact that the police never located any weapon of any kind, or of the fact that the weapon was initially described as a piece of cable. He made no attempt to analyze the “totality of the circumstances” surrounding the use, or threatened use of the weapon. He ignored the fact that as used to hit Duran in the back once, a piece of cable is *not* “readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). And while it is conceivable that a piece of cable might have the “potential” to cause death or substantial bodily harm, that is *not* sufficient. As *Martinez* holds, even if the weapon *was* a machete, it’s *potential* for causing death or serious harm is *not* what matters; *Martinez* specifically *rejected* the holding of

*Gamboa* that “[i]t is the potential as a weapon and not how the machete was actually used that is important. . .” 137 Wn. App. at 653. What matters is how the weapon in this case, whatever it was, was actually used.

Here the trial judge made no attempt to analyze the evidence of how the weapon was actually used, and certainly did not follow the rule that the court must view the evidence “in the light most favorable to [Martinez] the party that requested the instruction.” *Fernandez-Medina*, 141 Wn.2d at 455-56. *Accord In re Crace*, 157 Wn. App. 81, 236 P.3d 914 (2010) (defense counsel was ineffective for failing to request jury instruction on lesser offense because viewed in light most favorable to defendant jury could have found only lesser crime of unlawful display of a weapon was committed). In this case, there *was* affirmative evidence that only the lesser offense was given. Thus, under the *Fowler* test, the trial court erred in refusing to give the requested lesser degree instructions. Here, as in *Fernandez-Medina* and *Warden*, the defendant’s convictions (on Counts I and II) should be reversed and the case remanded for a retrial.

**7. THE TRIAL COURT’S DENIAL OF INFERIOR DEGREE OFFENSE INSTRUCTIONS VIOLATED MARTINEZ’S ART. 1, § 21 RIGHT TO A JURY TRIAL.**

Appellant has argued above that under the current legal test for the

giving of lesser offense jury instructions set forth in *Fowler*, the trial court erred in denying his request for jury instructions on robbery 2 and attempted robbery 2. If this Court agrees, then it will be completely unnecessary to address the following claim of error. It is only if this Court rejects Martinez' argument that he was entitled to these jury instructions under the *Fowler* test that it would become necessary to address this issue.

- a. **Prior to *Fowler* The Rules Were (i) That a Trial Court *Must* Give an Instruction on an Inferior Degree Offense Unless The Evidence *Excluded* The Possibility That The Inferior Degree Crime Was Committed; (ii) the Defendant Did *Not* Have To Present Any Evidence to Show That Only the Inferior Offense Was Committed; and (iii) It *Was* Sufficient to Justify The Giving of a Inferior Degree Instruction That The Jury Might Disbelieve the State's Witnesses.**

The *Fowler* rule requiring affirmative evidence that only the lesser was committed was not always the law. Prior to *Fowler* the law was *exactly the reverse*. Instead of requiring proof that only the lesser offense was committed before a jury instruction on the lesser would be given, the prior rule had been a lesser offense instruction *must* be given in every case unless there was affirmative proof that only the lesser offense had *not* been committed. Prior to *Fowler*, the focus was on whether there was positive evidence that *excluded* the possibility that only the lesser was committed.

In *State v. Foley*, 174 Wash. 575, 25 P.2d 565 (1933) the Court stated

that it was “the rule that the lesser degree of crime *must be submitted* to the jury along with the greater degree unless the evidence *positively excludes* any inference that the lesser crime was committed.” (emphasis added). This rule was expressly reaffirmed in *State v. Gallagher*, 4 Wn.2d 437, 103 P.2d 1100 (1940); *State v. Scheeler*, 45 Wn.2d 661, 277 P.2d 341 (1945); and in *State v. Petty*, 57 Wn.2d 513, 514, 358 P.2d 136 (1961). In three of these cases the defendants were charged with a greater offense and then were convicted by a jury of a lesser included or lesser degree offense. In these three cases the defendants argued that the lesser offense jury instruction should not have been given. In all three of these cases their arguments were rejected precisely because the evidence produced at trial did *not* “positively exclude” the possibility that only the lesser offense was committed.<sup>28</sup> In the fourth case the defendant was tried and convicted of the greater offense and the Supreme Court held that the refusal to give a lesser offense instruction was proper because the evidence *did* positively exclude commission of the lesser offense.<sup>29</sup>

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<sup>28</sup> In both *Foley* and *Gallagher* the defendant were charged with murder 1 but convicted of manslaughter. In *Scheeler* the defendant was charged with murder 2 and convicted of manslaughter.

<sup>29</sup> In *Petty* the defendant was charged and convicted of murder 2. His request for a manslaughter instruction was held properly denied because the evidence positively excluded the possibility that only manslaughter was committed.

Without discussing any of these prior cases, the *Fowler* opinion adopted *the opposite rule* that in order to grant a defendant's request for the giving of a lesser offense instruction "some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." 114 Wn.2d at 67. Thus the rule was changed from "you must give the instruction unless the evidence positively excludes it," to a new rule of "Don't give the instruction unless some evidence affirmatively establishes it."

