

No. 35042-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
CLALLAM COUNTY
STATE OF WASHINGTON
BY: 

STATE OF WASHINGTON,

Respondent,

vs.

Robert Covarrubias,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00079-1

The Honorable Judge George L. Wood

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

ASSIGNMENTS OF ERROR xiii

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR xvii

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

I. Prior Proceedings..... 1

II. Statement of Facts..... 1

A. Substantive facts. 1

B. Mr. Sonnabend’s identification of Mr. Covarrubias... 4

C. Facts established at CrR 3.5 hearing..... 7

D. Facts relating to prosecutorial misconduct. 8

E. Improper expert testimony..... 10

F. Rebuttal testimony. 11

G. Facts relating to defense counsels’ conflicts of interest.
12

H. Other ineffective assistance claims..... 23

I. Verdict, sentencing, and post-trial motions. 24

ARGUMENT..... 24

I.	The trial court violated Mr. Covarrubias’ right to due process by admitting into evidence a tainted identification.....	24
	J. Mr. Sonnabend’s out-of-court photographic identification should have been excluded.....	26
	K. Mr. Sonnabend’s in-court identification of Mr. Covarrubias should have been excluded.....	29
	L. The trial court misapplied the “independent origin” test in admitting Mr. Sonnabend’s in-court identification over objection.....	30
II.	The trial court erred by admitting Mr. Covarrubias’ custodial statements.....	33
III.	Mr. Covarrubias’ right to due process was violated when the jury was exposed to an erroneous instruction on reasonable doubt.....	38
IV.	The prosecutor committed misconduct requiring reversal.....	44
	A. The prosecutor committed misconduct by intentionally making statements on the law that differed from the court’s instructions.....	45
	B. The prosecutor committed misconduct by inserting her personal opinion into the case.....	48
V.	The evidence was insufficient to convict Mr. Covarrubias of first degree felony murder based on forcible rape.....	49
VI.	Two experts invaded the province of the jury by testifying that the death was a classic or typical murder with sexual assault.....	54

VII.	The trial court erred by allowing hearsay testimony about Ms. Carter’s state of mind more than six months prior to her death.	56
VIII.	Mr. Covarrubias was denied the effective assistance of counsel because multiple conflicts of interest adversely affected his attorneys’ performance.....	61
	A. Defense counsel’s prior representation of “other suspects” in Ms. Carter’s death created conflicts of interest that adversely affected counsel’s performance.	68
	B. Defense counsel’s prior representation of the deceased, her parents, and her brothers created a conflict of interest that adversely affected counsel’s performance. ...	79
	C. Defense counsel’s prior representation of 28 witnesses and potential witnesses created conflicts of interest that adversely affected counsel’s performance.	82
	D. Mr. Covarrubias’ purported waiver of his constitutional right to a conflict-free attorney was invalid because he was misinformed about the facts and legal standards relevant to the waiver.....	84
IX.	Mr. Covarrubias was denied the effective assistance of counsel because his attorneys’ deficient performance prejudiced him.	88
	A. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys’ failure to request instructions on the inferior degree offense of Murder in the Second Degree.	89
	B. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys’ failure to seek exclusion of certain evidence.	95
	C. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys’ failure to offer evidence that Mr. Criswell had harbored thoughts of killing Ms. Carter. ...	106

X. Cumulative error requires reversal of Mr. Covarrubias' conviction..... 107

CONCLUSION 109

TABLE OF AUTHORITIES

FEDERAL CASES

Ayers v. Belmontes, ___ U.S. ___, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006)..... 62

Belmontes v. Brown, 414 F.3d 1094 (9th Cir. 2005) 62, 87

Cage v. Louisiana, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990) 39, 41, 42, 44

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) 62, 72, 75, 78, 82, 84

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005) 106

Dickerson v. U.S., 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) 34

Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) 39

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 61

Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978)..... 84

Hovey v. Ayers, 458 F.3d 892 (9th Cir. 2006) 67

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 39, 42, 49

Lewis v. Mayle, 391 F.3d 989 (9th Cir., 2004) 62, 72, 75, 78, 82, 84, 85, 86, 88

Lifescan, Inc. v. Home Diagnostics, Inc., 103 F. Supp. 2d 345 (D. Del. 2000) 43

Lockhart v. Terhune, 250 F.3d 1223 (9th Cir., 2001)..... 62

<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964).....	33
<i>Marks v. United States</i> , 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977).....	35
<i>McClure v. Thompson</i> , 323 F.3d 1233 (9th Cir. 2003).....	63
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237, 15 2 L.Ed. 291 (2002)	61, 63
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	xiii, xviii, xix, 8, 33, 34, 35, 36, 37, 38, 102
<i>Missouri v. Seibert</i> , 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed 2d 643 (2004)	xvi, xix, 34, 35, 36, 37, 38, 102
<i>Neil v. Biggers</i> , 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972) xviii, 26, 27, 28, 30, 31, 33	
<i>Nix v. Whiteside</i> , 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed. 2d 123 (1986)..	63
<i>Oregon v. Elstad</i> , 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985)	36
<i>Sanders v. Ratelle</i> , 21 F.3d 1446 (9th Cir. 1994)	62, 63
<i>Simmons v. United States</i> , 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968).....	24, 31, 33
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	89, 95, 106, 107
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	39
<i>Swidler & Berlin v. United States</i> , 524 U.S. 399, 118 S.Ct 2081, 141 L.Ed 2d 379 (1998).....	64
<i>Tillman v. Cook</i> , 215 F.3d 1116 (10th Cir., 2000).....	40
<i>U.S. v. Salemo</i> , 61 F.3d 214 (3 rd Cir., 1995).....	61
<i>United States v. Beck</i> , 418 F.3d 1008(9th Cir. 2005)	25

<i>United States v. Crews</i> , 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed 2d 537 (1980).....	31, 32
<i>United States v. Elliot</i> , 463 F.3d 858 (9th Cir. 2006)	63
<i>United States v. LaPierre</i> , 998 F.2d 1460 (9th Cir. 1993).....	31
<i>United States v. Montgomery</i> , 150 F.3d 983 (9th Cir. 1998).....	25
<i>United States v. Ollie</i> , 442 F.3d 1135 (8th Cir. 2006)	34, 36, 38
<i>United States v. Rodriguez</i> , 162 F.3d 135 (1st Cir., 1998)	40
<i>United States v. Shwayder</i> , 312 F.3d 1109 (9th Cir. 2002)	62
<i>United States v. Wade</i> , 388 U.S. 218, 87 S. Ct 1926, 18 L.Ed 2d 1149 (U.S. 1967).....	31
<i>United States v. Williams</i> , 435 F.3d 1148 (9th Cir. 2006).....	35, 36
<i>Victor v. Nebraska</i> , 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)	39, 41, 42
<i>Wheat v. United States</i> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988).....	84
<i>Williams v. Taylor</i> , 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000).....	106
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981).....	61
<i>Wright v. West</i> , 505 U.S. 277, 112 S.Ct 2482, 120 L.Ed. 2d 225 (1992).	25

STATE CASES

<i>Cooke v. Cain</i> , 35 Wash. 353, 77 Pac. 682 (1904)	43
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	50
<i>In re A.V.D.</i> , 62 Wn.App. 562, 815 P.2d 277 (1991).....	50, 52
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	88

<i>In re Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	42
<i>Northwest Pipeline Corp. v. Adams County</i> , 132 Wn. App. 470; 131 P.3d 958 (2006).....	50
<i>Port of Seattle v. Pollution Control</i> , 151 Wn.2d 568, 90 P.3d 659 (2004)25	
<i>Rogers Potato v. Countrywide Potato</i> , 152 Wn.2d 387, 97 P.3d 745 (2004)	50, 51
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	99
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	45
<i>State v. Bennett</i> , 131 Wn. App. 319, 126 P.3d 836 (2006).....	44
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	55, 56
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P. 3d 899 (2005). 44, 45, 46, 47	
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006). 97, 98, 99, 100, 102	
<i>State v. C.D.W.</i> , 76 Wn. App. 761, 887 P.2d 911 (1995)	98, 102
<i>State v. C.M.C.</i> , 110 Wn. App. 285, 40 P.3d 690 (2002).....	97
<i>State v. Cameron</i> , 100 Wn.2d 520, 674 P.2d 650 (1983)	57, 60
<i>State v. Carlson</i> , 130 Wn. App. 589, 123 P.3d 891 (2005)	50
<i>State v. Castle</i> , 86 Wn.App. 48, 133 Wn.2d 1014 (1997)	xix, 9, 40, 46
<i>State v. Castle</i> .86 Wn.App. 48, 935 P.2d 656. <i>review denied</i> 133 Wn.2d 1014 (1997).....	44
<i>State v. Chamroeum Nam</i> , 136 Wn. App. 698, 150 P.3d 617 (2007)....	107, 108
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	107
<i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998).....	26, 27
<i>State v. Corn</i> , 95 Wn. App. 41, 975 P.2d 520 (1999).....	33, 34

<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	45, 46, 47
<i>State v. Davis</i> , 141 Wn.2d 798, 10 P.3d 977 (2000).....	61
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	49, 52, 54
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	61
<i>State v. Dykstra</i> , 127 Wn.App. 1, 110 P.3d 758 (2005).....	34
<i>State v. Early</i> , 70 Wn. App. 452, 853 P.2d 964 (1993).....	63, 67
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	89, 90, 92
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 12 (1999).....	97
<i>State v. Florczak</i> , 76 Wn. App. 55, 882 P.2d 199 (1994).....	55
<i>State v. Griggs</i> , 33 Wn. App. 496, 656 P.2d 529 (1982).....	32
<i>State v. Hatfield</i> , 51 Wn. App. 408, 754 P.2d 136 (1988).....	70, 74, 77, 87
<i>State v. Henderson</i> , 100 Wn.App. 794, 998 P.2d 907 (2000).....	45
<i>State v. Holmes</i> , 135 Wn. App. 588, 145 P.3d 1241 (2006).....	26
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	48, 88
<i>State v. Huckins</i> , 66 Wn. App. 213, 836 P.2d 230 (1992).....	45
<i>State v. Hunsaker</i> , 74 Wn. App. 38, 873 P.2d 540 (1994).....	66, 69, 72, 73, 75, 76, 79, 87
<i>State v. Hunt</i> , 128 Wn. App. 535, 116 P.3d 450 (2005).....	42, 44
<i>State v. Kinard</i> , 109 Wn. App. 428 P.3d 573 (2001).....	27
<i>State v. Kirkman</i> , ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 210 (2007).....	54, 55, 104
<i>State v. Littlefair</i> , 129 Wn. App. 330, 119 P.3d 359 (2005).....	26
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004)....	66, 67, 69, 70, 73, 76, 77

<i>State v. Maupin</i> , 63 Wn. App. 887, 822 P.2d 355 (1992).....	27, 28, 50
<i>State v. McDonald</i> , 40 Wn. App. 743, 700 P.2d 327 (1985).....	25, 29, 90
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	26, 27
<i>State v. Medlock</i> , 86 Wn. App. 89, 935 P.2d 693 (1997)	97
<i>State v. Parr</i> , 93 Wn.2d 95, 606 P.2d 263 (1980).....	57, 59
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006) ...	45, 47, 56
<i>State v. Pittman</i> , 134 Wn. App. 376, ___ P.3d ___ (2007)....	89, 90, 91, 93, 94, 95
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	48, 49
<i>State v. Ramos</i> , 83 Wn. App. 622, 922 P.2d 193 (1996)	67
<i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004).....	25
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P. 3d 1001 (2003).....	57
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	89, 96, 102, 103, 104, 105
<i>State v. Rooks</i> , 130 Wn. App. 787, 104 P.3d 670 (2005)	97
<i>State v. Sanchez-Guillen</i> , 135 Wn. App. 636, 145 P.3d 406 (2006)...	57, 59
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)	96
<i>State v. Smith</i> , 36 Wn. App. 133, 372 P.2d 759 (1983).....	30, 31
<i>State v. Spotted Elk</i> , 109 Wn.App. 253, 34 P.3d 906 (2001).....	34
<i>State v. Stenger</i> , 111 Wn.2d 516, 760 P.2d 357 (1988).....	65, 66
<i>State v. Stubsoen</i> , 48 Wn. App. 139, 738 P.2d 306 (1987).....	56
<i>State v. Suarez-Bravo</i> , 72 Wn. App. 359, 864 P.2d 426 (1994)	105
<i>State v. Thompson</i> , 151 Wn.2d 793, 92 P.3d 228 (2004)	47

<i>State v. Tjeerdsma</i> , 104 Wn. App. 878, 17 P.3d 678 (2001) ..	63
<i>State v. Trout</i> , 125 Wn. App. 403, 105 P.3d 69 (2005)	48
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002)	25
<i>State v. Vicuna</i> , 119 Wn. App. 26, 79 P.3d 1 (2003).....	67
<i>State v. Ward</i> , 125 Wn. App. 243, 104 P.3d 670 (2004) . 90, 91, 92, 93, 94, 95	
<i>Torgerson v. State Farm Mut. Auto. Ins. Co.</i> , 91 Wn. App. 952, 957 P. 2d 1283 (1998).....	58, 60

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	33
U.S. Const. Amend. VI	54, 61, 63
U.S. Const. Amend. XIV	33, 54, 61
Wash. Const. Article I, Section 21	54
Wash. Const. Article I, Section 22	54, 61
Wash. Const. Article I, Section 9.....	33

STATUTES

RCW 9.94A.540.....	93
RCW 9A.32.030.....	50
RCW 9A.32.050.....	100
RCW 9A.44.010.....	51
RCW 9A.44.050.....	50
RCW 9A.44.105.....	53

OTHER AUTHORITIES

Commonwealth v. Murphy, 559 Pa. 71, 739 A.2d 141 (1999) 40

ER 401 57, 59, 105

ER 402 57

ER 403 57, 59, 105

ER 404 58, 60

ER 405 58, 60

ER 406 58, 60

ER 801 56

ER 802 56

ER 803 56, 59

ER 806 79, 81

In re Michal, 415 Ill. 150 (1953) 64

RAP 2.5 26, 27, 45, 54

Restatement (Third) of the Law Governing Lawyers, Section 60 Comment
(e) and Section 77 64

RPC 1.10 67, 68, 71, 72, 81

RPC 1.7 64, 68, 71, 74, 77, 80

RPC 1.9 64, 65, 68, 69, 70, 71, 73, 74, 76, 77, 78, 79, 80

RPC 1.9 65

ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Covarrubias' constitutional right to due process by admitting into evidence a tainted eyewitness identification.
2. The trial court erred by admitting into evidence Mr. Sonnabend's out-of-court identification of Mr. Covarrubias.
3. The trial court erred by permitting Mr. Sonnabend to make an in-court identification of Mr. Covarrubias.
4. The trial court misapplied the "independent origin" doctrine in admitting Mr. Sonnabend's in-court identification of Mr. Covarrubias.
5. The trial court violated Mr. Covarrubias' privilege against self-incrimination.
6. The trial court erred by admitting into evidence Mr. Covarrubias' unwarned custodial statements.
7. The trial court erred by admitting into evidence Mr. Covarrubias' custodial statements obtained following a midstream administration of *Miranda* warnings.
8. The trial court erred by failing to inquire whether the interrogating officers deliberately attempted to circumvent *Miranda*.
9. The trial court erred by failing to inquire whether the interrogating officers implemented any curative measures to insulate Mr. Covarrubias' post-*Miranda* statements from his pre-*Miranda* statements.
10. Mr. Covarrubias' constitutional right to due process was violated when the jury was exposed to an incorrect definition of reasonable doubt.
11. The prosecutor committed misconduct that was flagrant and ill-intentioned.
12. The prosecutor committed misconduct that created a manifest error affecting Mr. Covarrubias' constitutional right to due process.

13. The prosecutor committed misconduct by providing the jury with an instruction defining reasonable doubt that differed from the instruction provided by the trial judge.
14. The prosecutor committed misconduct by injecting her personal opinion on Mr. Covarrubias' credibility.
15. The prosecutor committed misconduct by injecting into the trial her personal opinion on Mr. Covarrubias' guilt.
16. The conviction was based on insufficient evidence.
17. The state presented insufficient evidence that Mr. Covarrubias caused Ms. Carter's death.
18. The state presented insufficient evidence that Mr. Covarrubias forcibly raped Ms. Carter.
19. The state presented insufficient evidence that Ms. Carter's death occurred in the course of, in furtherance of, or in the immediate flight from a forcible rape.
20. Dr. Selove invaded the province of the jury by expressing an explicit opinion on the defendant's guilt.
21. Dr. Selove's testimony violated Mr. Covarrubias' constitutional right to a jury trial.
22. Dr. Selove's testimony constituted inadmissible profile testimony.
23. Dr. Selove should not have been permitted to testify that Ms. Carter's death was a "typical" or "classical death during a sexual assault."
24. Dr. Reay invaded the province of the jury by expressing an explicit opinion on the defendant's guilt.
25. Dr. Reay's testimony violated Mr. Covarrubias' constitutional right to a jury trial.
26. Dr. Reay's testimony constituted inadmissible profile testimony.
27. Dr. Reay should not have been permitted to testify that Ms. Carter's death was a "classic murder with sexual assault."