Moreover, the *Fowler* Court held that it is not sufficient that there is impeachment evidence that undermines the credibility of the State's witnesses and thus casts doubt on the theory that the greater offense was committed: "It is not enough that the jury might simply disbelieve the State's evidence." *Id.* at 67. This, too, amounted to an overruling of prior precedent, for in *State v. Gottstein*, 111 Wash. 600, 602, 191 P. 766 (1920), the Court *said the exact opposite*:

[T]he correct rule is that the lesser crime must be submitted to the jury along with the greater, unless the evidence positively excludes any inference that the lesser crime was committed, and ***it is not incumbent upon the defendant, before such an instruction will be given, to show facts from which a jury might draw the conclusion that the lesser crime and not the greater was in fact committed.***

(Emphasis added).

b. **Under the Decision in *State v. Donofrio*, a Case With Facts Remarkably Similar to The Present Case, The Court Held That It Was Error Not Give a Lesser Offense Instruction On Assault 3 Simply Because The Jury Might Not Have Believed the Prosecution Witness When She Claimed to Have Seen Some Kind of a Weapon in the Defendant's Hand.**

The *Fowler* decision is also utterly inconsistent with the decision in *State v. Donofrio*, 141 Wash. 132, 250 P. 951 (1926). Incredibly, the factual issue in *Donofrio* was identical to the issue appellant Martinez is raising here: Did the defendant have a deadly weapon? Donofrio was charged with first degree assault which required proof that he assaulted another with a firearm or a deadly weapon. He claimed the trial judge erred by denying his request for an instruction on third degree assault, which includes assaults where there is no firearm, no deadly weapon, and no other weapon or instrument likely to produce bodily harm. The defendant testified that he never committed any assault at all, and thus there was no “affirmative evidence” that he committed an assault with his bare hands. There were, however, many reasons why “the jury might simply disbelieve” the State’s witness, the victim of the assault. Like witness Cruz, the State’s witness was not sure what she was hit with; she could only say “it was something dark – he held it right here.” *Donofrio*, 141 Wash. at 137. She said it was in the nature of a blunt instrument. *Id.*

She could not say whether it was a revolver. *Id.* The Supreme Court held that a jury could conclude that she was simply wrong and had been hit with nothing more than a fist:

***It was dark at the time of the alleged assault, and the jury might well have believed that Miss Engdahl did not see any weapon or instrument in the hand of the accused likely to produce bodily harm, but that he struck her with his bare fist or hand, and thus believe that the assault upon her was no more serious than that of assault in the third degree,*** had the court submitted that question to the jury. He denied making any assault upon Miss Engdahl, and denied being present upon the occasion of the alleged assault. Her identification was not very satisfactory. She was not injured to the extent of being kept away from or losing time from her regular employment. We are of the opinion that the evidence was ample to warrant the jury in believing that any assault made by appellant upon Miss Engdahl, as claimed by her, was such as to render him guilty only of assault in the third degree, and that, had the trial judge submitted that question to the jury, they might have so found. The failure of the trial court in this respect, we think, entitled appellant to a new trial.

*Donofrio*, 141 Wash. At 137-138 (emphasis added).

The present case is remarkably similar. Like Mr. Donofrio, appellant Martinez said he was not a participant in any robbery or attempted robbery, and that he never had a gun in his possession that night. Here, as in *Donofrio*, it was dark at the time of the incident. In this case, one of the robbery victims admitted that he had *lied* when he told police he had seen a gun, and the other acknowledged that he got a very

poor look at the second robber who supposedly had the gun. Under *Donofrio*, Martinez was clearly entitled to a jury instruction on the inferior degree offense of Robbery 2. But without even mentioning *Donofrio*, *Fowler* silently overruled it, and imposed a new rule that mere “reasons to disbelieve” the State’s witnesses are not enough to justify the giving of an inferior degree jury instruction.

*Fowler* also silently overruled *Foley* on this same point. In that case the Supreme Court held that even though the testimony of the prosecution’s witness was uncontradicted – and thus there was no “affirmative evidence” that only the inferior degree offense was committed – the jury had the right to decide that only a lesser offense was committed because there were circumstances from which the jury could infer that the State’s witness was not telling the truth:

This witness was the only person, aside from the two men [who committed the crime] who was in the house at the time of the affray. She did not see the actual shooting and, in fact, it was not shown just how the shooting occurred. . . . There was even some evidence, though slight, tending to show that appellant had no gun. The testimony given by the woman may have been sufficient, had it been believed by the jury, to convict the appellant of murder in the first degree; but, in addition to the fact that the witness did not see what actually occurred at the time of the shooting, there is the added fact that *her testimony was subject to discredit in several respects*. She was a prostitute and a paramour of the deceased, as the evidence discloses; . . . she had

for years been subject to epileptic fits; she admitted on cross-examination that on a former occasion she had been arrested for drinking and disorderly conduct; in some respects at least she had been impeached in her testimony. *It seems obvious that that jury did not believe her implicitly. They manifestly did not believe that portion of her testimony on which the state relied to prove premeditated design.*

*Foley*, 174 Wash. At 580-81 (emphasis added).

c. **Pursuant to Art. 1, § 21, The Right to Jury Trial Must Be “Preserved Inviolable.” Thus Whatever the Scope of the Right Was at the Time The State Constitution Was Adopted, That Remains the Scope of the Right Thereafter.**

Article 1, Section 21 of the Washington Constitution provides “The right of trial by jury shall remain inviolate . . .” “This is a valuable right, jealously guarded by the courts.” *Watkins v. Silver Logging*, 9 Wn.2d 703, 710 116 P.2d 315 (1941). The effect of this constitutional declaration “is to provide that the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate.” *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 384, 47 P. 958 (1897). *Accord Sofie v. Fireboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989); *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1983); *Watkins*, 9 Wn.2d at 710. Although the Supreme Court has acknowledged that court “may be better able than a jury to deal intelligently with” many issues, it has rejected the contention that this can

serve as a justification for restricting the constitutional right to have a jury determine factual matters. *Watkins*, 9 Wn.2d at 712. Moreover, when there is doubt whether an issue should be submitted to a jury for its determination, the right to a jury trial is always preserved. *Bain v. Wallace*, 167 Wash. 583, 587, 10 P.2d 226, 228 (1932).

**d. Statutes Attempting to Deprive A Criminal Defendant of the Right to Have a Jury Decide the Issue of His Sanity, and Attempting to Prevent A Jury From Determining the Full Amount of a Plaintiff's Noneconomic Damages, Were Held Unconstitutional Because Historically These were Factual Issues Which Juries Traditionally Resolved.**

In *State v. Strasburg*, 60 Wash. 106, 110 P. 1014 (1910), the Supreme Court held unconstitutional a statute which eliminated insanity as a defense to a criminal charge. The Court held that this statute violated art. 1, § 21 because it took away from the accused the right to have a jury determine whether he was insane, a fact which juries had been determining at the time the Washington Constitution was adopted in 1889. The Court *rejected* the idea that a trial would be constitutional if a jury was present and determined some of the factual issues, but not all of the factual issues which were decided by juries at that time. To permit such a limitation on the factual issues submitted to the jury would be a destruction of the substance of the right while merely preserving its form:

[T]his right of trial by jury which our Constitution declares shall remain inviolate must mean *something more than the preservation of the mere form of trial by jury, else the Legislature could by a process of limitation in defining crime or criminal procedure entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury. . . . “The Constitution deals with substance, not shadows.* Its inhibition was leveled at the thing, not the name. \* \* \* If the inhibition can be evaded to by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.” . . . The due process of law provision of our Constitution above quoted probably does not mean of itself the right of trial by jury; but it does mean in connection with the provision “the right of trial by jury shall remain inviolate,” that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our Constitution.

*Strasburg*, 60 Wash. 106, 116-17, 110 P. 1020 (1910).

The prosecution argued that the right to jury trial would be preserved inviolate so long as the jury retained the power to decide if the defendant performed the *act* charged, and that the determination of his sanity was not a determination that the defendant had a § 21 right to have the jury decide.

The Court rejected this contention:

To take from the accused the opportunity to offer evidence tending to prove this fact [of his insanity] is in our opinion as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act or physically set in motion a train of events resulting in the act.

*Strasburg*, 60 Wash. at 119.

***One so accused had this right at the time of the adoption of our Constitution, and we are of the opinion that the question is so inherently related to the guilt or innocence of all accused persons, that it cannot now be taken away from them without violating these guarantees of the Constitution.***

*Strasburg*, 60 Wash. at 121 (emphasis added).

Similarly, in *Sofie v. Fireboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989), the Supreme Court struck down a statutory limit on the recovery of non-economic damages as violative of art. 1, § 21 because it operated to “tak[e] a jury’s finding of fact and alter[] it to conform to a predetermined formula.”

**e. Art. 1, § 21 Cannot Be Impaired By the Judicial Branch.**

In *Strasburg* and *Sofie Fireboard* the Court struck down *statutes* which limited the scope of the constitutional right to jury trial. But the same constitutional principle applies to the judicial branch. “The right to a jury trial may not be impaired by either legislative or judicial action.” *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).<sup>30</sup> *Accord Wilson v. Olivetti North America*, 85 Wn. App. 804, 934 P.2d

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<sup>30</sup> In *Geschwind v. Flanagan*, 121 Wn.2d 833, 839, 854 P.2d 1061 (1993), the Supreme Court reversed a ruling of the Court of Appeals holding that the degree of comparative

1231 (1997). “Neither by court decision nor by court rule, but only by constitutional amendment may such right be taken away.” *Scavenius v. Manchester Port. District*, 2 Wn. App. 126, 467 P.2d 372 (1970).

- f. **Fowler Deprived The Accused of the Right to Have A Jury Consider an Inferior Degree Offense Unless He Could Meet the New Requirement of Presenting “Affirmative Evidence” That Only That Offense had Been Committed. Because No Court Can Shrink The Scope of Art. 1, § 22, the Fowler Restriction on the Right to Have the Jury Decide What Crime Was Committed Violates Art. 1, § 21.**

At the time *Fowler* was decided, no party argued that the reduction in the scope of the right to jury trial violated art. 1, § 21. But appellant Martinez is presenting that argument here. Martinez submits that cases such as *Gottstein*, *Donofrio* and *Foley* show that at times much closer to 1889 when the Constitution was adopted,<sup>31</sup> the scope of the right to jury consideration of an inferior degree offense was much broader than the scope of the right after it was restricted by the *Fowler* Court. Under *Geschwind*, *Scavenius* and *Wilson*, it is clear that the Supreme Court was without constitutional power to alter the scope of that right. Therefore

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fault attributable to a passenger plaintiff could never be greater than 50%, holding that “such a limitation” would violate article 1, section 21 of the constitution.

<sup>31</sup> These three cases were decided in 1920, 1926, and 1933, and thus were within 31, 37, and 44 years of the year of constitutional adoption. *Fowler* was decided in 101 years after constitutional adoption in 1990, and thus is more than three times as distant from that date as *Gottstein*.