28. The trial court erred by admitting Ms. Carter's hearsay statements.
29. The trial court erred by admitting Ms. Carter's statements about her state of mind six months prior to her death.
30. The trial court erred by admitting Ms. Carter's statements about her state of mind without establishing that the statements were necessary and trustworthy.
31. The trial court erred by admitting inadmissible habit evidence regarding Ms. Carter's sexual habits.
32. The trial court erred by admitting inadmissible evidence regarding Ms. Carter's sexual character.
33. The trial court erred by failing to limit the jury's consideration of Ms. Carter's hearsay statements.
34. Mr. Covarrubias was denied the effective assistance of counsel because his attorneys were hampered by multiple conflicts of interest.
35. A conflict caused by defense counsels' prior representation of alternate suspect Jon Sonnabend adversely affected counsel's performance.
36. A conflict caused by defense counsels' prior representation of alternate suspect Kelly Banner adversely affected counsels' performance.
37. A conflict caused by defense counsels' prior representation of alternate suspect Gerald Spry adversely affected counsel's performance.
38. A conflict caused by defense counsels' prior representation of Ms. Carter (the deceased) adversely affected counsel's performance.
39. A conflict caused by defense counsels' prior representation of Ms. Carter's parents and her brothers adversely affected counsels' performance.
40. A conflict caused by defense counsels' prior representation of 20 additional witnesses and potential witnesses adversely affected counsels' performance.
41. Mr. Covarrubias' purported waiver of his right to conflict-free counsel was invalid.

42. The trial court erred by accepting Mr. Covarrubias' purported waiver of his right to conflict-free counsel.
43. The trial court erred by failing to disqualify Mr. Gasnick and Mr. Anderson from representing Mr. Covarrubias.
44. Mr. Covarrubias' purported waiver was not made knowingly, intelligently, and voluntarily, because he was provided inaccurate information on the facts and the law by special counsel.
45. Mr. Covarrubias' purported waiver was not made knowingly, intelligently, and voluntarily, because he was provided inaccurate information on the facts and the law by his own attorney.
46. Mr. Covarrubias' purported waiver was not made knowingly, intelligently, and voluntarily, because he was provided inaccurate information on the facts and the law by the trial judge.
47. Mr. Covarrubias was denied the effective assistance of counsel because he was prejudiced by his attorneys' deficient performance.
48. Defense counsels' failure to request an instruction on the inferior degree offense of Second Degree Felony Murder deprived Mr. Covarrubias of the effective assistance of counsel.
49. Defense counsels' failure to seek exclusion of damaging evidence deprived Mr. Covarrubias of the effective assistance of counsel.
50. Defense counsels' failure to seek exclusion of Mr. Covarrubias' statement under the *corpus delicti* rule deprived Mr. Covarrubias of the effective assistance of counsel.
51. Defense counsels' failure to argue for exclusion of Mr. Covarrubias' unwarned custodial statement deprived Mr. Covarrubias of the effective assistance of counsel.
52. Defense counsels' failure to argue for exclusion of Mr. Covarrubias' custodial statement under *Missouri v. Seibert* deprived Mr. Covarrubias of the effective assistance of counsel.
53. Defense counsels' failure to seek exclusion of Mr. Sonnabend's out-of-court identification of Mr. Covarrubias deprived him of the effective assistance of counsel.

54. Defense counsels' failure to object to inadmissible profile evidence deprived Mr. Covarrubias of the effective assistance of counsel.
55. Defense counsels' failure to object to Dr. Selove's inadmissible opinion that Ms. Carter's death was a "typical" or "classical death during a sexual assault" deprived Mr. Covarrubias of the effective assistance of counsel.
56. Defense counsels' failure to object to Dr. Reay's inadmissible opinion that Ms. Carter's death was a "classic murder with sexual assault" deprived Mr. Covarrubias of the effective assistance of counsel.
57. Mr. Covarrubias was denied the effective assistance of counsel when his attorney failed to offer available evidence supporting the defense strategy of implicating "other suspects."
58. Mr. Covarrubias was denied the effective assistance of counsel when his attorney failed to offer available evidence that Mr. Criswell had harbored thoughts of killing Ms. Carter.
59. Cumulative error requires reversal of the conviction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Robert Covarrubias was charged with First Degree Felony Murder. The state alleged that he had caused the death of Melissa Carter during a rape accomplished by forcible compulsion. Ms. Carter's body was discovered on the waterfront trail in Port Angeles.

Jon Sonnabend claimed to have seen a man and a woman on the waterfront trail the night that Ms. Carter disappeared. More than a month later, he saw a newspaper photograph in which Mr. Covarrubias was identified as the suspect in her death. He approached the police and told them that Mr. Covarrubias may have been the man he saw that night. Prior to trial, he saw a second photograph of Mr. Covarrubias. At trial, he was permitted to testify that he identified Mr. Covarrubias as the man he saw that night, based on the newspaper photograph. Over objection, he was permitted to make an in-court identification of Mr. Covarrubias as the person he saw that night.

1. Did the trial court violate Mr. Covarrubias' constitutional right to due process by admitting into evidence a tainted eyewitness identification? Assignments of Error Nos. 1-4.
2. Was Mr. Sonnabend's out-of-court photographic identification of Mr. Covarrubias impermissibly suggestive as a matter of law? Assignments of Error Nos. 1-4.
3. Did the trial court err by admitting into evidence Mr. Sonnabend's out-of-court identification of Mr. Covarrubias from a single newspaper photograph? Assignments of Error Nos. 1-4.
4. Did the trial court err by failing to analyze Mr. Sonnabend's out-of-court identification of Mr. Covarrubias under the *Neil v. Biggers* reliability factors? Assignments of Error Nos. 1-4.
5. Was Mr. Sonnabend's in-court identification of Mr. Covarrubias impermissibly suggestive? Assignments of Error Nos. 1-4.
6. Did the trial court err by permitting Mr. Sonnabend to make an in-court identification of Mr. Covarrubias? Assignments of Error Nos. 1-4.
7. Did the trial court err by failing to analyze Mr. Sonnabend's in-court identification of Mr. Covarrubias under the *Neil v. Biggers* reliability factors? Assignments of Error Nos. 1-4.
8. Did the trial court erroneously conclude that Mr. Sonnabend's in-court identification of Mr. Covarrubias had an origin independent of the two photographs he had viewed prior to testifying? Assignments of Error Nos. 1-4.

Mr. Covarrubias was subjected to custodial interrogation for approximately 25 minutes before the administration of *Miranda* warnings.

He was then provided *Miranda* warnings and the interrogation continued without a break. No evidence was presented distinguishing statements made prior to *Miranda* with those made after *Miranda*. His statements were admitted at trial.

9. Did the officers violate Mr. Covarrubias' privilege against self-incrimination by subjecting him to custodial interrogation without first administering *Miranda* warnings? Assignments of Error Nos. 5-9.
10. Did the trial court violate Mr. Covarrubias' constitutional privilege against self-incrimination by admitting into evidence his unwarned custodial statements? Assignments of Error Nos. 5-9.
11. Did the trial court violate Mr. Covarrubias' constitutional privilege against self-incrimination by admitting into evidence custodial statements obtained following a midstream administration of *Miranda* warnings? Assignments of Error Nos. 5-9.
12. Did the trial court fail to determine whether the interrogating officers deliberately evaded the requirements of *Miranda*, as mandated by *Missouri v. Seibert*? Assignments of Error Nos. 5-9.
13. Did the trial court fail to determine whether the interrogating officers implemented any curative measures to insulate Mr. Covarrubias' post-*Miranda* statements from his pre-*Miranda* statements? Assignments of Error Nos. 5-9.

During cross-examination of Mr. Covarrubias, the prosecuting attorney made statements indicating that she didn't believe him, and that she personally believed he was guilty of rape and murder.

The prosecuting attorney proposed an instruction on reasonable doubt based on *State v. Castle*. The court rejected the instruction in favor of the standard pattern instruction. The prosecuting attorney displayed her proposed instruction to the jury (before a sustained objection required her to take it down), told the jury that it was an approved alternate definition

of reasonable doubt, and read from the instruction during closing argument.

14. Was Mr. Covarrubias' constitutional right to due process violated when the jury was exposed to an incorrect definition of reasonable doubt? Assignments of Error Nos. 10-13.
15. Did the prosecutor commit misconduct that was flagrant and ill-intentioned by showing the jury a reasonable doubt instruction that the trial judge had rejected? Assignments of Error Nos. 10-13.
16. Did the prosecutor commit misconduct that was flagrant and ill-intentioned by telling the jury that a reasonable doubt instruction rejected by the trial judge was an approved alternate definition? Assignments of Error Nos. 10-13.
17. Did the prosecutor commit misconduct that was flagrant and ill-intentioned by reading from a reasonable doubt instruction that the trial judge had rejected? Assignments of Error Nos. 10-13.
18. Did the prosecutor's misconduct create a manifest error affecting Mr. Covarrubias' constitutional right to due process? Assignments of Error Nos. 10-15.
19. Did the prosecutor commit misconduct by injecting into the trial her personal opinion that Mr. Covarrubias was not credible? Assignments of Error Nos. 10-15.
20. Did the prosecutor commit misconduct by injecting into the trial her personal opinion that Mr. Covarrubias was guilty of rape and murder? Assignments of Error Nos. 10-15.

The prosecution failed to present any direct evidence that Mr. Covarrubias caused the death of Ms. Carter in the course of, in furtherance

of, or in the immediate flight from a forcible rape. The circumstantial evidence was consistent with consensual sexual activity occurring hours before and unrelated to her death, with nonconsensual but unforced rape (Rape in the Third Degree), and with death followed by sexual violation of her remains.

21. Was Mr. Covarrubias' conviction based on insufficient evidence? Assignments of Error Nos. 16-19.
22. Did the state fail to present sufficient evidence to establish beyond a reasonable doubt that Mr. Covarrubias caused Ms. Carter's death? Assignments of Error Nos. 16-19.
23. Did the state fail to present sufficient evidence to establish beyond a reasonable doubt that Mr. Covarrubias forcibly raped Ms. Carter? Assignments of Error Nos. 16-19.
24. Did the state fail to present sufficient evidence to establish beyond a reasonable doubt that Ms. Carter's death occurred in the course of, in furtherance of, or in the immediate flight from a forcible rape? Assignments of Error Nos. 16-19.

At the trial, undisputed evidence established sexual contact between Mr. Covarrubias and Ms. Carter. The state's expert (Dr. Selove) testified that the evidence was consistent with consensual sexual activity unrelated to Ms. Carter's death. Despite this, he told the jury (without objection) that her death was a "typical" or "classical death during a sexual assault." He also testified that she was "probably" raped, although he acknowledged that he had no evidence to support that conclusion.

On cross-examination of the defense expert, Dr. Reay, the prosecution was permitted (without objection) to elicit the opinion that Ms. Carter's death was a "classic murder with sexual assault."

25. Did Dr. Selove's testimony invade the province of the jury because he expressed an explicit opinion that the defendant was guilty of rape and murder? Assignments of Error Nos. 20-23.

26. Did Dr. Selove's testimony violate Mr. Covarrubias' constitutional right to a jury trial? Assignments of Error Nos. 20-23.
27. Did Dr. Selove's testimony (that Ms. Carter's death was a "typical" or "classical death during a sexual assault") constitute inadmissible victim profile testimony? Assignments of Error Nos. 20-23.
28. Did Dr. Reay's testimony invade the province of the jury because he expressed an explicit opinion that the defendant was guilty of rape and murder? Assignments of Error Nos. 20-27.
29. Did Dr. Reay's testimony violate Mr. Covarrubias' constitutional right to a jury trial? Assignments of Error Nos. 20-27.
30. Did Dr. Reay's testimony (that Ms. Carter's death was a "classic murder with sexual assault") constitute inadmissible victim profile testimony? Assignments of Error Nos. 24-27.

After Mr. Covarrubias testified that he had had consensual oral sex with Ms. Carter, the prosecution offered rebuttal testimony showing that Ms. Carter had previously made statements that she disliked oral sex, found it degrading, and thought it was disgraceful. The statements were made at least 6 months prior to her death. The trial court did not determine that her hearsay was necessary and trustworthy, but admitted the testimony over objection. The trial judge did not give an instruction limiting the jury's consideration of the evidence.

31. Did the trial court err by admitting Ms. Carter's hearsay statements? Assignments of Error Nos. 28-30.
32. Did the trial court err by admitting Ms. Carter's statements about her state of mind six months prior to her death? Assignments of Error Nos. 28-32.

33. Did the trial court err by admitting Ms. Carter's statements about her state of mind without establishing that the statements were necessary and trustworthy? Assignments of Error Nos. 28-32.
34. Did the trial court err by admitting inadmissible habit evidence regarding Ms. Carter's sexual habits? Assignments of Error Nos. 28, 31.
35. Did the trial court err by admitting inadmissible evidence regarding Ms. Carter's sexual character? Assignments of Error Nos. 28, 32.
36. Did the trial court err by failing to limit the jury's consideration of Ms. Carter's hearsay statements? Assignments of Error Nos. 33.

The public defender office assigned to represent Mr. Covarrubias had previously represented 28 others involved in the investigation. These included Ms. Carter (the deceased), her parents, her brothers, and her best friend, as well as three individuals whom the defense hoped to implicate as "other suspects" in Ms. Carter's death, and 20 other individuals named by the prosecution as potential witnesses. The prosecuting attorney asked the trial judge to inquire into potential conflicts of interest. Mr. Covarrubias was assigned special counsel to advise him with respect to the conflict.

Special counsel advised Mr. Covarrubias that there was no conflict. The court indicated that defense counsel's plan to implicate former clients did not create a potential conflict. One defense attorney indicated that juvenile convictions could never be used for impeachment, and so there was no conflict with any former clients. The other defense attorney indicated that he would not review closed files to search for confidential information. Both attorneys sought to avoid any potential conflicts by screening themselves from information relating to Ms. Carter's cases and by not cross-examining former client's that they had personally represented.

37. Was Mr. Covarrubias denied the effective assistance of counsel because his attorneys were hampered by multiple conflicts of interest? Assignments of Error Nos. 34-40.
38. Did conflicts created by defense counsels' prior representation of "other suspects" adversely affect the performance of Mr. Covarrubias' attorneys? Assignments of Error Nos. 34, 35-37.
39. Did conflicts created by defense counsels' prior representation of Ms. Carter (the deceased), her parents, her brothers, and her best friend adversely affect the performance of Mr. Covarrubias' attorneys? Assignments of Error Nos. 34, 38, 39.
40. Did conflicts created by defense counsels' prior representation of 19 additional witnesses and potential witnesses adversely affect the performance of Mr. Covarrubias' attorneys? Assignments of Error Nos. 34, 40.
41. Did special counsel, the court, and Mr. Covarrubias' own attorneys provide him with inaccurate information about the facts and the law in connection with his purported waiver of his right to conflict-free counsel? Assignments of Error Nos. 34, 41-46.
42. Was Mr. Covarrubias' purported waiver of his right to conflict-free counsel invalid because it was not made knowingly, intelligently, and voluntarily? Assignments of Error Nos. 34, 41-46.
43. Did the trial court err by accepting Mr. Covarrubias' purported waiver of his right to conflict-free counsel? Assignments of Error Nos. 34, 41-46.
44. Should the trial court have disqualified the Clallam County Public Defender's Office from representing Mr. Covarrubias

due to the involvement of 28 of their former clients in the case?
Assignments of Error Nos. 34, 41-46.

Although Mr. Covarrubias denied any involvement with Ms. Carter's death, there was evidence to suggest that he was guilty only of Second Degree Felony Murder for causing the death of Ms. Carter in connection with a Rape in the Third Degree or Rape of a Child in the Third Degree. Despite this, defense counsel failed to request an instruction on the inferior degree offense of Second Degree Felony Murder. Defense counsel also failed to seek exclusion of damaging evidence, despite the existence of valid arguments supporting exclusion. Finally, defense counsel failed to offer available evidence that strongly supported the defense theory that Mr. Criswell was implicated in Ms. Carter's death. Each of these errors prejudiced Mr. Covarrubias.

45. Was Mr. Covarrubias denied the effective assistance of counsel by his attorneys' failure to request an instruction on the inferior degree offense of Second Degree Felony Murder?
Assignments of Error Nos. 47, 48.
46. Was Mr. Covarrubias denied the effective assistance of counsel by his attorneys' failure to seek exclusion of damaging evidence? Assignments of Error Nos. 47, 49-56.
47. Was Mr. Covarrubias denied the effective assistance of counsel by his attorneys' failure to offer available evidence supporting the defense strategy of implicating Mr. Criswell in the death?
Assignments of Error Nos. 47, 57, 58.
48. Does cumulative error require reversal of Mr. Covarrubias' conviction? Assignments of Error Nos. 1-59.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. PRIOR PROCEEDINGS

On February 16, 2005, Robert G. Covarrubias was charged with Murder in the First Degree. CP 18. Trial began on March 27, 2006, and the jury convicted him as charged on April 21, 2006. CP 6. He was sentenced on June 15, 2006 within his agreed standard range. CP 6-17. This timely appeal followed. CP 5.