Martinez' right to a lesser offense instruction must be decided by applying cases such as *Donofrio*. Under pre-*Fowler* case law such as *Donofrio*, he was constitutionally entitled to inferior degree offense instructions on Robbery 2 and Attempted Robbery 2, because *the prosecution* did not "positively exclude" the possibility that only these inferior offenses were committed. Martinez was entitled to inferior degree offense instructions because it was sufficient that the jurors might have disbelieved the testimony of the State's witnesses that Veteta-Contreras displayed a machete, or that Martinez displayed a gun. Therefore, the denial of his request for such instructions violated his state constitutional right to a jury trial as preserved by art. 1, § 21.

**8. MARTINEZ' FIFTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS SUBJECTED TO CUSTODIAL INTERROGATION WITHOUT FIRST RECEIVING *MIRANDA* WARNINGS.**

**a. The Trial Court Erroneously Believed That The Absence of Handcuffs Was Dispositive.**

At a pretrial hearing on the admissibility of Martinez' pre-Miranda statements to Officer Terry, it was undisputed that Martinez was not handcuffed. CP 311. The trial judge believed this one fact was dispositive and made the following ruling:

The Court finds that this was a *Terry* stop. ***The lack of handcuffs is nearly dispositive*** – a reasonable person would not believe that they were under custodial arrest. The questions by Officer Terry were not coercive and the statements are admissible. Officer Terry was conducting an investigation and did not make a custodial arrest of the defendant until after he had formed probable cause, which occurred when he told the defendant he was under arrest.

CP 315 (emphasis added).

b. **The Only Relevant Inquiry Is Whether The Suspect Would Have Felt Free to Terminate His Interrogation By Leaving.**

Appellant Martinez respectfully submits that the trial judge's ruling is erroneous as a matter of law. The trial court confused the applicable Fourth Amendment standard for what is an arrest with the applicable Fifth Amendment standard for what triggers the requirement that *Miranda* warnings precede any interrogation.

“It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a ‘degree associated with formal arrest.’” *State v. Daniels*, 160 Wn.2d 256, 266, 156 P.3d 905 (2007), quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983). In *Daniels* the prosecution contended that this language meant that “a suspect is entitled to *Miranda* warnings only when she is formally arrested.” *Id.* The *Daniels* Court flatly rejected this contention:

Rather, we must determine *whether*, given [the] factual setting, *a*

***“reasonable person [would] have felt he or she was not a liberty to terminate the interrogation and leave.”*** *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.ed.2d 383 (1995). If not, she must be given *Miranda* warnings before the police ask any question likely to provoke an incriminating response.

*Daniels*, 160 Wn.2d at 266 (emphasis added). *Daniels* is completely consistent with the holding in *United States v. Berkemer*, 468 U.S. 420, 442 (1984) where the Supreme Court held that “the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”

**c. A Reasonable Person Detained At Gunpoint Does Not Feel At Liberty To Terminate His Own Interrogation.**

In this case, Martinez was ordered at gunpoint to sit on the ground and he was detained there until he could be viewed by witness Cruz. RP VI, 1087; RP III, 333-34. A reasonable person who is ordered at gunpoint to sit on the ground would feel that he was not at liberty to leave, and therefore under the test of *Keohane* and *Daniels*. Many courts throughout the land have concluded that when police detain a suspect at gunpoint, even though they do not place him in handcuffs, he has been placed in custody for purposes of *Miranda*. For example, in *United States v. Perdue*, 8 F.3d 1455, 1464-65 (10<sup>th</sup> Cir. 1993) police with their guns drawn ordered the defendant to get out of his car and to lie face down on

the ground. The record was not clear whether or not he was also handcuffed. But the Tenth Circuit held that it did not matter whether the defendant was handcuffed or not; the police use of guns pointed at the defendant compelled the conclusion that the defendant was placed in custody and thus Miranda warnings should have been given before he was questioned. The Court noted that “Mr. Perdue was forced out of his car and onto the ground at gunpoint.” *Id.* at 1465.

The record indicates that physical force and handcuffs *may* also have been used at this initial detention. ***Regardless of whether handcuffs and physical force were actually employed***, Mr. Perdue’s freedom of action was curtailed in a ‘significant way.’ *Berkemer*, 468 U.S. at 435, 104 S.Ct. at 3148.

Furthermore, the use of guns to force a suspect off the road, out of his car, and onto the ground is a type of police conduct more “associated with formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983), than with the characteristically “noncoercive” and “nonthreatening” *Terry* stop. . .

As noted *supra*, *Berkemer* instructs that the “only relevant inquiry [when determining if a suspect is in ‘custody’] is how a reasonable man in the suspect’s position would have understood his situation. *Berkemer*, 468 U.S. at 442, 104 S.Ct. at 3151. A reasonable man in Mr. Perdue’s situation could not have misunderstood the fact that if he did not immediately cooperate, his life would be in danger. Any reasonable person in Mr. Perdue’s position would have felt “completely at the mercy of the police.” *Berkemer*, 468 U.S. at 438, 104 S.Ct. at 3149. ***We therefore find as a matter of law that Mr. Perdue was in police custody during the initial questioning by Officer Carreno.***

*Perdue*, 8 F.3d at 1463 (emphasis added).