II. STATEMENT OF FACTS

A. Substantive facts.

On December 23, 2004, 15-year-old Melissa Carter hung out with her 21-year-old boyfriend, Travis Criswell, and her best friend, Ashley Fruin (also 15). RP (4/6/06) 62, 91, 96. They saw Carter's older brothers, Jason and Brandon Carter. Jason and Brandon were angry, they did not want their sister to be with Mr. Criswell, who was using methamphetamine. They argued and separated. RP (4/6/06) 66-67; RP (4/10/06) 47-48, 194-195; RP (4/11/06) 24-26.

Nick Cannon was staying at the Chinook Motel in Port Angeles, but he wanted to be able to rent an apartment. RP (4/6/06) 145. He

decided to have a party in his hotel room and sell methamphetamine there to make his dream a reality. RP (4/6/06) 146, 452.

Jade Rector, Dustin Lauridsen, Nick Cannon were walking around in downtown Port Angeles that day, and they ran into Mr. Covarrubias. RP (4/6/06) 121. They chatted, and Mr. Covarrubias told them he had beer and offered to share it. RP (4/6/06) 122-123. They decided to take the beer to the party at the Chinook Motel. RP (4/6/06) 122-123.

Ms. Carter, Ms. Fruin, and Mr. Criswell came to the party, as did Edward Steward, Christina Garver, Duane Stephan, David Burnside and Kelly Banner. RP (4/6/06) 71, 125, 147-150. A marijuana pipe was passed, as was the beer, some rum that Mr. Criswell had picked up, and possibly a methamphetamine pipe. RP (4/6/06) 29, 69, 71. Several injected methamphetamine in the bathroom. RP (4/6/06) 30, 71, 73, 146. All partygoers drank some beer; most also used the marijuana pipe. RP (4/6/06) 30, 71, 73, 146.

Everyone at the party noticed that Ms. Carter and Mr. Criswell were fighting. RP (4/6/06) 34-35, 182. They seemed distant, and at one point, they went outside to argue. All heard them yelling, and Ms. Carter hit Mr. Criswell at least once, up to five times, and gave him a bloody lip. RP (4/6/06) 35, 78-80, 99-100, 126, 153-154, 190-191; RP (4/10/06) 64-66; RP(4/11/06) 33-36. Ms. Carter left the party, walking down the street.

while Mr. Criswell shouted that it was the last time she would see him.

RP (4/6/06) 80, 110; RP (4/11/06) 39.

Kelly Banner, who was described as "best friends" with Mr. Criswell, drove Ms. Carter and Mr. Criswell around on December 23, 2004, and dropped them off at the party. RP (3/27/06) 99; RP (4/17/06) 118. He saw Mr. Criswell later, noticed his bloody lip, and after asking, learned that Ms. Carter had hit Mr. Criswell. RP (4/17/06) 120. After the party, Mr. Banner drove Mr. Criswell around looking for Ms. Carter, and then slept alone in the parking lot of KMart in his truck. RP (4/17/06) 123-125. The next day, December 24, 2004, Mr. Banner again drove Mr. Criswell around looking for Ms. Carter. RP (4/17/06) 126. Mr. Criswell told him that he was concerned Ms. Carter had killed herself. RP (4/17/06) 129. Mr. Banner used some methamphetamine and then drove home late in the evening on Christmas day. RP (4/17/06) 131-133. He told his mother, father and girlfriend that Ms. Carter had killed herself on the waterfront trail. In court he claimed that this was not true and that his story only coincidentally matched where her body was later found. RP (4/17/06) 133-136.

On December 26, 2006, Jacob Slack and Jeff Price went to smoke marijuana at the waterfront trail, and found a body. RP (4/3/06) 60-61.

Ms. Carter's body was naked, partly in the brush, and had parts of her face eaten off. RP (4/3/06) 71-72.

Officers arrested Mr. Covarrubias on December 28, 2004 on a Department of Corrections warrant. RP (4/11/06) 113-116. During an interview, Mr. Covarrubias described his activities on December 23, 2004. He denied having sex with, raping or killing Ms. Carter, and then stopped the interview. RP (4/11/06) 157-201. He later testified at trial that he and Ms. Carter had consensual oral sex twice: once at the party and once that same evening at the house where he'd been staying (the "squat" house). RP (4/19/06) 50-52, 56-74. He explained to the jury that he had denied this to the officers because he didn't wish to be prosecuted for a sex offense. RP (4/49/06) 92. At trial, he maintained that he had not raped her, had not been at the waterfront trail that night, and had not assaulted or killed her. RP (4/19/06) 104, 77, 74.

Samples from Ms. Carter's body were sent to the lab, and Mr. Covarrubias' DNA was found in semen in her throat. RP (4/11/06) 157-201; RP (4/13/06) 190. Mr. Covarrubias, already in custody, was charged with murder. CP 18.

B. Mr. Sonnabend's identification of Mr. Covarrubias.

In February of 2005, Jon Sonnabend saw a photo of Mr. Covarrubias in the newspaper and told police that he had seen him on the

waterfront trail December 23, 2004. RP (4/12/06) 103-116, 146-162. At trial, Mr. Sonnabend testified that he had a head injury and was diagnosed with schizo-affective disorder. His symptoms, which included visual and auditory hallucinations, were controlled by his medication. RP (4/12/06) 98-100, 147. Evidence was introduced suggesting that he had not been taking his medication in late December. RP (4/12/06) 173.

Mr. Sonnabend testified that he went to the waterfront trail on December 23, 2004 to drink three 22 oz. beers and an energy drink. RP (4/12/06) 103. He said that he got there around midnight, and heard people talking and laughing. RP (4/12/06) 103-104, 106. He stood and saw a man walking backwards with his hands on a woman's shoulders, trying to kiss her while she said that she had a boyfriend. RP (4/12/06) 107. About an hour and a half later, the couple walked by him again and he got a good view of the woman, from roughly 25 to 30 feet away, but said he couldn't give much of a description. RP (4/12/06) 108-109. The man walked within a couple feet of Mr. Sonnabend. He testified that the man was Hispanic, stocky, with a short goatee and in his early to mid-twenties. RP (4/12/06) 110.

Fifteen to twenty minutes later, he saw the woman come back down the stairs. She asked Mr. Sonnabend if he had a cell phone (he did not), and continued walking west. RP (4/12/06) 112. He asked her if she

was OK, and she said yes. Mr. Sonnabend described her as not looking too worried. RP (4/12/06) 111-112. The man then came down the stairs, going more quickly, and went in the same direction. RP (4/12/06) 112. Mr. Sonnabend heard the woman say “just leave me the fuck alone” within 10 minutes. RP (4/12/06) 112. Mr. Sonnabend went in their direction but did not see them. During the entire time he was at the waterfront, he did not hear any sounds of a struggle or fight. RP (4/12/06) 112-113, 156.

He left the area around 3 am to catch a bus, but got too cold to wait for the bus, and went to a friend’s house instead. RP (4/12/06) 103, 113-114. He claimed that he contacted the police a week later because he’d heard about a body being found, but was reminded (by the prosecutor) that the contact actually occurred in February. RP (4/12/06) 114.

Mr. Sonnabend testified that he saw a photo of Mr. Covarrubias in the newspaper, and thought he might be the same man he saw at the waterfront trail. There was no objection to this testimony. RP (4/12/06) 115-116. Defense counsel objected to Mr. Sonnabend making an in-court identification. RP (4/12/06) 116-146. The defense argued that there was an insufficient basis for the identification because it would be based on the newspaper photos rather than Mr. Sonnabend’s recollection. RP (4/12/06) 117-119. The defense also pointed out that Mr. Sonnabend had told the

police that he thought all Mexicans looked alike and that he is not good with faces. RP (4/12/06) 125-126, 159.

The prosecutor told the court that Mr. Sonnabend had said he could make an in-court identification, but that he could not swear absolute certainty. RP (4/12/06) 123-124. In an offer of proof, Mr. Sonnabend testified that he could identify the man he saw that night on the waterfront trail. RP (4/12/06) 134-136. He said that he saw the photo of the defendant in the newspaper before he came spoke to the police, and that he'd seen another photograph in the newspaper since then. RP (4/12/06) 137-138.

The court ruled Mr. Sonnabend's in-court identification admissible, finding that the witness had an independent basis for the identification, that he was certain of the identification, and that any other factors went toward his credibility. RP (4/12/06) 139-140.

Mr. Sonnabend identified Mr. Covarrubias in front of the jury. RP (4/12/06) 146. He described his level of certainty as "ten out of ten". RP (4/12/06) 147.

C. Facts established at CrR 3.5 hearing.

The court held a hearing pursuant to CrR 3.5 on the first day of trial, March 27, 2006. RP (3/27/06) 24-79. At the hearing, Detective Robert Ensor testified that he brought Mr. Covarrubias into an interview

room at 1638 hours on December 28, 2006. RP (3/27/06) 28. He said that Mr. Covarrubias was in the interview room for 3 to 4 minutes before the interview began. RP (3/27/06) 36, 29. Detective Ensor said that he read Mr. Covarrubias his rights at 1708 hours, and that the interview ended at 1948 hours, when Mr. Covarrubias requested an attorney. RP (3/27/06) 32-34. Detective Eric Kovatch testified that he walked into the interview room at 5:05 pm, and that he was present when *Miranda* rights were administered. RP (3/27/06) 54, 55. He stated that Mr. Covarrubias requested an attorney at 7:48 pm and the interview stopped. RP (3/27/06) 58. The defense waived argument at the 3.5 hearing, and the court ruled the statements admissible. RP (3/27/06) 75-79.

D. Facts relating to prosecutorial misconduct.

The defense moved to prevent the state from bringing out that Mr. Covarrubias had been in prison recently or that he had a Department of Corrections warrant. The state agreed. RP (3/27/08) 121-123. Sgt. Glen Roggenbuck testified that he arrested Mr. Covarrubias on a Department of Corrections warrant. RP (4/3/06) 143. Defense counsel objected and the testimony was stricken. RP (4/3/06) 143.

The court also excluded evidence of unidentified blood found at the abandoned house where Mr. Covarrubias had been staying. RP (3/27/06) 130-135. The judge reiterated this ruling on April 6, 2006. RP

(4/6/06) 10. The prosecutor said that she had instructed Jim Tarver from the WSP crime response team not to discuss the blood found at the squat house. RP (4/12/06) 94. During his testimony, Mr. Tarver described a blood stain found on a chair in the house. RP (4/12/06) 212. The defense did not object, but during the next break the Court noted that it had occurred and ordered no further mention of it. RP (4/12/06) 212, 219-221.

During the state's cross-examination of Mr. Covarrubias, he was asked if he'd raped or killed a 15-year-old girl. When he answered that he had not, the prosecuting attorney responded by saying "Sure." RP (4/19/06) 140. An objection was sustained. RP (4/19/06) 140. Later, the prosecutor started a question with the phrase "You want this jury to believe..." An objection was sustained. RP (4/19/06) 154. The prosecutor then asked: "You want this jury to believe you are telling the truth because you took an oath?" The objection to this question was overruled. RP (4/19/06) 154.

At the start of trial, the Court admonished both parties not to discuss "reasonable doubt" with the jurors "other than what the law is." RP (3/27/06) 89. The state proposed a reasonable doubt instruction based on *State v. Castle*, 86 Wn.App. 48, 133 Wn.2d 1014 (1997). RP (4/20/06) 138. State's Proposed Instruction No. 3, Supp. CP. The court declined to give it, instead giving an instruction based on WPIC 4.01, Supp. CP.

Instruction No. 5. During her closing argument, the prosecuting attorney displayed to the jury her proposed instruction on reasonable doubt. Post-trial Exhibit, Supp. CP. Defense counsel objected, and the prosecutor responded by arguing in front of the jury that “the court has allowed me to argue this in the past.” and “I think the court is well aware it is not a misstatement of the law.” RP (4/20/06) 177-178. The display was removed, but the prosecutor made the following additional argument to the jury, without objection:

You have the Court’s instructions, obviously that is what you are going by. But it’s also the case that reasonable doubt may be expressed in other ways. And I like to explain by using different language which I believe is a little bit easier to understand and that other language says that reasonable doubt is also – that proof beyond a reasonable doubt is also proof that leaves you firmly convinced that the crime has been committed. The law doesn’t require the State to exclude every doubt. What the law requires is that the State prove its case and the elements of the crime beyond a reasonable doubt. If there is a real possibility that the Defendant is innocent, you have to give him the benefit of the doubt and a quit.[sic]

But, if after your full, fair and careful consideration of all of the facts and the law, you are firmly convinced of the proof and the right of the State’s case, if you are convinced, if you have an abiding belief in the truth of the charge then the State has met its burden.

RP (4/20/06) 178-179.

E. Improper expert testimony.

The state called Dr. Daniel Selove, who performed the autopsy on Ms. Carter’s body, on April 5, 2006. Without objection he was permitted

to testify that strangling a woman during a sexual assault was “typical.” and later referred to this case as a “classical death during a sexual assault.” despite the absence of any evidence establishing that the death and any sexual activity were contemporaneous or that the sexual activity was nonconsensual. RP (4/5/06) 65, 77. He admitted there was no evidence of a forcible rape, and that the sex could have been consensual, but reiterated (again without objection, and without any reference to a basis for the conclusion) that Ms. Carter was “probably” raped. RP (4/5/06) 167.

Without objection, the prosecutor was permitted to ask defense expert Dr. Donald Reay if this was “a classic murder with sexual assault”. He responded that it was. RP (4/18/06) 126. During redirect, he indicated that there was no evidence that would rule out consensual sex followed by murder hours later. RP (4/18/06) 140.

F. Rebuttal testimony.

The state sought to call witnesses during their rebuttal case to show that Ms. Carter disliked oral sex. RP (4/19/06) 163-165. Mr. Covarrubias objected, arguing that her state of mind regarding giving oral sex was not at issue, that people’s opinions about sexual practices are subject to change and dishonesty, and that the people the state intended to call for this purpose were far too likely to perjure themselves on this issue. RP (4/19/06) 164-167, 172-174. The court ruled that the statements were

admissible. Defense counsel argued that the timing of the statements must be shown to prove their relevance. RP (4/20/06) 7-14.

The state recalled Ms. Fruin, who told the jury that Ms. Carter had expressed negative feelings about oral sex “off and on” in the two years they’d lived together. RP (4/20/06) 26. She testified that the first time Ms. Carter had done so was a year and a half before her death. The last time she’d done so was 6 months before her death. RP (4/20/06) 26, 30. She said that Ms. Carter had told her it made her feel degraded, that she’d had oral sex when she was 13 under pressure from her previous boyfriend (who’d threatened to jump off a bridge if she wouldn’t). RP (4/20/06) 26-28. The state also called Laura Oldfield who testified that Ms. Carter had told her (when she was 14) that oral sex was disgraceful to women. Ms. Carter did not admit to Ms. Oldfield that she’d had oral sex. RP (4/20/06) 33-35.

G. Facts relating to defense counsels’ conflicts of interest.

The court appointed the Clallam County Public Defender’s office, and two attorneys, Ralph Anderson and Harry Gasnick, shared responsibilities on the case. RP (2/17/05) 6; RP (12/22/05) 10. At a hearing on February 23, 2006, defense counsel noted that their office had represented Ms. Carter in juvenile court, and added that the attorneys working on the murder case were not discussing it with Ms. Carter’s

assigned public defender Suzanne Hayden. RP (2/23/06) 20. Lead attorney Mr. Anderson indicated that he had represented half the witnesses on the state's list in juvenile court, but that he had no memory of any of them, except that he had obtained an acquittal on a rape charge for Jacob Pearce. RP (2/23/06) 36.

The state argued that ethics rules would require written waivers from each former client, since impeachment with convictions was anticipated. RP (2/23/06) 38. The defense stated that attorneys could not be found within Clallam County qualified to work on this case and that attorneys from outside of the county would need to be used if the public defenders office were to be removed. RP (2/23/06) 40-41. Mr. Anderson noted that he was absolutely loyal to Mr. Covarrubias who was innocent. RP (2/23/06) 42-43. The defense attorney later said, with apparent sarcasm, that perhaps the public defender agency should not represent any further defendants until Mr. Covarrubias' case was over. RP (2/23/06) 53.

At a hearing on March 3, 2006, the Court expressed concern that the public defender had previously represented two people whom they planned to suggest were alternate suspects in the homicide. RP (3/3/06) 6-7. The defense attorney indicated that they had constructed "a Chinese wall" with Ms. Hayden regarding the deceased, that he did not have any unique information for cross-examination, and that he did not want the

county to waste money on all of the time he had spent preparing the case so far. RP (3/3/06) 13.

Defense counsel Gasnick asked if the court wanted him to review files for conflicts and confidential information, and the court responded that they should not. Mr. Gasnick indicated that reviewing the files could lead to more problems. RP (3/8/06) 10-12.