Similarly, in *Jacobs v. Singletary*, 952 F.2d 1282 (11<sup>th</sup> Cir. 1992), the Court found the suspect was in custody and that accordingly questioning without *Miranda* warnings required suppression of the defendant's statements. In that case the defendant was approached by police officers with their weapons drawn and one of them "grabbed her" and asked her a question. She was not handcuffed, but nevertheless the Court found that since a reasonable person in her position would not have felt free to leave, she was in custody for purposes of *Miranda* and thus her statements to the police should have been suppressed. *Id.* at 1291.

Here, as in *People v. Shivers*, 21 N.Y.2d 118, 233 N.E.2d 836, 268 N.Y.S.2d 827 (1967),

The primary question for decision is, of course, whether the defendant was deprived of his freedom in a "significant" way when he was questioned by the police officer at gunpoint. To ask the question is to answer it. . . .

. . . [O]nce the officer does draw his gun, the individual interrogated is actually deprived of his freedom and, under *Miranda*, he may no longer be questioned without first being warned of his rights, and any statement elicited without such warnings may not be received in evidence . . .

*Accord People v. Huffman*, 41 N.Y.2d 29, 359 N.E.2d 353, 356 (1976).

Courts are in general accord: suspects detained at gunpoint are in

custody for *Miranda* purposes, even if they are not handcuffed. *Miley v. United States*, 477 A.2d 720 (D.C. Ct. App. 1984); *State v. Intogna*, 101 Ariz. 275, 285, 419 P.2d 59 (1966);<sup>32</sup> *People v. Hentz*, 75 Ill. App.3d 526, 394 N.E.2d 586 (1979).<sup>33</sup>

It is undisputed that Martinez did not receive any *Miranda* warnings in this case, and that in response to questioning from the officer Martinez made the statement that he did not have anything and showed the officer that he was not carrying any weapon. The prosecution presented testimony that Martinez said this, and argued to the jury that it actually showed that Martinez was involved in the robbery. The State argued that since the officer had not said anything to Martinez about a gun or a weapon, the only explanation for how he would know that police were

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<sup>32</sup> “Certainly a defendant questioned by an officer with a drawn gun within three feet of him was deprived of his freedom in a significant way. Clearly the officer had no intention of letting the defendant escape and defendant himself could not have reached any other conclusion.”

<sup>33</sup> “[O]f the greatest significance is the fact that at least one of the officers who greeted the defendant had his gun drawn.”

looking for someone with a gun was that he actually was the robber with the gun that the police were looking for. RP IX, 1514. If Martinez' statement had been suppressed, as it should have been, the prosecution would have been deprived of this argument.

The trial judge ruled that since Martinez was never put in handcuffs, that meant he was never in custody and that *Miranda* warnings were never required. But while it is no doubt true that a reasonable person who was handcuffed by police would not feel free to go, that does not mean that being handcuffed is a requirement that must be fulfilled before it can be said that a person is in custody. There are other ways of making a reasonable person feel that he is not at liberty to go. Ordering him at gunpoint to sit down on the ground is one of them.

The trial court used precisely the same type of analysis which the Supreme Court flatly rejected in *Daniels*. Whether or not the officer had probable cause to make an arrest is *irrelevant* to the *Miranda* question and the trial court was wrong to focus on it. Whether or not the officer had verbally informed the suspect that he was making a custodial arrest was also irrelevant. The "only relevant inquiry" under *Berkemer* is whether a reasonable person in Martinez' shoes would have thought he was free to

go. As a matter of law, when a reasonable person is detained *at* gunpoint he does not feel free to go. Accordingly, the trial judge's conclusion of law that *Miranda* warnings were not required was erroneous, and here, as in *Perdue*, *Jacobs* and *Shivers*, the defendant's un-Mirandized statements should have been suppressed.

**E. CONCLUSION**

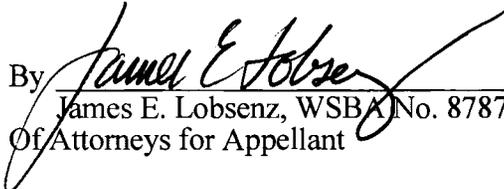
For the reasons stated in argument sections 1, 2, 3, and 8, appellant Martinez asks this Court to vacate all of his convictions and to remand for a new trial on all counts.

For the reasons stated in argument sections 4 & 5, he asks this Court to reverse his conviction on Count I and remand that count for retrial.

For the reasons stated in argument sections 6 & 7, he asks this Court to reverse his convictions on Counts I and II, and to remand those two counts for retrial.

DATED this 9<sup>th</sup> day of September, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Of Attorneys for Appellant

# APPENDIX-A

OFFICE OF THE PROSECUTING ATTORNEY  
KING COUNTY, WASHINGTONDan Satterberg  
Prosecuting AttorneyW554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

September 13, 2010

Martin Monetti  
C/O Robert Flennaugh II  
810 3rd Ave Ste 500  
Seattle, WA 98104-1619RE: State of Washington v. Pedro Martinez and Hector Veteta-Contreras

Dear Mr. Monetti:

I have met with your attorney, Robert Flennaugh II, concerning your observations of the events outside of China Harbor on the early morning of April 17, 2010. I have watched the video of your detention and subsequent injury by Seattle Police Officers during the course of the investigation, and have spoken with your friends, Robin Barrera and Denis Garcia Garcia, as well as the victims of the robberies. I have also reviewed the police reports and other police videos in this case. Based on my review of these items, I do not believe that you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz (the two robbery victims) on the night in question. Based on my conversations with your attorney, my personal interviews with the myriad witnesses in this case, and my review of all the other evidence, I do believe that your testimony at trial is material to the case. Because I do not believe, based on this review, that the State can prove you played any role in the robbery, and because you have material evidence of the crimes, I am willing to offer you immunity to prohibit you from making any 5th amendment claims to silence either for defense interviews or for trial testimony.