On March 8, 2006, the Court ordered the defense attorneys to provide additional information regarding their former and current clients listed as witnesses. RP (3/8/06) 7-12. Mr. Gasnick had previously represented both Donald Blowers and Cody Snow, who had been in custody with Mr. Covarrubias. Mr. Covarrubias had allegedly spoken with Mr. Blowers and Mr. Snow and reviewed his discovery with them. While represented by Mr. Gasnick, Mr. Blowers had approached officers regarding his conversations with Mr. Covarrubias. RP (2/23/06) 51-53; RP (3/8/06) 14. Mr. Anderson also acknowledged that he considered state witness Jacob Backman a friend and he had loaned him money. RP (3/8/06) 37.

Initially, the defense planned to pursue a strategy of implicating former client Gerald Spry, former client Jon Sonnabend, or Mr. Criswell and former client Kelly Banner. RP (3/8/06) 46-47. The state expressed concern that their witness Mr. Sonnabend was represented by the public

defender, including in 2006. RP (3/8/06) 50-51. According to the state, Mr. Gasnick had raised Mr. Sonnabend's mental health in a case in District Court. RP (3/8/06) 63. Mr. Anderson indicated that the murder case was not a subject of idle discussion in the office, and that the defendant did not want a new attorney. RP (3/8/06) 54, 56-57.

On March 9, 2006, the state filed a Motion For Judicial Inquiry into Conflict of Interest, as the public defenders office currently or previously represented 28 people on the state's witness list. Supp. CP. Suzanne Hayden filed a declaration on March 14, 2006, indicating that a firewall had been maintained and she did not participate in any discussions regarding the Covarrubias case. Supp. CP, Declaration of Suzanne Hayden.

The court held another hearing relating to the conflict issue on March 16, 2006. The state indicated that 26 people on their witness list were represented, either currently or previously, by the public defender's office. They noted that John Hayden, spouse of Suzanne Hayden, had advised the defendant after his interview with police on December 28, 2004. They also noted that Mr. Anderson had referred to one former client as a friend, and had put money onto his books at the jail. RP (3/16/06) 11-12. The defense argued that the mere fact of past representation did not create a conflict, and that the assumption that they

learned confidential and ugly secrets during representation was unwarranted. RP (3/16/06) 17-18. Mr. Gasnick acknowledged that he had helped Mr. Sonnabend get a mental health evaluation and had filed it with the court. He also said that his former client Mr. Banner was a known liar, but argued that the state was raising concerns about conflicts to distract the defense from preparing for trial. RP (3/16/06) 20-23. The defense further indicated that what public defender John Hayden had told Jacob Backman in his representation of him was confidential. RP (3/16/06) 23.

Mr. Anderson argued that a firewall had been erected and that while he does put money on clients' books, he had not done it for any witnesses that he could recall. RP (3/16/06) 29. The state raised examples where defense attorneys covered for each other in court, including a recent hearing in which Mr. Anderson appeared on behalf of Mr. Spry. RP (3/16/06) 36-37. The court held that simply pointing the finger at a former client did not by itself raise an issue of divided loyalty, and that there was no proof of any confidential information obtained from the prior representations. Judge Wood also said that if Mr. Covarrubias did not waive any conflict, the case would most likely be "significantly delayed". RP (3/16/06) 45-48. The court then appointed special counsel for Mr. Covarrubias on the conflict issue and set another hearing. RP (3/16/06) 48.

Special counsel Craig Ritchie met with Mr. Covarrubias regarding the potential conflict. At a hearing on March 21, 2006, he objected to the court imposing the requirement of a written waiver, arguing that the issue was between the defendant and his attorney and should not involve the court. RP (3/21/06) 7-12. Mr. Ritchie also stated that he had advised Mr. Covarrubias that if he did not raise an objection to the conflict issue now, he would not be able to do so later. He objected that the waiver, as drafted, required Mr. Covarrubias to waive his appeal rights. RP (3/21/06) 11, 22. The prosecutor noted that she had added two people to their witness list, bringing the total of public defender represented witnesses up to 28. RP (3-21-06) 18.

The next day, the parties again appeared in court to address the conflict issue. Mr. Ritchie indicated that it was hard for him to advise Mr. Covarrubias because he did not see a conflict for the public defender's office. He had informed Mr. Covarrubias that his attorney may worry, during cross-examination of a former client, that the former client might complain to the bar association and that the attorney may back off from cross-examination in fear of that. RP (3/22/06) 10-12. Mr. Covarrubias indicated he wanted to keep his attorneys after a colloquy with the court. RP (3/22/06) 23-27. Mr. Ritchie raised a concern that Mr. Covarrubias might feel coerced into signing the waiver, as the court was requiring him

to fully relinquish any objections or the court would take away his attorney. RP (3/22/06) 27. The court ruled there was no coercion, found that Mr. Covarrubias' waiver was voluntary and knowing, and the public defender remained on the case. RP (3/22/06) 27-31.¹

Mr. Anderson indicated to the court that juvenile convictions were per se inadmissible for impeachment, but that he wanted Mr. Covarrubias to know that he would impeach his former clients with their juvenile convictions if the rules permitted it. RP (3/22/06) 100.

On March 27, 2006, the first day of trial and March 30, 2006, the state added additional witnesses formerly represented by the public defender, and once again, Mr. Covarrubias was asked to waive any conflicts. Without conferring with special counsel, he did so. RP (3/30/06) 44-54.

On March 27, Mr. Anderson again stated that juvenile adjudications were per se inadmissible, and reiterated that he could not have a conflict with his former juvenile clients. RP (3/27/06) 83. Reviewing *Teglund* on April 3, 2006, Mr. Anderson acknowledged that juvenile convictions could be used for impeachment. RP (4/3/06) 25-27.

¹ This decision was the subject of a Motion for Discretionary Review, which was denied.

On April 10, 2006, the state noted that prosecution witness Mr. Burnside had several juvenile convictions that should not be used for impeachment as the record had been sealed with the public defender's assistance. RP (4/10/16) 15. The court indicated that sealed records could not be admitted. RP (4/10/16) 17.

On April 13, 2006, the state called Mr. Blowers to testify about conversations and notes he'd shared with Mr. Covarrubias while both were in segregation in the jail. RP (4/13/06) 8, 10. Mr. Blowers objected, complaining that Mr. Gasnick had been his attorney, had withdrawn, and then had interviewed him for the Mr. Covarrubias case within two minutes of the withdrawal. RP (4/13/06) 7-8. Through the prosecutor, he indicated that he believed that Mr. Gasnick had a conflict. Mr. Gasnick confirmed that all of Mr. Blowers' criminal history was generated in one case in which Mr. Gasnick was the attorney, but corrected Mr. Blowers by stating that the interview was 20 minutes after the withdrawal, and that he had offered Mr. Blowers the opportunity to speak with a different attorney in his office. RP (4/13/06) 8, 13.

Mr. Anderson indicated that he, and not Mr. Gasnick, would personally cross-examine Mr. Blowers. RP (4/13/06) 8-9. The defense referred to Mr. Blowers as a "jailhouse snitch," sought to impeach him with his drug and malicious mischief convictions, and argued that his only

motivation to testify was to get out of segregation in the jail. RP (4/13/06) 9-10. Mr. Anderson clarified that he had never met Mr. Blowers and that he was only privy to information about him provided in the discovery and by Mr. Gasnick. RP (4/13/06) 13-14. The court informed Mr. Blowers that there was no conflict, and he testified. RP (4/13/06) 15, 24.

The following is a summary chart of witnesses listed by the prosecution, whom the public defender's office had previously represented:

Name of Former Client	Charges on which former client was represented	Substance of Testimony	Implicated as "other suspect?"
Melissa Carter	MIP, Harassment, Probation Violation(s)	(deceased)	
Gerald Spry	Poss'n Stolen Property 2, Theft 3 x 3, Trespass 1, VUCSA, Probation Violation(s)	(Did not testify)	Yes
William (Jacob) Pearce	Resisting Arrest, Burglary, Theft 2, Poss'n Stolen Property 2, Rape of Child 3, Bail Jumping	Confronted Mr. Covarrubias at his house along with Criswell	
Jon Sonnabend	Mal. Mischief, Telephone Calls to Harass, Probation Violation(s)	Was at waterfront trail night of 12/23/04 and saw a couple walking; later claimed the man was Mr. Covarrubias.	Yes
Jacob Backman	Unlawful Poss'n Firearm, Robbery 1, VUCSA x 2, DWLS 3, Harassment, Violation of No Contact Order x 2, Assault 4 x 2, Burglary 1, Poss'n Drug Paraphernalia	(Did not testify)	
Christina Garver	Mal. Mischief, Probation Violation(s)	Attended party and noted that Carter and Criswell were distant	

Name of Former Client	Charges on which former client was represented	Substance of Testimony	Implicated as "other suspect?"
Cody Snow	Assault 3, Probation Violation(s), Poss'n Stolen Property 2 x 2, Possession Prescription Drug in Unlawful container	Was in jail with Mr. Covarrubias and reviewed his discovery; claimed Mr. Covarrubias denied making statement to police	
Donald Blowers	Mal. Mischief, VUCSA	Was in jail with Mr. Covarrubias and reviewed his discovery. claimed Mr. Covarrubias told him he had sex with Ms. Carter at the hotel	
Christopher Carter	VUCSA, Assault 4, Interfering with 911 Call, Probation Violation(s)	(Father of deceased) Ms. Carter was healthy, last spoke with her 12/24/04 at 5pm	
Carla Carter	DUI	(Mother of deceased) (Did not testify)	
Kelly Banner	MIP	Told three people that Mr. Criswell's girlfriend (Ms. Carter) had killed herself on the waterfront trail, before her body was discovered; Used drugs and slept in car after attending party	Yes
Dustin Lauridsen	Mal. Mischief, Resisting Arrest, Assault 3, MIP, Probation Violation(s)	Invited Mr. Covarrubias, Rector, and Cannon to party; attended party and saw Mr. Covarrubias catch up with Ms. Carter as she left party; confronted Mr. Covarrubias with Criswell day after party	
Jade Rector	MIP x 5	Attended party with group including Mr. Covarrubias, saw Ms. Carter and Criswell fight. was very intoxicated	
Laura Oldfield	Probation Violation(s). Theft 3	Ms. Carter didn't like oral sex	
Ed Steward	Unlawful Imprisonment	Was at party and noted Ms. Carter and Criswell arguing	
Jacob Slack	Reckless Endangerment, Probation Violation(s)	Saw people at the trail night of 12/23/04 but it wasn't Mr. Covarrubias or Ms. Carter	

Name of Former Client	Charges on which former client was represented	Substance of Testimony	Implicated as "other suspect?"
Jeffrey Price	Carrying a Weapon, Minor Use of Firearm	Discovered body, lied about who was present when body found	
David Burnside	Vehicle Prowl 2 x 6, Theft 3 x 2, Residential Burglary, Mal. Mischief 3, MIP, Probation Violation(s)	With Ms. Carter all day 12 23 04, saw her argue with her brothers and attended party and saw her fight with Criswell.	
Robert Welker	Forgery, Probation Violation(s)	(Did not testify)	
Ashley Fruin	Probation Violation(s)	Ms. Carter's best friend, lived together: was with Ms. Carter all day and at party, saw fights with Criswell; saw Ms. Carter leave party and looked for her; Ms. Carter didn't like oral sex	
Brandon Carter	Mal. Mischief 3 x2, MIP x2, Probation Violation(s)	(Brother of deceased) (Did not testify)	
Jason Carter	Poss'n Stolen Property 3, Vehicle Prowl, Probation Violation(s), Theft 1	(Brother of deceased) (Did not testify)	
Duane Stephan	Assault 2, 4	Spent day with Ms. Carter, saw her fight with brothers; went to party and saw Ms. Carter and Criswell fight, confronted Mr. Covarrubias twice with Criswell.	
Kelly Mortenson	Theft 2 x 2, TMVOP, Probation Violation(s)	(Did not testify)	
Dustin Davis	VUCSA, Residential Burglary	(Did not testify)	
Solamon Jacobs	Obstructing, Fugitive	(Did not testify)	
Cody Seaman	Furnishing Liquor to Minors, Obstructing, Criminal Trespass, Resisting Arrest x 2, Mal. Mischief 3, Assault 4, TMVOP, Probation Violation(s)	(Did not testify)	
Joseph Farrington	False Statement, Weapon Poss'n in School Zone, Poss'n Stolen Property 1	(Did not testify)	
Joseph Eczaretta	Forgery	(Did not testify)	

Supp. CP: State's Memo and Declaration for Judicial Inquiry into Conflict. Certified Statement of Harry Gasnick: RP (4 3 06) 108-124; RP (4 6 06) 18-59, 60-115, 119-142, 175-196; RP (4 10 06) 35-43, 43-126, 134-149, 154-185; RP (4 12 06) 97-162.; RP (4 13 06) 24-26; RP (4 17 06) 93-98, 99-105, 112-145; RP (4 20 06) 25-32, 33-35, 85-99; RP (3 27 06) 146-147.

H. Other ineffective assistance claims.

During the trial, defense counsel requested additional time to interview state witnesses. As of the first day of trial, the defense had not interviewed the lead investigator from the Washington State Patrol Crime Response Team, Karen Lindel-Green. RP (3/27/06) 145. Nor had the defense spoken with Ms. Carter's best friend, Ms. Fruin, who had been with the deceased just prior to her death. RP (4/4/06) 152. Prior to trial, defense counsel had not interviewed the state's expert, Dr. Selove, who had performed the autopsy. RP (4/4/06) 84. All of these witnesses were listed by the state long before the start of trial. Supp. CP.

On March 30, 2006, the defense indicated that newly provided discovery indicated that Mr. Criswell had admitted (to staff at the prosecuting attorney's office) that he'd had thoughts of removing Ms. Carter from this world. RP (3/30/06) 7. These statements were not presented to the jury during examination of Mr. Criswell, even though defense counsel repeatedly sought and eventually received permission to argue the theory that Mr. Criswell had killed Ms. Carter. RP (3/22/06) 78-80, 82-83; RP (3/27/06) 99; RP (4/6/06) 15; RP (4/20/06) 123-129.

The defense did not propose a jury instruction regarding the inferior degree crime of Murder in the Second Degree. Supp. CP. Defense Proposed Instructions.

I. Verdict, sentencing, and post-trial motions.

The jury convicted Mr. Covarrubias of First Degree Murder as charged. RP (4/21/06) 4. He was sentenced within his standard range, and he appealed. RP (6/15/06) 43; CP 5. The defense filed a motion for a new trial and other relief on June 23, 2006, and the court held several hearings. Findings of Fact were entered on April 9, 2007, and a notice of appeal was filed on April 11, 2007. (That appeal will presumably be consolidated with this case.)

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. COVARRUBIAS' RIGHT TO DUE PROCESS BY ADMITTING INTO EVIDENCE A TAINTED IDENTIFICATION.

A criminal defendant has a constitutional right to due process of law. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. Admission into evidence of an eyewitness' identification violates due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377 at 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); *State*

v. *McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985). Whether or not admission of an identification violates due process is an issue of law reviewed *de novo*. See *Wright v. West*, 505 U.S. 277 at 301, 112 S.Ct 2482, 120 L.Ed. 2d 225 (1992); *United States v. Beck*, 418 F.3d 1008 at 1012 n. 1 (9th Cir. 2005); *United States v. Montgomery*, 150 F.3d 983 at 992 (9th Cir. 1998).²

The admission into evidence of a witness' identification of the defendant violates due process if the accused can show that the identification procedure was impermissibly suggestive. The court is then required to examine the totality of the circumstances to determine whether the procedure created a "substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wn.2d 91 at 118, 59 P.3d 58 (2002). Under this test, the corrupting effect of a suggestive identification is weighed against factors indicating reliability. *McDonald*, at 747. These

² In Washington, Division III has reduced the issue to one of simple evidentiary admissibility, governed by an abuse of discretion standard. See *State v. Kinard*, 109 Wn. App. 428 at 432 36 P.3d 573 (2001). This is incorrect. Like any other mixed question of fact and law, the appropriate standard of review is *de novo*. See e.g., *State v. Rankin*, 151 Wn.2d 689 at 709, 92 P.3d 202 (2004); *Port of Seattle v. Pollution Control*, 151 Wn.2d 568 at 588, 90 P.3d 659 (2004); *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001). Furthermore, if Mr. Covarrubias' conviction is affirmed using a deferential standard, a federal court might ultimately reverse after employing a *de novo* standard. Application of a *de novo* standard at this stage might therefore save additional years of litigation.

factors include (1) the opportunity of the witness to view the perpetrator, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the witness' certainty at the time of the identification, and (5) the length of time between the crime and the identification.

McDonald, at 747, citing *Neil v. Biggers*, 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972).

J. Mr. Sonnabend's out-of-court photographic identification should have been excluded.

Mr. Sonnabend was allowed to testify that he saw a couple walking on the waterfront trail the night Ms. Carter went missing, and that when he saw a newspaper photograph showing Mr. Covarrubias in custody and charged with her death, he came forward because he believed Mr. Covarrubias may have been the man he'd seen that night. RP (4/12/06) 103-162. Defense counsel did not specifically object to Mr. Sonnabend's out-of-court identification of Mr. Covarrubias' photograph; however an issue may be raised for the first time on review when the record establishes a clear violation of a constitutional right. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322 at 334, 899 P.2d 1251 (1995); *State v. Holmes*, 135 Wn. App. 588 at 592, 145 P.3d 1241 (2006); *State v. Littlefair*, 129 Wn. App. 330 at 338, 119 P.3d 359 (2005); *State v. Contreras*, 92 Wn. App. 307 at 313-314, 966 P.2d 915 (1998). To show

that an issue involves a manifest error affecting a constitutional right under RAP 2.5(a). “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights: it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, at 334; *see also Contreras, supra*, at 313-314.

Here, the error violated Mr. Covarrubias’ constitutional right to due process and it prejudiced him because Mr. Sonnabend was the only eyewitness who claimed to have seen Mr. Covarrubias on the waterfront trail the night Ms. Carter went missing. Accordingly, the error may be raised for the first time on review.³ RAP 2.5(a); *McFarland, supra*.

An out-of-court photographic identification is impermissibly suggestive if it directs undue attention to a particular photo. *State v. Kinard*, 109 Wn. App. 428 at 432-433 (2001). As a matter of law, the presentation of a single photograph is impermissibly suggestive, and therefore requires analysis of the *Neil v. Biggers* factors prior to admission. *State v. Maupin*, 63 Wn. App. 887 at 896-897, 822 P.2d 355 (1992).

³ In the alternative, Mr. Covarrubias was denied the effective assistance of counsel, as argued elsewhere in this brief.

In this case, the court should not have allowed Mr. Sonnabend to testify that he recognized the man depicted in the newspaper photograph as the person he saw on the waterfront trail. This initial identification was based on a single photograph, rather than a montage. The photograph depicted Mr. Covarrubias in custody as the accused in Ms. Carter's murder. RP (4/12/06) 115-116. Because of this, the identification was impermissibly suggestive as a matter of law. *Maupin, supra*.

The *Neil v. Biggers* reliability factors do not outweigh the corrupting effect of this procedure; thus, the totality of the circumstances require suppression of the out-of-court photographic identification. First, Mr. Sonnabend had a very limited time in which to view the couple he saw on the waterfront trail. It was nighttime, the only light was from the hotel parking lot, they walked by without stopping. Mr. Sonnabend had been drinking, and he may not have been taking his medications. RP (4/12/06) 103, 108, 110-111, 173. Second, his attention was not specifically engaged, since he had no reason to suspect that any crime was impending, and thus no reason to examine the couple he claims to have seen. RP (4/12/06) 97-116, 133-139, 146-162.

Third, he did not provide any description to the police prior to viewing the photograph. RP (4/12/06) 114-116. In addition, Mr. Sonnabend was completely unable to describe the woman he saw that

night, except to say that she was a “typical kid” with long brown hair. This was so even though she spoke with him, asking if he had a cell phone. RP (4/12/06) 109-111. Fourth, the record establishes that he was not certain of the identification at the time he saw the photograph and spoke to the police. RP (4/12/06) 124. Fifth, his identification of Mr. Covarrubias occurred in February, one-and-a-half months after he claimed to have seen the couple on the waterfront trail. RP (4/12/06) 114.

Under these circumstances, Mr. Sonnabend’s assertion that he recognized the man in the photograph as the person he allegedly saw on the waterfront trail should have been excluded. *McDonald, supra*. Admission of the identification violated his constitutional right to due process; accordingly, the conviction must be reversed and the case remanded for a new trial.

K. Mr. Sonnabend’s in-court identification of Mr. Covarrubias should have been excluded.

As with the out-of-court photographic identification, Mr. Sonnabend’s in-court identification should have been suppressed. Mr. Sonnabend’s view of the February newspaper photograph necessarily tainted the in-court identification. In addition, Mr. Sonnabend was shown another photograph of Mr. Covarrubias one week before testifying. RP (4/12/06) 133-134, 138. Under these circumstances, the in-court

identification was impermissibly suggestive, requiring analysis under the *Neil v. Biggers* factors.

The *Neil v. Biggers* analysis for the out-of-court photographic identification applies equally to the in-court identification, and weighs in favor of suppression. As outlined above, Mr. Sonnabend had only a brief opportunity to view the man on the waterfront trail, his degree of attention was relatively low, he did not describe the person before viewing either photograph, he was initially uncertain about the identification, and more than a month and a half had passed between the alleged encounter on the trail and his view of the newspaper photograph. RP (4/12/06) 97-162.

For all these reasons, Mr. Sonnabend's in-court identification should have been excluded.

- L. The trial court misapplied the "independent origin" test in admitting Mr. Sonnabend's in-court identification over objection.

The trial court held that Mr. Sonnabend's in-court identification was admissible because it had an "independent origin," citing *State v. Smith*, 36 Wn. App. 133, 372 P.2d 759 (1983). RP (4/12/06) 140. Under the "independent origin" test, an in-court identification made after an impermissibly suggestive pretrial identification may be admitted "if the State can establish by clear and convincing evidence that [the in-court identification] had an origin independent of the improper identification

procedure.” *Smith, supra*, at 138. *See also United States v. Wade*, 388 U.S. 218 at 241, 87 S. Ct 1926, 18 L.Ed 2d 1149 (U.S. 1967); *United States v. LaPierre*, 998 F.2d 1460 at 1468 (9th Cir. 1993). The “independent origin” test was articulated prior to *Simmons v. United States, supra* and *Neil v. Biggers*, but apparently survives those cases, despite the overlap between the two inquiries. *See United States v. Crews*, 445 U.S. 463 at 473 n. 18, 100 S.Ct. 1244, 63 L.Ed 2d 537 (1980).

Factors considered under the “independent origin” test include (1) the witness’ opportunity to observe the suspect, (2) discrepancies between any untainted description and the defendant’s actual description, (3) prior identification of another person, (4) prior identification of the defendant by photograph, (5) any failure to identify the defendant on a prior occasion, (6) the lapse of time between the alleged act and the identification, and (7) whether the witness previously knew the defendant. *Smith*, at 138, *citing Wade, supra*.

For example, in *Crews, supra*, a robbery victim

viewed her assailant at close range for a period of 5-10 minutes under excellent lighting conditions and with no distractions... [the defendant] closely matched the description given by the victim immediately after the robbery... the victim failed to identify anyone other than [defendant]... [and] twice selected [defendant] without hesitation in nonsuggestive pretrial identification procedures... and only a week had passed between the victim's initial observation of [defendant] and her first identification of him. *Crews*, at 473 n. 18.

The Supreme Court found this persuasive evidence that the victim's in-court identification had an origin independent of an improper pretrial identification. *Crews*, at 473 n. 18. Similarly, in *State v. Griggs*, 33 Wn. App. 496, 656 P.2d 529 (1982), the victim of a sex crime had met the defendant approximately two weeks prior to the crime, knew him as "Bill," and spent 4 to 6 hours with him the night of the crime. *Griggs*, at 502. Under these circumstances, the Court of Appeals "agree[d] with the trial court's determination that [the] identification would be based on an origin of facts totally independent from the suggestive photographic display." *Griggs*, at 502.

Here by contrast, there is nothing in the record to suggest that Mr. Sonnabend's in-court identification was based on facts independent of his view of the two photographs. Mr. Sonnabend did not know Mr. Covarrubias before the night of December 23, 2004. RP (4/12/06) 97-167. As noted previously, he saw the man briefly in passing only twice at night, he did not give a description or make any identification before seeing the photo in the newspaper identifying Mr. Covarrubias as a suspect, and he was not offered a lineup or montage. The in-court identification was sixteen months later. RP (4/12/06) 97-167.

Because there was no independent origin for the testimony, Mr. Sonnabend's in-court identification of Mr. Covarrubias as the person he saw on the waterfront trail should not have been admitted. *Simmons v. United States, supra* and *Neil v. Biggers, Supra*. The conviction must be reversed and the case remanded for a new trial.

II. THE TRIAL COURT ERRED BY ADMITTING MR. COVARRUBIAS' CUSTODIAL STATEMENTS.

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This privilege against self-incrimination is applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed 2d 653 (1964). Similarly, Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..."

The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Corn*, 95 Wn. App. 41 at 57, 975 P.2d 520 (1999). Advice of the right to remain silent and the right to counsel must precede custodial interrogation. *Miranda, supra; Corn*, at 57. When the

state seeks to admit custodial statements obtained in the absence of an attorney, the state bears the “heavy burden” of establishing the defendant’s waiver. *Corn.* at 58. In 2000, the United States Supreme Court reaffirmed *Miranda*, and held (for the first time) that the *Miranda* warnings were constitutionally required (rather than merely “prophylactic.”) *Dickerson v. U.S.*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

Miranda violations are reviewed *de novo*. *State v. Dykstra*, 127 Wn.App. 1 at 7, 110 P.3d 758 (2005). Failure to comply with *Miranda* is presumed prejudicial, and the state bears the burden of proving the error harmless beyond a reasonable doubt. *State v. Spotted Elk*, 109 Wn.App. 253 at 261, 34 P.3d 906 (2001).

When *Miranda* warnings are inserted in the midst of a continuing interrogation, they are likely to mislead, and thus foreclose the possibility of a knowing, intelligent, and voluntary waiver. *Missouri v. Seibert*, 542 U.S. 600 at 613-614, 124 S.Ct. 2601, 159 L.Ed 2d 643 (2004). In such cases, the pre-*Miranda* statements are automatically excluded, while the post-*Miranda* statements must be excluded unless the prosecution establishes circumstances justifying admission. *United States v. Ollie*, 442 F.3d 1135 at 1142-1143 (8th Cir. 2006).

The *Seibert* court fragmented on the appropriate standards to determine admissibility. When a fragmented Supreme Court decides a

case, and no single rationale garners five votes, the holding of the court is that position taken by those justices who concurred in the judgments on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977). This provides a legal standard which, when applied, will always produce results with which a majority of the fragmented Court would agree. *United States v. Williams*, 435 F.3d 1148 at 1157 (9th Cir. 2006).

According to a four-justice plurality opinion (authored by Justice Souter), a statement given after midstream *Miranda* warnings is admissible only if the advice of rights was effective. The plurality outlined five relevant factors: (1) the completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and the second, (4) the continuity of police personnel, and (5) the degree to which the interrogator's questions treated the second round as continuous with the first. *Seibert*, at 615. The fifth vote to suppress the confession in *Seibert* was supplied by Justice Kennedy, who believed that a deliberate failure to give *Miranda* warnings requires suppression of the post-*Miranda* statement unless curative measures preceded the second

interview.⁴ *Seibert*, at 662. (Kennedy, J., concurring.) Accordingly, Justice Kennedy's rationale controls in *Seibert*. *Williams*, *supra*; *see also Ollie*, *supra*.

When seeking to admit a post-*Miranda* statement obtained during a "two-step" or "question first" interrogation, the prosecution must show that the midstream administration of warnings was not a deliberate attempt to circumvent *Miranda*. *Ollie*, *supra*. If the prosecution fails to establish that the omission of warnings was inadvertent, the post-*Miranda* statement is inadmissible, unless the police took sufficient curative action before obtaining the statement. *Ollie*, *supra*, at 1142-1143. In other words, if the state fails to present any evidence that the omission was inadvertent, the post-*Miranda* statement must be suppressed in the absence of curative measures. *Ollie*, *supra*, at 1142-1143.

In this case, Detective Ensor testified at the CrR 3.5 hearing that Mr. Covarrubias was taken into custody and interrogated on December 28, 2004. Mr. Covarrubias was brought into the interview room at 1638 (4:38 p.m.), and the interview commenced within three or four minutes. RP (3/27/06) 28, 36. Mr. Covarrubias was not provided his *Miranda* rights

⁴ According to Kennedy, if the failure to give warnings was inadvertent, the case is governed by the principles announced in *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985)

until 1708 (5:08 p.m.), at least 25 minutes after the interview commenced. RP (3/27/06) 34. This was confirmed by Detective Kovatch, who testified that Sgt. Roggenbuck brought Mr. Covarrubias to the station, and that he (Det. Kovatch) entered the interview room at approximately 5:05 p.m., and was present when *Miranda* rights were read. RP (3/27/06) 54-55. The state did not present any testimony about the 25 minutes of pre-*Miranda* interview. RP (3/27/06) 24-79.

Neither party provided argument, and the court held the statements admissible. RP (3/27/06) 75-79. The court did not enter findings of fact and conclusions of law, and did not address the 25 minute pre-*Miranda* interview. RP (3/27/06) 77-79.

Under these circumstances, Mr. Covarrubias' statements should have been excluded. First, the state did not establish which of the statements admitted at trial were obtained post-*Miranda*. If any of them were obtained during the 25-minute pre-*Miranda* interview, they were automatically inadmissible under *Miranda*. The prosecution's failure to meet its burden on this point requires suppression under a straightforward application of *Miranda*.

Second, any post-*Miranda* statements should have been excluded under Justice Kennedy's test in *Seibert, supra*: there was no testimony suggesting that the initial failure to administer warnings was inadvertent:

nor did the state present any evidence that curative measures were taken to insulate the post-*Miranda* statements. Given the absence of proof, the state failed to sustain its burden, and the statements should have been suppressed. *Ollie, supra; Seibert, supra.*

The *Seibert* plurality rule requires the same result, because (1) the state did not prove that the initial interview lacked completeness and detail, (2) the state did not prove a lack of overlap between the two statements, (3) the second interrogation followed immediately after the first, in the same interview room, (4) Det. Ensor was present the entire time (although Det. Kovatch arrived just in time for the administration of warnings prior to the “second” interview), and (5) the post-*Miranda* interrogation was treated as a continuation of the first. RP (3/27/06) 27-79. All five factors weigh in favor of exclusion.

Accordingly, the trial court erred by admitting Mr. Covarrubias’ custodial statements. *Seibert, supra; Miranda, supra.* The conviction must be reversed and the case remanded for a new trial without reference to Mr. Covarrubias’ statements. *Ollie, supra.*

III. MR. COVARRUBIAS’ RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE JURY WAS EXPOSED TO AN ERRONEOUS INSTRUCTION ON REASONABLE DOUBT.

In a criminal case, the jury must be instructed that the state has the burden to prove each essential element of the crime beyond a reasonable

doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard “provides concrete substance for the presumption of innocence,” which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. at 363; *see also Sullivan v. Louisiana, supra*. An instruction defining reasonable doubt is erroneous if there is a reasonable likelihood that the jury applied it in an unconstitutional manner. *Victor v. Nebraska*, 511 U.S. 1 at 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). An error defining reasonable doubt can never be harmless error. *Sullivan v. Louisiana, supra*. The constitution does not require a trial court to define reasonable doubt; however, any definition must not diminish the state’s burden of proof. *Victor v. Nebraska*, at 5; *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

In *Victor v. Nebraska*, the Supreme Court made clear that the phrase “possible doubt” could be included in an instruction defining reasonable doubt so long as the context required the word “possible” to mean “imaginary” or “fanciful.”

Cases interpreting similar instructions have followed the Supreme Court’s requirement that the context clarify any ambiguities. *See, e.g.,*

*United States v. Rodriguez*⁵, 162 F.3d 135 at 146 (1st Cir., 1998)); *Tillman v. Cook*⁶, 215 F.3d 1116 at 1125-1126 (10th Cir., 2000); *Commonwealth v. Murphy*⁷, 559 Pa. 71 at 84, 739 A.2d 141 (1999).

The validity of the so-called *Castle* instruction is currently pending before the Washington State Supreme Court. *State v. Bennett*, No. 78377-2. If the Supreme Court determines that the instruction is invalid, then the prosecutor's actions-- substituting the *Castle* instruction for the standard instruction chosen by the court, and announcing to the jury that it is an accurate definition of reasonable doubt-- will require reversal in this case. If the *Castle* instruction is upheld, the prosecutor's misconduct nonetheless requires reversal, as argued elsewhere in this brief.

In this case, the trial court properly defined reasonable doubt, and rejected the instruction on reasonable doubt proposed by the prosecutor. Instruction No. 5, Supp. CP; RP (4/20/06) 137-138. Despite this, the

⁵ "[T]he instructions overall left the jury with an accurate impression of the presumption of innocence and of the substantial burden faced by the prosecution," because the phrase "real possibility" was given substance in part by the sentence "Everything in our common experience is open to some possible or imaginary doubt".

⁶ The instruction explicitly distinguished a "real, substantial doubt" from one that is "merely possible or imaginary".

⁷ The phrase "substantial doubt" was acceptable because it was "invoked only as a comparison to possible or imaginary doubt."

prosecutor injected her own definition of reasonable doubt into the trial: she showed jurors the instruction rejected by the trial judge, announced to the jury that the court had allowed her to use the instruction in the past and that it was not a misstatement of the law, and read from the instruction during closing despite the court's ruling sustaining defense counsel's objection. RP (4/20/06) 177-179.