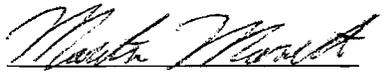
In exchange for a complete, truthful account of any knowledge you may have relevant to the case, nothing that you say during the defense interview will be used against you in any criminal proceeding. I have received a brief proffer from your defense counsel which contributes to my belief that the evidence you can provide is relevant to the case. Should I still feel this way following the interview, and should I remain convinced of the lack of evidence against you on the charges, I will provide you with transactional immunity in order to secure your testimony at trial. This means that as long as you testify truthfully at trial, the State will not file charges of robbery related to this criminal investigation, or any other charges related to the robbery of Eliezer Duran or Walter Flores Cruz. If your testimony at trial leads to knowledge of completely separate charges, the State's immunity offer is limited only to circumstances surrounding the robbery of these two victims (for example, if you state that the car you drove in to China Harbor was stolen, or that you had beat up someone in the parking lot, the State may still pursue charges for those crimes). In this context, then, I offer you transactional and use immunity related only to the issues surrounding the Robbery on April 17, 2010 of Eliezer Duran and Walter Flores Cruz for both your defense interview and your trial testimony. In order to secure the State's offer of immunity, you must speak truthfully in interviews and during your testimony.

Prosecuting Attorney  
King County

Martin Monetti  
September 13, 2010  
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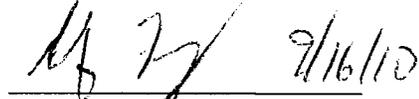
Mr. Monetti, after speaking to other witnesses and to your attorney, I understand that on the early morning of April 17, 2010, you were celebrating your 21<sup>st</sup> birthday and were intoxicated. I also understand that you do not remember everything that occurred nor do you recall the exact order of events. I only ask that you be truthful about what you do remember and that you are clear when you cannot recall a specific incident.

If you agree to the terms of this agreement as set forth in this paragraph 2 of page 1 of this letter, please so indicate by signing the letter and obtaining the signature of your attorney. Our signature below indicates our agreement to the terms, which are fully set forth in paragraph 2 of page 1 in this document.



9/16/10

Martin Monetti/Date



Robert Fennaugh II/Date



Tomás Gahan/Date  
Senior Deputy Prosecuting Attorney

OFFICE OF THE PROSECUTING ATTORNEY  
KING COUNTY, WASHINGTON

Dan Satterberg  
Prosecuting Attorney

W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

December 8, 2010

Martin Monetti  
C/O Robert Flennaugh II  
810 3rd Ave Ste 500  
Seattle, WA 98104-1619

RE: State of Washington v. Pedro Martinez and Hector Veteta-Contreras

Dear Mr. Monetti:

As you know, I have met with your attorney, Robert Flennaugh II, concerning your witness of the events outside of China Harbor on April 17, 2010. I have watched the video of your detention and subsequent injury by Seattle Police Officers during the course of the investigation, and have spoken with your friends, Robin Barrera and Denis Garcia Garcia as well as the victims of the robberies. I have also reviewed the police reports and other police videos in this case. I also met with you and your attorney and the defendants' attorneys for an interview in this case, and listened to what you were able to remember of this incident. Based on my review of these items, I do not believe that you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz (the two robbery victims) on the night in question. Based on my conversations with your attorney, my personal interviews with the myriad witnesses in this case, and my review of all the other evidence, I do believe that your testimony at trial is material to the case. Because I do not believe, based on this review, that the State can prove you played any role in the robbery, and because you have material evidence of the crimes, I am willing to offer you full immunity to prohibit you from making any 5th amendment claims to silence either for defense interviews or for trial testimony, regarding both the robbery and your admitted possession of marijuana on the early morning of April 17, 2010.

In exchange for your complete and truthful testimony about what you remember in this case, the State will not file charges of robbery related to this criminal investigation, or any other charges related to the robbery of Eliezer Duran or Walter Flores Cruz or your admitted possession of marijuana. If your testimony at trial leads to knowledge of completely separate charges, the State's immunity offer is limited only to circumstances surrounding the robbery of these two victims and possession of marijuana (for example, if you state that the car you drove in to China Harbor was stolen, or that you had beat up someone in the parking lot, the State may still pursue charges for those crimes).

Mr. Monetti, after speaking to other witnesses and to you, I understand that you were intoxicated on the evening of April 17, 2010, and that you do not remember everything that occurred nor do you recall the exact order of events. I only ask that you be truthful about what you do remember and that you are clear when you cannot recall a specific incident. In order to

• Prosecuting Attorney  
King County

• Martin Monetti  
September 13, 2010  
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secure the State's offer of immunity, you must speak truthfully in interviews and during your testimony.

If you agree to the terms of this agreement as set forth in this letter, please so indicate by signing the letter and obtaining the signature of your attorney. Our signature below indicates our agreement to the terms, which are fully set forth in this document.