Allowing the state to present this definition of reasonable doubt was error. No instructions were given defining "real possibility;" nor was the jury given a definition of "possible doubt." Court's Instructions, Supp. CP. The first of these two phrases calls to mind the instruction rejected by the Supreme Court in *Cage v. Louisiana, supra*, with its emphasis on "grave" or "substantial" doubt. The second phrase closely parallels the concept being defined-- "reasonable doubt" itself-- yet the instruction provides no guidance for distinguishing between a "reasonable doubt" and a "possible doubt." Furthermore, instead of presenting the state's burden in an affirmative manner, the definition focuses on what the prosecutor need *not* do ("the law does not require proof that overcomes every possible doubt.") The effect of this is to detract from the serious and heavy burden that the state does bear.

The instruction does not contain words like "imaginary" or "fanciful," which saved similar language in *Victor v. Nebraska, supra*.

Instead, the instruction relies on the phrases “firmly convinced,” “absolute certainty,” and “benefit of the doubt” to provide context to the “real possibility” and “possible doubt” language. These three phrases provide the context within which the questionable language should be analyzed. *Victor v. Nebraska, supra.*

To satisfy the reasonable doubt standard, the evidence must meet “the highest burden possible.” *In re Young*, 122 Wn.2d 1 at 39, 857 P.2d 989 (1993). To adequately convey the reasonable doubt standard, any definition must make apparent to the jury that conviction requires proof that is more than clear, cogent, and convincing.⁸ *See Cage v. Louisiana, supra; In re Winship, supra; Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The language here fails to meet that standard.

First, although use of the words “firmly convinced” does not necessarily reduce the prosecution’s burden (*see, e.g., Hunt, supra*, at 539), one may be “firmly convinced” by evidence that is merely “clear,

⁸ But see *State v. Hunt*, 128 Wn. App. 535, 116 P.3d 450 (2005), in which Division III found that the instruction at issue here “accurately informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, but need not necessarily prove its case by an absolute certainty.” *Hunt*, at 540.

cogent, and convincing.” See, e.g., *Cooke v. Cain*⁹, 35 Wash. 353 at 363-364, 77 Pac. 682 (1904); *Lifescan, Inc. v. Home Diagnostics, Inc.*¹⁰, 103 F. Supp. 2d 345 at 378 n. 6 (D. Del. 2000). Because of this, the phrase “firmly convinced” cannot be used to clarify what is meant by “real possibility” and “possible doubt.”

Second, to say that proof need not provide “absolute certainty” about a defendant’s guilt does nothing to distinguish between proof by a preponderance, proof that is clear, cogent, and convincing, and proof beyond a reasonable doubt. One need not have “absolute certainty” to meet any of these standards.

Third, the phrase “benefit of the doubt” conveys a similar idea to the very low preponderance standard. Requiring jurors to give a defendant the “benefit of the doubt” suggests that close cases-- cases in which neither side has a clear preponderance-- must result in acquittals. The clear implication is that where the preponderance favors the state, a jury is permitted to convict, even in the absence of proof beyond a reasonable doubt.

⁹ A factfinder may be “firmly convinced” by evidence that “is ‘clear, cogent, and convincing,’ even though it be the testimony of a party only.”

¹⁰ Quoting with approval an instruction reading in part “You must be firmly convinced that the fact is indeed true in order to meet the clear and convincing burden.”

Because the context does not properly clarify the phrases “possible doubt” and “real possibility,” the instruction is unconstitutional. Despite this, many cases have erroneously upheld similar instructions.¹¹ But as used in the prosecutor’s instruction in this case, the phrases “possible doubt” and “real possibility” are equivalent to the language rejected by the U.S. Supreme Court in *Cage*. Under the prosecutor’s instruction, the jury here was obliged to find the defendant guilty unless their doubt was sufficiently substantial to be considered “real.” As a result, it is reasonably likely that the jury used an unconstitutional standard to evaluate the evidence.

IV. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor’s improper actions prejudice the accused’s right to a fair trial. *Boehning, supra*, at 518. Prejudice is established whenever there is a substantial likelihood that instances of

¹¹ In Washington, all three divisions of the Court of Appeals have upheld the instruction. *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, review denied 133 Wn.2d 1014 (1997); *State v. Hunt, supra*; *State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2006).

misconduct affected the jury's verdict. *Boehning, supra, at 518*. Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson*, 100 Wn.App. 794 at 804-805, 998 P.2d 907 (2000).

Under certain circumstances, prosecutorial misconduct may be reviewed even absent an objection from defense counsel. Misconduct to which no objection was made requires reversal (1) if it is so flagrant and ill-intentioned that a curative instruction would not have remedied the prejudice, or (2) if it creates a manifest error affecting a constitutional right, and the state is unable to prove that the error is harmless beyond a reasonable doubt. *Boehning, supra, at 518*; RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907 at 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

A. The prosecutor committed misconduct by intentionally making statements on the law that differed from the court's instructions.

A prosecutor's statements to the jury upon the law must be confined to the law set forth in the instructions. *State v. Davenport*, 100 Wn.2d 757 at 760, 675 P.2d 1213 (1984); *State v. Huckins*, 66 Wn. App. 213 at 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is a correct statement of law. *Davenport, at 760*. Such misconduct is a "serious irregularity having the

grave potential to mislead the jury.” *Davenport*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury’s verdict. *Boehning*, *supra*; *Davenport*, at 762.

In this case, the prosecutor injected her own instruction on reasonable doubt into the trial. The trial judge had already rejected the instruction, and it differed from the one given by the court. RP (4/20/06) 138. Despite this, the prosecuting attorney showed the instruction to the jury, and then (after the court sustained Mr. Covarrubias’ objection) read the instruction to the jury. RP (4/20/06) 177-179. This was misconduct under *Davenport*, even if the prosecutor’s instruction is later determined to be legally correct.¹² Reversal is required under *Boehning* because there is a substantial likelihood that this egregious misconduct affected the verdict: some jurors may have used the prosecutor’s definition of reasonable doubt during their deliberations instead of the court’s definition. This is especially true given the prosecutor’s comment that it was an accurate and approved definition of reasonable doubt. Because the misconduct may have affected the verdict, the conviction must be reversed and the case remanded for a new trial.

¹² As noted elsewhere, the validity of the *Castle* instruction is pending before the Washington Supreme Court. *State v. Bennett*, No. 78377-2.

If defense counsel's objection is deemed insufficient to preserve the error for review, reversal is still required. First, the misconduct was flagrant and ill-intentioned. The state did not seek prior court approval of the visual aid setting out a standard for reasonable doubt the court had already clearly rejected. The prosecutor argued in front of the jury that it was an accurate and accepted definition of reasonable doubt. Even after the objection was sustained and she was ordered to take it down, she proceeded to read it to the jury. RP (4/20/06) 177-179. Second, the misconduct affected Mr. Covarrubias' constitutional right to due process by providing the jury with two different definitions of reasonable doubt. Reversal is required unless the state can establish that the error was harmless beyond a reasonable doubt. *State v. Perez-Mejia, supra*, at 920 n. 11. Because the evidence of guilt in this case was not "overwhelming," the state cannot make this showing. *State v. Thompson*, 151 Wn.2d 793 at 808, 92 P.3d 228 (2004).

For all these reasons, the prosecutor's misconduct in closing requires reversal. *Davenport, supra; Boehning, supra*. The case must be remanded to the Clallam County Superior Court for a new trial, and the prosecuting attorney should be admonished to refrain from presenting rejected definitions of core concepts to the jury.

B. The prosecutor committed misconduct by inserting her personal opinion into the case.

A prosecutor may not express a personal opinion as to the credibility of a witness or the guilt of the accused. *State v. Horton*, 116 Wn. App. 909 at 921, 68 P.3d 1145 (2003). Misconduct occurs when it is clear that counsel is expressing a personal opinion. *State v. Price*, 126 Wn. App. 617 at 653, 109 P.3d 27 (2005); *State v. Trout*, 125 Wn. App. 403, 105 P.3d 69 (2005).

In this case, during cross-examination, the prosecuting attorney clearly expressed her personal opinion that Mr. Covarrubias was a liar and that he was guilty of rape and murder. First, she asked him if he'd raped and murdered a fifteen-year-old girl. When he said he had not, she responded with a comment: "Sure." RP (4/19/06) 140. There was no question associated with the comment; its only purpose was to convey to the jury her personal opinion that Mr. Covarrubias was a liar, a rapist, and a murderer.

Second, she asked Mr. Covarrubias if he wanted the jury to believe he was telling the truth because he took an oath. RP (4/19/06) 154. The purpose of this question was to cast doubt on his credibility by indirectly conveying the prosecutor's own belief that he was lying. By expressing

her personal opinion on Mr. Covarrubias' credibility and guilt, the state committed misconduct requiring reversal. *Price, supra.*

V. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. COVARRUBIAS OF FIRST DEGREE FELONY MURDER BASED ON FORCIBLE RAPE.

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable-doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it. *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be sufficient to convince a rational jury beyond a reasonable doubt. *Devries*,

supra. Since the reasonable doubt standard is the highest standard of proof, review is more stringent than in civil cases. In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005); *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470; 131 P.3d 958 (2006), *citing Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). It also must be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

A felony murder conviction must be supported by sufficient evidence of each element of the predicate felony. *State v. Maupin*, 63 Wn. App. 887 at 892, 822 P.2d 355 (1992). In this case, the state was required to prove that Mr. Covarrubias caused Ms. Carter’s death “in the course of or in furtherance of... or in immediate flight [from]” rape in the second degree. RCW 9A.32.030: Instruction No. 9, Supp. CP. Rape in the second degree requires proof of sexual intercourse by forcible compulsion. RCW 9A.44.050: Instruction No. 11, Supp. CP. Forcible compulsion

means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death, physical injury, or kidnapping. RCW 9A.44.010; Instruction No. 13, Supp. CP.

Here, the state failed to prove (1) that Mr. Covarrubias caused Ms. Carter's death, (2) that Mr. Covarrubias raped Ms. Carter by means of forcible compulsion, and (3) that Ms. Carter's death occurred in the course of, in furtherance of, or in the immediate flight from any such rape.

First, the state lacked any direct evidence that Mr. Covarrubias caused Ms. Carter's death. When taken in a light most favorable to the state, the circumstantial evidence included the presence of his semen in her throat, his initial denial of any sexual contact with her, minor scratches on his body, a partygoer's testimony that Mr. Covarrubias followed Ms. Carter when she left the party, Mr. Sonnabend's testimony that he saw Mr. Covarrubias several times in the company of a young woman on the waterfront trail over the course of an hour and a half, and the expert's testimony that Ms. Carter died of strangulation. RP (4/5/06) 79; RP (4/6/09) 37; RP (4/11/06) 184; RP (4/12/06) 22, 97-162; RP (4/13/06) 189, 190. This evidence may provide "substantial" support for the inference that Mr. Covarrubias caused Ms. Carter's death, in that it may be sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato, supra*. However, the evidence is not substantial

enough to conclude there's a high probability that he caused her death.

A.V.D., supra, at 568. It is certainly not sufficient to allow a rational jury to conclude beyond a reasonable doubt that he caused her death. *Devries, supra.*

Second, the state lacked any direct evidence that Mr. Covarrubias raped Ms. Carter by means of forcible compulsion. When taken in a light most favorable to the state, the circumstantial evidence included the presence of his semen in her throat, his initial denial and later admission of sexual contact with her, Mr. Sonnabend's testimony that Mr. Covarrubias tried to kiss a woman who responded by saying she had a boyfriend, Mr. Sonnabend's testimony that the woman later told Mr. Covarrubias to get away from her, Ms. Carter's hearsay statements (made six months earlier) that she did not like oral sex, the fact of her death by strangulation, and the minor scratches on his body. RP (4/5/06) 79; RP (4/6/09) 37; RP (4/11/06) 184; RP (4/12/06) 22, 97-162; RP (4/13/06) 189, 190; RP (4/20/06) 25-32. Taken in a light most favorable to the state, this does not establish beyond a reasonable doubt that Mr. Covarrubias forcibly raped Ms. Carter. It is possible, as Mr. Covarrubias testified, that the two of them had consensual sex, presumably prior to Mr. Sonnabend's observations on the waterfront trail (or, in the alternative, between the two times Mr. Sonnabend saw them). It is also possible that Mr. Covarrubias raped Ms. Carter but

without forcible compulsion, either by ignoring her clearly expressed lack of consent or by threatening her property rights as described in RCW 9A.44.060 (Rape in the Third Degree). Or he may have threatened to expose a secret (such as infidelity), or to harm himself, in order to pressure her into sexual intercourse. It is also possible that he killed her and then violated her remains, as described in RCW 9A.44.105. Given the wide range of possibilities that are consistent with the state's proof, it cannot be said that the evidence was sufficient to establish beyond a reasonable doubt that he raped her by means of forcible compulsion.

Third, the evidence was insufficient to establish that the death was caused in the course of, in furtherance of, or in the immediate flight from any such rape. The state's evidence on this point was (1) that Ms. Carter was undressed when her body was discovered and (2) the experts' opinion that she was killed at that site. The expert testimony also established that sperm can survive in a living person's throat-- even after a person eats, brushes their teeth, or uses mouthwash-- for a period of up to 6 hours. Sperm will last in a dead body for up to 5 days. RP (4/5/06) 133-134, 137, 176; RP (4/18/06) 62-70. In other words, the death could have occurred hours after sexual activity, or it could have preceded sexual activity. The facts are insufficient to establish beyond a reasonable doubt that any rape was contemporaneous with Ms. Carter's death.

For all these reasons, the evidence was insufficient to sustain the conviction for First Degree Felony Murder. The conviction must be reversed and the case dismissed with prejudice. *DeVries, supra*.

VI. TWO EXPERTS INVADED THE PROVINCE OF THE JURY BY TESTIFYING THAT THE DEATH WAS A CLASSIC OR TYPICAL MURDER WITH SEXUAL ASSAULT.

A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Under RAP 2.5(a)(3), the appellant must identify a constitutional error and show how it actually affected her or his rights at trial. *State v. Kirkman*, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 210, p. 9 (2007). It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. *Kirkman*, at pp. 9-10.

A criminal defendant has a constitutional right to a jury trial. Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV.

Impermissible opinion testimony on the defendant's guilt violates an accused's constitutional right to a jury trial. *Kirkman*, at p. 10; *State v. Florezak*, 76 Wn. App. 55, 882 P.2d 199 (1994); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Such testimony raises a manifest error affecting a constitutional right if it is "an explicit or almost explicit witness statement on an ultimate issue of fact." *Kirkman*, at pp. 27-28.

In this case, testimony from Dr. Selove and Dr. Reay invaded the province of the jury.¹³ The state presented no evidence contradicting Mr. Covarrubias' testimony that he had consensual sex with Ms. Carter; however, both doctors were permitted to testify that Ms. Carter's death was a "classic" or "typical" homicide with sexual assault. RP 4/5/06 p. 65, 77; RP (4/18/06) 126. Given Mr. Covarrubias' testimony and the evidence that his semen was found on the body, the two doctors' testimony amounted to a direct and explicit opinion that Ms. Carter was raped and killed by Mr. Covarrubias. These were not merely opinions on an ultimate issue of fact; instead, they were opinions on every element of the charged offense. Accordingly, the testimony created a manifest error affecting Mr. Covarrubias' constitutional right to a jury trial.

¹³ Defense counsel failed to object to the testimony, and even elicited some of it on cross-examination. If the error is determined not to be a manifest error affecting a constitutional right, or if it is determined to be invited error, then Mr. Covarrubias was denied the effective assistance of counsel, as argued elsewhere in this brief.

Constitutional error is harmless only if the prosecution can establish that it was harmless beyond a reasonable doubt. *State v. Perez-Mejia, supra*, at 920 n. 11. The state cannot make this showing. The evidence was consistent with Mr. Covarrubias' claim that he had consensual sex with Ms. Carter, and that she was later killed by someone else. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Black, supra*.

VII. THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY ABOUT MS. CARTER'S STATE OF MIND MORE THAN SIX MONTHS PRIOR TO HER DEATH.

Under ER 801(c), hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay is generally inadmissible. ER 802. An exception is made for hearsay statements that directly convey the dilatant's mental state.¹⁴ Under ER 803(a)(3), hearsay is admissible if it is "[a] statement of the dilatant's then existing state of mind..." In order to admit the evidence, the trial court must find (1) that "there is some degree of necessity to use out-of-court, uncross-examined declarations," and (2) that there is "circumstantial probability of the trustworthiness of

¹⁴ By contrast, statements that provide circumstantial evidence of the declarant's state of mind are not hearsay, since they are not offered for their truth, but rather for the conclusions that can be drawn from them. *See, e.g., State v. Stubbsjoen*, 48 Wn. App. 139 at 146, 738 P.2d 306 (1987).

the out-of-court, uncross-examined declarations.” *State v. Parr*, 93 Wn.2d 95 at 98-99, 606 P.2d 263 (1980).

The word “then” in the phrase “then existing” refers to the time the statement was made. *State v. Sanchez-Guillen*, 135 Wn. App. 636 at 646, 145 P.3d 406 (2006). State of mind evidence is inadmissible if “it bears only a remote or artificial relationship to the legal or factual issues actually raised.” *State v. Cameron*, 100 Wn.2d 520 at 530-531, 674 P.2d 650 (1983). Evidence admitted under ER 803(a)(3) is likely to be misused by a jury, and thus should be accompanied by a limiting instruction. *Parr, supra*, at 98-99; *State v. Redmond*, 150 Wn.2d 489 at 496, 78 P. 3d 1001 (2003).

Under ER 401, relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Irrelevant evidence is inadmissible; relevant evidence is generally admissible. ER 402. However, even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

Under ER 406, evidence of a person's habit may be introduced to show that a person acted in conformity with the habit on a particular occasion. The proponent of the evidence must establish behavior consisting of "semiautomatic, almost involuntary and invariably specific responses to fairly specific stimuli," and the evidence is excluded "if the court determines the conduct does not reach the level of habit or routine." *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952 at 962, 957 P. 2d 1283 (1998), *citations omitted*.

Under ER 404, evidence of the victim's character is inadmissible to suggest action on a particular occasion, unless offered by the accused, or by the prosecution to rebut character evidence offered by the accused. Character evidence may only be introduced in the form of testimony about a person's reputation. ER 405.

Here, over Mr. Covarrubias' objection, the trial court admitted Ms. Carter's hearsay statements that she did not like oral sex and that she believed oral sex degraded women. One witness (Ms. Fruin) testified that these statements were made over the course of one or two years, up until six months prior to Ms. Carter's death. The other witness (Ms. Oldfield) testified that the statements were made when Ms. Carter was fourteen years old. RP (4/20/06) 26-35.

Assuming these statements qualify as statements of Ms. Carter's "state of mind" under ER 803(a)(3), they are nonetheless inadmissible. First, the trial court did not explicitly find that there was some degree of necessity to use the hearsay statements. Nor did the court find that the circumstances established their trustworthiness. RP (4/20/06) 7-13. Accordingly, the evidence should have been excluded under *Parr, supra*.

Second, the alleged statements pertain to Ms. Carter's state of mind at the time the statements were made: from age fourteen up until six months prior to her death. RP (4/20/06) 25-35. *Sanchez-Guillen*. Her mental state during that time period was not relevant to any issue in the case; thus the evidence should have been excluded under ER 401.

Third, even if her mental state months prior to her death had some slight bearing on the issue of consent at the time of her death, it was inadmissible because whatever probative value it might have had was substantially outweighed by the danger of unfair prejudice. ER 403. The witnesses did not purport to convey Ms. Carter's exact words. Instead, they recited their recollection of the approximate substance of her remarks, some of which occurred a considerable time before the trial. RP (4/20/06) 25-35. Additionally, Ms. Carter may have made her statements to convince her friends that she was not promiscuous, rather than because she had a sincere belief that oral sex was wrong. Finally, Ms. Carter may

well have changed her mind over the six months subsequent to her last statement.

Fourth, the state's argument-- that Ms. Carter had a habit of refusing oral sex, and that she acted in conformity with that habit on the day she died-- was improper. The evidence did not qualify as habit evidence, since it did not reach the level of a semiautomatic, almost involuntary, and invariably specific response to a fairly specific stimulus. *Torgerson v. State Farm, supra*. The evidence should therefore have been excluded under ER 406.

Fifth, if the testimony were considered to be evidence of Ms. Carter's character, it was inadmissible to show action in conformity therewith, under ER 404. It was also improper because it was not reputation evidence, as required by ER 405.

For all these reasons, the trial court erred by admitting testimony about Ms. Carter's earlier statements, and by allowing the prosecution to argue that her statements established her lack of consent on the day of her death. The error prejudiced Mr. Covarrubias, because it was the state's only evidence on the issue of consent. Because of this, the conviction must be reversed and the case remanded for a new trial. *Cameron*, at 530-531. On retrial, the state must be prohibited from introducing this testimony.

VIII. MR. COVARRUBIAS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE MULTIPLE CONFLICTS OF INTEREST ADVERSELY AFFECTED HIS ATTORNEYS' PERFORMANCE.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995). The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wn.2d 798 at 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261 at 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)).

An “actual conflict,” for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance. *Mickens v. Taylor*, 535 U.S. 162 at 172, 122 S.Ct. 1237, 152 L.Ed. 291 (2002); *State v. Dhaliwal*, 150 Wn.2d 559 at 571, 79 P.3d 432 (2003). To establish an adverse effect, a defendant need only show that the attorney’s behavior

“seems to have been influenced” by the conflict. *Lewis v. Mayle*, 391 F.3d 989 at 999 (9th Cir., 2004), *citing Lockhart v. Terhune*, 250 F.3d 1223 at 1230-1231 (9th Cir., 2001). Prejudice is presumed once the defendant makes this showing. *Cuyler v. Sullivan*, 446 U.S. 335 at 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

To assess whether or not a conflict “seems to have influenced” defense counsel, a reviewing court must

look beyond [the attorney’s] protestations... to see whether independent evidence in the record supports the allegation of divided loyalties. *United States v. Shwayder*, 312 F.3d 1109 at 1119 (9th Cir. 2002) (“Human self-perception regarding one’s own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it”); *Sanders v. Ratelle*, 21 F.3d 1446 at 1452 (9th Cir. 1994) (“The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney’s behavior seems to have been influenced by the suggested conflict.”)

Belmontes v. Brown, 414 F.3d 1094 at 1119 (9th Cir. 2005), *reversed on other grounds sub nom Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006).

In cases involving successive representation, conflicts may arise

(1) if the cases are substantially related, (2) if the attorney reveals (or refuses to reveal) privileged communications of the former client, or (3) if the attorney otherwise divides his loyalties, for example by failing to conduct a rigorous cross-examination for fear of misusing privileged information, or by failing to call a former client as a witness. *See Sanders*

v. Ratelle, supra, at 1453, State v. Robinson, 79 Wn. App. 386 at 396, 902 P.2d 652 (1995).

Although breach of an ethical standard does not necessarily establish a claim of ineffective assistance, ethics rules define the scope of an attorney's duty of loyalty. Thus violation of an ethical duty owed to an accused client establishes a conflict that may "adversely affect" an attorney's performance. *State v. Tjeerdsma, 104 Wn. App. 878 at 885, 17 P.3d 678 (2001); Nix v. Whiteside, 475 U.S. 157 at 165, 106 S.Ct. 988, 89 L.Ed. 2d 123 (1986); Mickens v. Taylor, 535 U.S. 162 at 176, 122 S.Ct. 1237, 152 L.Ed. 2d 291 (2002); see also, e.g., United States v. Elliot, 463 F.3d 858 at 865 (9th Cir. 2006).* When recognized canons of ethics and professional codes "'speak with one voice' as to what constitutes reasonable attorney performance" in relation to an ethical duty, then breach of that ethical duty necessarily violates the Sixth Amendment. *McClure v. Thompson, 323 F.3d 1233 at 1242 (9th Cir. 2003), quoting Nix v. Whiteside, supra.*

An attorney owes a duty to former clients; this duty also extends to former clients of his or her law firm. *State v. Early, 70 Wn. App. 452 at 459, 853 P.2d 964 (1993).* The obligations posed by the Rules of Professional Conduct continue in full force even after a former client's death. *See, e.g., Restatement (Third) of the Law Governing Lawyers,*

Section 60 Comment (e) and Section 77 Comment (c): *In re Michal*, 415 Ill. 150 (1953); *Swidler & Berlin v. United States*, 524 U.S. 399 at 407, 118 S.Ct 2081, 141 L.Ed 2d 379 (1998) (“Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel... Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.”)

Under RPC 1.7, a lawyer shall not represent a client if “there is a significant risk that the representation... will be materially limited by the lawyer’s responsibilities to... a former client.”¹⁵ Under RPC 1.9, entitled “Duties to former clients,”

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. RPC 1.9(a).

RPC 1.9(c) provides that

¹⁵ An exception is permitted if four conditions are met: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation... (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).” RPC 1.7.

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
RPC 1.9(c)

Matters are substantially related under RPC 1.9(a) “if they involve the same transaction or legal dispute *or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.*” RPC 1.9, Comment 3, *emphasis added*. In *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988), the Supreme Court applied a test similar to the standard expressed in Comment 3 to RPC 1.9. As the comment suggests, the Court examined the kind of factual information that would normally have been obtained in the prior representation. RPC 1.9, Comment 3. The Court determined that the defendant’s aggravated first-degree murder case was “closely interwoven” with prior charges of misdemeanor assault and taking a motor vehicle. According to the Court, “privileged information obtained by the prosecuting attorney when he was the defendant's counsel in the previous

case could well work to the accused's disadvantage in this case where the death penalty is sought." *Stenger*, at 521-22.¹⁶

In light of the fact-based inquiry in *Stenger*, the courts of appeal have adopted a "painstaking" three-part test to determine whether matters are substantially related:

First, the court reconstructs the scope of the facts involved in the former representation and projects the scope of the facts that will be involved in the second representation. Second, the court assumes that the lawyer obtained confidential client information about all facts within the scope of the former representation. Third, the court then determines whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation. *State v. Hunsaker*, 74 Wn. App. 38 at 45, 873 P.2d 540 (1994), *citations omitted*.

Matters may be "substantially related" even if the commonality consists of facts within the scope of the prior representation that could permit impeachment of the former client in the current proceeding. *State v. MacDonald*, 122 Wn. App. 804 at 813, 95 P.3d 1248 (2004) (*citing Hunsaker*). Furthermore, actual receipt of confidential information is unnecessary; counsel is presumed to have received confidential

¹⁶ The Court speculated that the prosecuting attorney obtained "factual information... from the accused, including information about the defendant's back-ground and earlier criminal and antisocial conduct." *Stenger*, at 521-22.

information about all facts within the scope of the prior representation.

MacDonald, supra, at 813-814.

Under RPC 1.10, conflicts attaching to one attorney are imputed to all attorneys in a firm. Thus if one attorney in the firm (including a public defender agency) is disqualified from representing a client, all attorneys in the firm are so disqualified. *State v. Vicuna*, 119 Wn. App. 26 at 31, 79 P.3d 1 (2003). No exceptions to this rule apply in this case.¹⁷ There is no difference between an imputed and a direct conflict for purposes of the Sixth Amendment. *Hovey v. Ayers*, 458 F.3d 892 at 908 (9th Cir. 2006). The determination of whether a conflict exists is a question of law, reviewed *de novo*. *State v. Ramos*, 83 Wn. App. 622 at 628, 922 P.2d 193 (1996); *Early, supra, at 459.*

In this case, potential conflicts were apparent at the start of trial. Some of the potential conflicts ripened into “actual conflicts,” dividing the loyalties of Mr. Covarrubias’ attorneys and denying him the effective assistance of counsel.

¹⁷ The rule does provide for two exceptions, neither of which apply here. First, a lawyer disqualified because of a personal interest might not disqualify the entire firm. Second, a newly hired attorney disqualified because of a conflict arising from previous employment might not disqualify the entire firm, but only if the disqualified lawyer is screened from the current representation and certain other safeguards are met. RPC 1.10.

- A. Defense counsel's prior representation of "other suspects" in Ms. Carter's death created conflicts of interest that adversely affected counsel's performance.

The defense strategy consisted of implicating "other suspects" in Ms. Carter's death. RP (5/2/05) 8. RP (3/8/06) 46-47. Among the other suspects initially named by defense counsel were three former clients of the public defender's office: Jon Sonnabend, Gerald Spry, and Kelly Banner. RP (3/8/06) 46-47. With respect to these three former clients, representation of Mr. Covarrubias was improper under RPC 1.7, RPC 1.9(a), RPC 1.9(c), and RPC 1.10.

1. Defense counsel's prior representation of Mr. Sonnabend created a conflict of interest that adversely affected counsel's performance.

The public defender's office had previously represented Jon Sonnabend on charges of Malicious Mischief in the Third Degree, Telephone Calls to Harass, and probation violations. Supp. CP, Decl. of Harry Gasnick. At least one of the prior charges involved domestic violence. Supp. CP, State's Memo for Judicial Inquiry into Conflict. Counsel's representation included helping Mr. Sonnabend obtain a post-conviction mental health evaluation, as well as multiple post-conviction court appearances. Supp. CP, Decl. of Harry Gasnick. The public defender's office represented Mr. Sonnabend in 2006, even after he'd come forward and claimed to be able to place Mr. Covarrubias on the

waterfront trail in the company of a young woman the night of Ms. Carter's disappearance. RP (3/3/06) 7; RP (4/12/06) 114.

Reconstructing the scope of the former representation under *Hunsaker*, the "factual information [which] would normally have been obtained in the prior representation" consisted of Mr. Sonnabend's general background, criminal history, drug and alcohol use and treatment history, history of mental health symptoms and treatment, and current mental health status. Defense counsel would also have learned any substantive facts relating to the prior charges, and Mr. Sonnabend's mental state in that case. Furthermore, since at least one case involved domestic violence, the attorneys' would have learned about Mr. Sonnabend's attitudes toward women, his general ideas on gender relations, his experience with and beliefs about violence generally and domestic violence in particular (and possibly his attitudes and beliefs about sexual violence). *Hunsaker, supra*: RPC 1.9, Comment 3. Defense counsel is presumed to have received confidential information relating to all of these facts. *MacDonald, supra*.

This confidential information was relevant to Mr. Covarrubias' case because it (at least marginally) increased the possibility that Mr. Sonnabend was the killer: Mr. Sonnabend was mentally unstable, may have had alcohol and drug problems, and was present on the waterfront trail the night Ms. Carter disappeared. RP (4/12/06) 97-162. The

confidential information defense counsel was presumed to have obtained was also relevant to impeach Mr. Sonnabend: his visual and auditory hallucinations, his failure to take medication, and his consumption of alcohol and drugs all rendered his observation and memory suspect. RP (4/12/06) 97-162, 163-188.

Since defense counsel is presumed to have obtained confidential information relating to all these matters, the two cases were “substantially related” within the meaning of RPC 1.9(a). *MacDonald, supra*. Furthermore, Mr. Sonnabend’s interests were materially adverse to those of Mr. Covarrubias, since the latter’s strategy initially consisted of implicating Mr. Sonnabend in Ms. Carter’s death. RP (2/23/06) 15. *See State v. Hatfield*, 51 Wn. App. 408 at 412, 754 P.2d 136 (1988) (“The interests of those two clients were adverse, since Hatfield had a demonstrated interest in blaming the assault on Anderson, while Anderson had an obvious interest in avoiding the blame.”) Because Jon Sonnabend’s case was substantially related, and because Mr. Sonnabend’s interests were materially adverse, the representation of Mr. Covarrubias created a conflict of interest under RPC 1.9(a).¹⁸

¹⁸ There is no indication that Mr. Sonnabend was even asked to give informed consent regarding the conflict, or that such consent was reduced to writing, as required by RPC 1.9(a).

The situation also posed a significant risk that representation of Mr. Covarrubias would be materially limited by counsel's responsibilities to Mr. Sonnabend. This created a conflict under RPC 1.7. Furthermore, under RPC 1.9(c)(1), defense counsel was prohibited from using any information relating to the representation of Mr. Sonnabend to the disadvantage of Mr. Sonnabend, unless the information was "generally known." RPC 1.9(c)(1). Nor could defense counsel reveal any information relating to the representation of Mr. Sonnabend.¹⁹ RPC 1.9(c)(2).

These conflicts "seem to have influenced" defense counsel. First, at trial, defense counsel did not attempt to implicate Mr. Sonnabend in Ms. Carter's death, and did not argue in closing that he was involved. RP (4/12/06) 97-162; RP (4/20/06) 180-204. Second, defense counsel did not cross-examine Mr. Sonnabend about prior inconsistent statements indicating that he was uncertain about his identification of Mr. Covarrubias. RP (3/8/06) 62; RP (3/23/06) 70; RP (4/12/06) 97-162. Third, Mr. Anderson, who had not personally represented Mr. Sonnabend, took the lead on his cross-examination, apparently as an attempt to avoid

¹⁹ In the absence of information "generally known" or consent from Mr. Sonnabend, the public defender's office would have had to withdraw from the case. Screening was not an option permitted under RPC 1.10.

the conflict. RP (4/12/06) 97-162. Fourth, Mr. Gasnick, who had represented Mr. Sonnabend, refused to examine his old files relating to the representation, apparently in the mistaken belief that he could screen himself from the former representation.²⁰ RP (3/8/06) 10-12. Fifth, defense counsel did not object to admission of Mr. Sonnabend's out-of-court identification of Mr. Covarrubias from a newspaper photograph. RP (4/12/06) 97-162. Sixth, defense counsel did not cross-examine Mr. Sonnabend about the second photograph he reviewed prior to identifying Mr. Covarrubias in court. RP (4/12/06) 97-162.

Since the conflict "seems to have influenced" the attorneys, prejudice is presumed and reversal is required. *Lewis v. Mayle*, at 999; *Cuyler v. Sullivan*, *supra*.