Martin Monetti 12/15/10

Martin Monetti/Date

Robert Flennaugh II 12/15/10

Robert Flennaugh II/Date

Tomás Gahan 12/15/10

Tomás Gahan/Date

Senior Deputy Prosecuting Attorney

# APPENDIX-B



# APPENDIX-C

INSTRUCTION NO. 14

To convict the defendant Pedro José Martinez of the crime of robbery in the first degree, as charged in count I, each of the following six elements of the crime must be proved beyond a reasonable doubt:

1. That on or about 17 April 2010, the defendant unlawfully took personal property from the person or in the presence of Walter Flores-Cruz;

2. That the defendant intended to commit theft of the property;

3. That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;

4. That force or fear was used by the defendant to obtain or retain possession of the property;

5. That in the commission of these acts or in immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon; and

6. That these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

# APPENDIX-D

No. \_\_\_\_\_

The defendant Pedro Jose Martinez is charged in Count I. with robbery in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of robbery in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

WPIC 4.11

# APPENDIX-E

No. \_\_\_\_\_

The defendant Pedro Jose Martinez is charged in Count II with attempted robbery in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of attempted robbery in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

WPIC 4.11

# APPENDIX-F

No. \_\_\_\_\_

A person commits the crime of robbery in the second degree when he or she commits robbery.

WPIC 37.03

# APPENDIX-G

No. \_\_\_\_\_

To convict the defendant Pedro Jose Martinez of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17<sup>th</sup> day of April, 2010, the defendant unlawfully took personal property from the person of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against that person's will by the defendant's use or threatened use of immediate force;

(4) That force or fear was used by the defendant to obtain or retain possession of the property; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

# APPENDIX-H

No. \_\_\_\_\_

To convict the defendant Pedro Jose Martínez of the crime of attempted robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17<sup>th</sup> day of April, 2010, the defendant did an act that was a substantial step toward the commission of robbery in the second degree;

(2) That the act was done with the intent to commit robbery in the second degree; and

(5) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 100.02

# APPENDIX-I

**FILED**  
KING COUNTY, WASHINGTON

DEC 16 2010

SUPERIOR COURT CLERK  
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	8-0
	)	Plaintiff, ) No. 10 C 03559 & SEA
	)	
vs.	)	
	)	WRITTEN FINDINGS OF FACT AND
PEDRO MARTINEZ,	)	CONCLUSIONS OF LAW ON CrR 3.5
	)	MOTION TO SUPPRESS THE
	)	DEFENDANT'S STATEMENT(S)
	)	
	)	
	)	
	)	

A hearing on the admissibility of the defendant's statement(s) was held on December 6, and 7 2010 , before the Honorable Judge Kessler.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing. Defense waived the right to require the

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1 State to have more officers present as the entire interaction is captured on video, which was  
2 admitted as State's I.

3 After considering the evidence submitted by the parties and hearing argument, to wit: the  
4 testimony of Seattle Police Officer David Terry and watching the video of the investigation,  
5 detention and arrest, marked State's Pretrial 1, the court enters the following findings of fact and  
6 conclusions of law as required by CrR 3.5.

7 1. THE UNDISPUTED FACTS:

- 8 A. On the early morning of April 17, 2010, the defendant Martinez was stopped by Seattle  
9 Police pursuant to the investigation of a robbery.
- 10 B. He was required to sit on the ground and was not handcuffed. He was not free to go.
- 11 C. SPD Officer Terry spoke with the witness Walter Flores-Cruz and the defendant,  
12 Martinez.
- 13 D. Following that process, Officer Terry informed the defendant Martinez that he was under  
14 arrest and handcuffed him. He then accurately read the defendant his Miranda rights; the  
15 defendant stated that he understood and was not asked if he waived his rights. The  
16 defendant continued to make some statements following Miranda. The Court finds that  
17 the defendant understood his rights and waived them.

18

19 3. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S  
20 STATEMENT(S):

21 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

22 The following statements of the defendant captured on the video are admissible in  
23 the State's case-in-chief under an CrR 3.5 analysis (the statements in bold reflect  
the statements that survive a Bruton analysis):

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Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

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Beginning at 8:11 into the video:

Terry: I need to let you know you are being audio recorded. Can you tell me what happened?

Martinez: Yeah. You know. I don't know. If the other guy have the knife. Goes to these people and says what's up, you know? And the money, you know, I don't know what's the other guy.

Terry: (Cop chatter) So, what did you say to him?

Martinez: That other guy, I don't know what gang - I think it was South Side, or I don't know. So the other guy, he says to the other people, "give me the money, give me the money." You know. I don't know what happened to him.

Terry: Yeah, but what did you say to him?

Martinez: "I don't have nothing." (Lifts shirt up - revealing empty waistband)

Terry: Yeah, but you told him, "we're gangsters."

Martinez: I'm not. Wow.

Terry: That's what you said?

Martinez: No. Really. Really. On my mom.

Terry: Yeah?

Martinez: Yeah, I'm no gangster. You check my record, I'm no gangster.

Terry/Cops: Anybody look him up?

What did you he come back as? He had something with the county for...

what did you get arrested for? For driving without a license?

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Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

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1 **Martinez:** Yeah, I don't have nothing. I don't have arms. (raises hand in  
2 pledge). I don't have nothing. Want to check? I'm on  
3 probation. No smoke. No drink.

4 **Terry:** You've been drinking tonight?

5 **Martinez:** (talking over him) You can check me.

6 **Terry:** Well, how do you know the guy with the knife?

7 **Martinez:** I don't know - he's around. He's around. I don't know where.

8 **Terry:** How do you know him?

9 **Martinez:** Because I see him in the party. In the China Harbor. While I was dancing  
10 with my girlfriend. My girlfriend say, "Hey, look that guy. He have knife. I  
11 don't know what happened." I, you know, I protecting my girlfriend.

12 **Terry:** But you were out here with him.

13 **Martinez:** I no was with him.

14 **Terry:** You weren't with the guy with a knife?

15 **Martinez:** No.

16 **Terry:** You don't know who he is?

17 **Martinez:** No. Really, really. I don't.

18 *{At this point, Officer Terry returns to Walter Flores-Cruz to clarify Martinez's role. After*  
19 *speaking with Flores-Cruz again, Officer Terry re-approaches Martinez.}*

20 **Terry:** Alright dude, you're under arrest.

21 **Martinez:** Why, sir?

22 **Terry:** You're under arrest for robbery...Stand up. Everything cool?

23 **Martinez:** Why? I don't have arms, I don't have nothing.

1 Terry: That's okay, you're involved with it, you go to jail too.  
2 How old are you, 19? And you've been drinking? I can smell it on  
3 your breath.  
4 Martinez: Why me and the other guy no?  
5 *Cop chatter*  
6 Terry: **Miranda Warnings and advisement of rights. You have the right to remain**  
7 **silent. Anything you say can be used against you in a court of law. You have**  
8 **the right at any time to talk to a lawyer and have your lawyer present with**  
9 **you when you're being questioned. If you cannot afford to hire a lawyer, one**  
10 **will be appointed to represent you before any questioning if you wish. You**  
11 **can decide at any time to exercise these rights to not answer any questions or**  
12 **make any statements. Do you understand each of these rights I've explained**  
13 **to you?**  
14 Martinez: Yes, sir.  
15 Terry: Do you have any questions?  
16 Martinez: No, sir.  
17 Terry: You have the right to a lawyer if you ~~are~~ are unable to pay for or afford a  
18 lawyer you are entitled to have one provided without charge. RK

19  
20 The above statements are admissible in the case in chief under a 3.5 analysis. Everything  
21 but the portion in bold should be redacted following a Bruton analysis. The statements should  
22 end at "That's okay, you're involved with it, you go to jail too."  
23

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 5

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

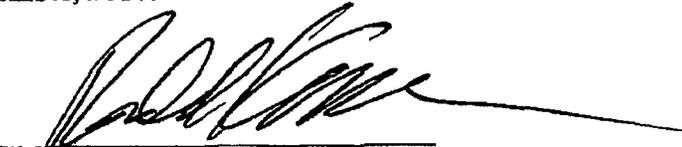
1                   How old are you, 19? And you've been drinking? I can smell it on  
2                   your breath."

3                   The Court finds that this was a Terry stop. The lack of handcuffs is nearly dispositive - a *Re*  
4 reasonable person would not believe that they were under custodial arrest. The questions by  
5 Officer Terry were not coercive and the statements are admissible. Officer Terry was conducting  
6 an investigation and did not make a custodial arrest of the defendant until after he had formed  
7 probable cause, which occurred *when he told the defendant he was under arrest. Re*  
~~after his conversation with the defendant.~~

8                   At the station, the defendant told police officer Terry  
9 that he was from El Salvador ~~born~~. That is admissible as it  
10 was stated post-Miranda.

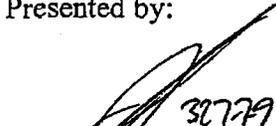
11 In addition to the above written findings and conclusions, the court incorporates by reference its  
12 oral findings and conclusions

13 Signed this 7/15 day of December, 2010.

14  
15   
16 JUDGE

Ronald Kessler

17 Presented by:

18   
19 Senior Deputy Prosecuting Attorney  
20 *Copy received*

21   
22 Attorney for Defendant

23 MARK FLORA 14026

WRITTEN FINDINGS OF FACT AND  
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516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP -9 PM 1:24

NO. 66674-6-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

vs.

PEDRO JOSE MARTINEZ,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On September 9, 2011, I caused to be served a true and correct copy of the following document on:

CERTIFICATE OF SERVICE – 1

CARNEY  
BADLEY  
SPELLMAN

LAW OFFICES  
A PROFESSIONAL SERVICE CORPORATION  
701 FIFTH AVENUE, #3600  
SEATTLE, WA 98104-7010  
FAX (206) 467-8215  
TEL (206) 622-8020

1                    **Counsel for the State:**  
2                    Thomas Gahan  
3                    King County Prosecutor's Office  
4                    516 Third Avenue, Room W554  
5                    Seattle, WA 98104  
6                    **(Via Legal Messenger)**

7                    **Appellant**  
8                    Mr. Pedro Jose Martinez  
9                    DOC No. 347635  
10                    Clallam Bay Corrections Center  
11                    1830 Eagle Crest Way  
12                    Clallam Bay, WA 98326  
13                    **(Via U.S. Mail)**

14                    Entitled exactly:

15                    **APPELLANT'S MOTION FOR LEAVE TO FILE OVER LENGTH**  
16                    **OPENING BRIEF;**  
17                    **BRIEF OF APPELLANT.**

18                    

19                    \_\_\_\_\_  
20                    Lily T. Laemmle  
21                    Legal Assistant

\_\_\_\_\_  
CERTIFICATE OF SERVICE – 2

\_\_\_\_\_  
CARNEY  
BADLEY  
SPELLMAN  
\_\_\_\_\_

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