2. Defense counsel's prior representation of Kelly Banner created a conflict of interest that adversely affected counsel's performance.

The public defender's office had previously represented Kelly Banner on a Minor in Possession of Alcohol charge. Supp. CP, Decl. of Harry Gasnick. Reconstructing the scope of the former representation under *Hunsaker*, the "factual information [which] would normally have

²⁰ A conflict was imputed to all attorneys in the firm, and screening was not permitted. RPC 1.10.

been obtained in the prior representation” consisted of general background and residential circumstances, alcohol and substance use habits, behavior while under the influence, mental health and/or drug treatment attempts, and criminal history. Defense counsel would also have learned the substantive facts relating to the prior case, as well as Mr. Banner’s mental state in that case. *Hunsaker, supra*; RPC 1.9, Comment 3.

This information was relevant to Mr. Covarrubias’ case. Before Ms. Carter’s body was discovered, Mr. Banner told his parents and his girlfriend that Ms. Carter had killed herself on the waterfront trail. At trial, he claimed that he’d made the statement because he’d missed Christmas as a result of heavy methamphetamine use. RP (4/17/06) 112-145. Information about his background, his family relationships, his drug use, and his treatment history would have been relevant to cross-examine him about this claim. Appropriate cross examination could have undermined Mr. Banner’s stated reason for his advance knowledge about Ms. Carter’s death, and thereby suggested to the jury that Mr. Banner was either involved in Ms. Carter’s death, or that he was covering for his best friend Mr. Criswell. *See MacDonald, supra*. Accordingly, the two cases were “substantially related” within the meaning of RPC 1.9(a). Furthermore, Mr. Banner’s interests were materially adverse to those of Mr. Covarrubias, since the latter’s strategy consisted of implicating Mr.

Banner and/or Mr. Criswell in Ms. Carter's death. *See State v. Hatfield, supra.* Because Mr. Banner's case was substantially related, and because Mr. Banner's interests were materially adverse, the representation of Mr. Covarrubias created a conflict of interest under RPC 1.9(a).²¹

The situation also created a significant risk that representation of Mr. Covarrubias would be materially limited by counsel's responsibilities to Mr. Banner. This created a conflict under RPC 1.7. The public defender's office was prohibited from using any information relating to the representation of Mr. Banner to the disadvantage of Mr. Banner, unless the information was "generally known." RPC 1.9(c)(1). Nor could the office reveal any information relating to the representation of Mr. Banner. RPC 1.9(c)(2).

These conflicts adversely affected counsel's performance. First, defense counsel did not argue in closing that Mr. Banner may have been directly involved in Ms. Carter's death (other than to say that he might have been covering for Criswell). RP (4/20/06) 180-204. Second, Mr. Banner was not cross-examined about any inconsistencies between his story (that he lied to his parents and girlfriend because he'd missed

²¹ There is no indication that Mr. Banner was even asked to give informed consent regarding the conflict, or that such consent was reduced to writing, as required by RPC 1.9(a).

Christmas while using methamphetamine) and his background, family history, prior drug use, or treatment history. Third, Mr. Gasnick refused to look at Mr. Banner's closed file, apparently trying to screen himself from the prior representation, despite having personally been Mr. Banner's attorney on the earlier case. Fourth, Mr. Anderson, who had not personally represented Mr. Banner, conducted the cross-examination, in an apparent attempt to avoid conflict.

Since the conflict "seems to have influenced" the attorneys, prejudice is presumed and reversal is required. *Lewis v. Mayle*, at 999; *Cuyler v. Sullivan*, *supra*.

3. Defense counsel's prior representation of Gerald Spry created a conflict of interest that adversely affected counsel's performance.

The public defender's office had previously represented Gerald Spry on charges of Possession of Property in the Second Degree, Theft in the Third Degree (three counts), Trespass in the First Degree, Violation of the Uniform Controlled Substances Act, and probation violation(s). Supp. CP. Decl. Of Harry Gasnick. In addition, at least one of his prior cases involved domestic violence. Supp. CP. State's Memo for Judicial Inquiry into Conflict.

Reconstructing the scope of the former representation under *Hunsaker*, the "factual information [which] would normally have been

obtained in the prior representation” consisted of Mr. Spry’s general background, criminal history, drug and alcohol use and treatment history, history of mental health symptoms and treatment, and current mental health status. Defense counsel would also have learned any substantive facts relating to each prior charge, and Mr. Spry’s mental states in those cases. Furthermore, since at least one case involved domestic violence, the attorneys’ would have learned about Mr. Spry’s attitudes toward women, his general ideas on gender relations, his experience with and beliefs about violence generally and domestic violence in particular (and possibly his attitudes and beliefs about sexual violence). *Hunsaker, supra*; RPC 1.9, Comment 3. Defense counsel is presumed to have received confidential information relating to all of these facts. *MacDonald, supra*.

Mr. Spry was initially considered an “other suspect” because he appeared at a pawnshop shortly after Ms. Carter’s death, with scratches on his face consistent with a struggle, and pawned an item of jewelry that may have belonged to Ms. Carter. RP (3/23/06) 66. Confidential information relating to his prior possession of stolen property, theft, and drug charges should have suggested to counsel that Mr. Spry had an ongoing need for money (to feed what was apparently a significant drug habit), and that this could have prompted him to kill Ms. Carter and

disguise her death to resemble a sexual assault. Mr. Anderson, who had represented Mr. Spry, described him as a “well-known drug user and dealer”. RP (3/23/06) 67.

Since defense counsel is presumed to have obtained confidential information relating to all of Mr. Spry’s prior charges, the two cases were “substantially related” within the meaning of RPC 1.9(a). *MacDonald, supra*. Furthermore, Mr. Spry’s interests were materially adverse to those of Mr. Covarrubias, since the latter’s strategy initially consisted of implicating Mr. Spry in Ms. Carter’s death. RP (3/23/06) 66-69. *See State v. Hatfield, supra*. Because Gerald Spry’s case was substantially related, and because Mr. Spry’s interests were materially adverse, the representation of Mr. Covarrubias created a conflict of interest under RPC 1.9(a).²²

The situation also posed a significant risk that representation of Mr. Covarrubias would be materially limited by counsel’s responsibilities to Mr. Spry. This created a conflict under RPC 1.7. Furthermore, under RPC 1.9(c)(1), defense counsel was prohibited from using any information relating to the representation of Mr. Spry to the disadvantage of Mr. Spry.

²² There is no indication that Mr. Spry was even asked to give informed consent regarding the conflict, or that such consent was reduced to writing, as required by RPC 1.9(a).

unless the information was “generally known.” RPC 1.9(c)(1). Nor could defense counsel reveal any information relating to the representation of Mr. Spry. RPC 1.9(c)(2).

These conflicts “seem to have influenced” defense counsel. First, at trial, defense counsel made no attempt to implicate Mr. Spry in Ms. Carter’s death. An earlier police investigation had concluded that Mr. Spry was not involved in Ms. Carter’s death; however, defense counsel had an independent duty to investigate and pursue Mr. Spry’s possible involvement. There is no indication that the defense team made any efforts to investigate Mr. Spry or pursue him as an “other suspect.” Whether or not this failure was reasonable is irrelevant; in the absence of proof to the contrary, defense counsel’s failure to investigate is presumed to have been influenced by a duty of loyalty to Mr. Spry. Second, Mr. Gasnick, who had represented Mr. Spry, refused to examine his old files relating to the representation, apparently in the mistaken belief that he could screen himself from his former client’s case.

Since the conflict “seems to have influenced” the attorneys, prejudice is presumed and reversal is required. *Lewis v. Mayle*, at 999; *Cuyler v. Sullivan*, *supra*.

- B. Defense counsel's prior representation of the deceased, her parents, and her brothers created a conflict of interest that adversely affected counsel's performance.

Ms. Carter's status as a former client of the public defender's office created additional conflicts for defense counsel. The office had previously represented Ms. Carter on charges of Minor in Possession of Alcohol, Harassment and probation violations. The "factual information [which] would normally have been obtained in the prior representation" consisted of family background, living situation, chemical dependency use and treatment history, mental health history, as well as the underlying facts regarding each charge and violation, and her mental state at the time of the offenses. *Hunsaker, supra*; RPC 1.9, Comment 3. Given the rehabilitative purpose of juvenile court, the inquiry would necessarily have touched on Ms. Carter's relationship with her 21-year-old boyfriend, Mr. Criswell, and the fact that he had focused his attentions on her since she was 11 years old. RP (4/11/06) 56.

This information was relevant to Mr. Covarrubias' case because Ms. Carter's relationship with Mr. Criswell was at the heart of the primary defense theory that Mr. Criswell killed Ms. Carter. Furthermore, defense counsel also undoubtedly learned confidential information that could be used under ER 806 to impeach Ms. Carter (whose hearsay statements regarding her distaste for oral sex were admitted during the state's

rebuttal). Accordingly, her earlier cases were “substantially related” within the meaning of RPC 1.9(a).

Furthermore, Ms. Carter’s posthumous interests, and the interests of her parents and brothers were materially adverse to those of Mr. Covarrubias: if he did kill her, it would have been in her interest and in her family’s interests to see him convicted. Because the two cases were substantially related, and because these interests were materially adverse, the representation of Mr. Covarrubias created a conflict of interest under RPC 1.9(a).

The situation also created a significant risk that representation of Mr. Covarrubias would be materially limited by counsel’s responsibilities to Ms. Carter. This created a conflict under RPC 1.7. The public defender’s office was prohibited from using any information relating to the representation of Ms. Carter to her disadvantage, unless the information was “generally known.” RPC 1.9(c)(1). Nor could the office reveal any information relating to the representation. RPC 1.9(c)(2). Accordingly, defense counsel’s representation of Mr. Covarrubias created a conflict under RPC 1.9(c).

These conflicts adversely affected counsel’s performance. First, the two attorneys representing Mr. Covarrubias screened themselves from information relating to the prior representation of Ms. Carter. RP (3/3/06)

13: RP (3/8/06) 30-31; Supp. CP; Decl of Suzanne Hayden; RP (3/16/06) 19. The attorneys mistakenly believed that screening themselves from information relating to Ms. Carter's case would eliminate any conflict. RP (3/3/06) 13; Supp. CP; Decl of Suzanne Hayden; RP (3/16/06) 19. This is incorrect; the Rules of Professional Conduct do not permit screening under these circumstances.²³

Instead of resolving the conflict, the screening was itself an adverse effect of the conflict. By screening themselves from information in Ms. Carter's files (or other information obtained during the representation of Ms. Carter), the two attorneys failed to familiarize themselves with information relating to the prior representation. Given the reconstructed scope of the prior representation of Ms. Carter, it is likely that information relating to the prior representation would have helped defense counsel investigate Ms. Carter's relationship with Mr. Criswell, in pursuing Mr. Criswell as an "other suspect." Furthermore, confidential information relating to the prior representation would have helped to discredit Ms. Carter's hearsay statements under ER 806, and may have helped to discredit Mr. Criswell's testimony. By screening

²³ As noted above, screening is only effective where a recently hired attorney is screened from those cases in conflict with cases handled by her or his previous firm during her or his period of employment at such previous firm. RPC 1.10.

themselves from the information, the defense attorneys failed to avail themselves of materials that may have assisted in their investigation and conduct of the trial. Additionally, defense counsel made no effort to discredit Ms. Carter's hearsay statements under ER 806.

Since the conflict "seems to have influenced" the attorneys, prejudice is presumed and reversal is required. *Lewis v. Mayle*, at 999; *Cuyler v. Sullivan*, *supra*.

- C. Defense counsel's prior representation of 28 witnesses and potential witnesses created conflicts of interest that adversely affected counsel's performance.

In addition to those participants listed above, a large number of additional potential witnesses had previously been represented by the public defender's office. Supp. CP, Declaration of Harry Gasnick. Not all of these witnesses testified at the trial; however, all of the prior representations created potential conflicts with the public defender's office.

In each case, a defense attorney would have been expected to obtain general background information including family and living situations, past warrant and criminal history, drug and alcohol use and treatment, mental health status, and sealed information including sealed criminal history. Discussions with former clients would always necessarily include the underlying facts of the charge, the client's

motivations for whatever actions they took, and their mental state at the time of the offense. For those former clients whose prior cases involved domestic violence,²⁴ the attorneys' would have learned about their former clients' attitudes toward women, their general ideas on gender relations, their experience with and beliefs about violence generally and domestic violence in particular (and possibly their attitudes and beliefs about sexual violence).

Furthermore, the attorney would also have the opportunity and obligation to observe each client and note how she or he responded to pressure, her or his ability to answer direct questions, and her or his honesty. This information would have been available to the defense attorneys regarding each of the 28 people previously represented by the public defender's office.

In addition to the numerous specific ways these conflicts impacted defense counsel, they also adversely impacted counsel's performance in a more general way: Mr. Gasnick repeatedly complained that the inquiry into potential conflicts was a distraction, taking him and Mr. Anderson away from their preparation of Mr. Covarrubias' case. RP (3/16/06) 22-23;

²⁴ Jacob Backman, Duane Stephan, Christina Garver, Jon Sonnabend, and Gerald Spry. Supp. CP. State's Memo for Judicial Inquiry into Conflict.

RP (3/23/06) 4-5; RP (3/30/06) 16; RP (4/19/06) 8-11. This may have been what led to counsel's failure to interview a number of important witnesses and review the state's exhibits prior to the start of trial. RP (3/27/06) 145; RP (4/4/06) 152; RP (4/4/06) 84; RP (4/10/06) 22. Because the attorneys were unable to devote their full attention to representing Mr. Covarrubias, their performance was adversely affected by the numerous conflicts of interest. Accordingly, prejudice is presumed. The conviction must be reversed and the case remanded for a new trial. *Lewis v. Mayle*, at 999; *Cuylar v. Sullivan*, *supra*.

D. Mr. Covarrubias' purported waiver of his constitutional right to a conflict-free attorney was invalid because he was misinformed about the facts and legal standards relevant to the waiver.

A defendant may waive her or his right to a conflict-free attorney. *Holloway v. Arkansas*, 435 U.S. 475 at 483, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978). A valid waiver must be voluntary, knowing, and intelligent, such that the accused is sufficiently informed of the consequences of the waiver. *Lewis v. Mayle*, 391 F.3d 989 at 996 (9th Cir. 2004). A reviewing court must indulge every reasonable presumption against the waiver. *Lewis v. Mayle*, at 997. Furthermore, the U.S. Supreme Court has commented that even a proper waiver may not preclude review. *Wheat v. United States*, 486 U.S. 153 at 161-162, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988).

In *Lewis v. Mayle*, the defendant signed a written waiver, discussed the (single) potential conflict with his attorney, was advised to seek outside counsel, and was advised of the dangers and possible consequences arising from the conflict. *Lewis v. Mayle*, at 996. However, the record contained no evidence that the defendant was advised that his attorney might have continuing obligations towards the former client. *Lewis v. Mayle*, at 997. Based on this deficiency, the court concluded that the waiver was invalid, determined that the potential conflict ripened into an “actual conflict” (because it seemed to have influenced counsel) and reversed the conviction, commenting that “[t]he potential for a severe conflict of interest in this case was readily apparent from the outset. The state trial judge should never have let a conflicted attorney represent Lewis. The risks were simply too great.” *Lewis v. Mayle* at 999-1000.

In this case, the potential for severe conflicts was also readily apparent from the outset. The public defender’s office had previously represented Ms. Carter (the deceased), her parents, her brothers, her best friend, three potential “other suspects” in her death, and 19 other witnesses listed by the prosecution. See above, page 20-23 (chart). Each of these prior representations created a potential for conflict. Mr. Covarrubias executed a waiver as to each potential conflict; however, he was given erroneous information prior to signing the waiver.

The trial court assigned outside counsel (Craig Ritchie) to discuss the waiver with Mr. Covarrubias. However, Mr. Ritchie provided Mr. Covarrubias with erroneous information. First, there is no indication that Mr. Ritchie had access to all the public defender files or the information contained within those files; hence it was impossible for Mr. Ritchie to know any confidential information obtained by the public defenders office, or to assess the extent of each conflict. RP (3/21/06) 7-30; RP (3/22/06) 4-31. Second, Mr. Ritchie advised Mr. Covarrubias that there were no potential conflicts (other than defense counsel's possible fear that a former client might file a frivolous bar complaint if cross-examined too vigorously). RP (3/22/06) 11-12. This is astonishing, given that defense counsel hoped to implicate former clients in a murder, hoped to impeach former clients who testified against Mr. Covarrubias, and hoped to win an acquittal for one charged in the murder of a former client.²⁵

Mr. Covarrubias was also given inaccurate information by the trial judge, who (1) opined that implicating a former client did not raise any issues of divided loyalty, and (2) indicated that there was no proof of any confidential information obtained from the prior representations. RP

²⁵ Mr. Ritchie provided ineffective assistance in his advice to Mr. Covarrubias. However, a showing of deficient performance and prejudice is unnecessary, given that this court must indulge every reasonable presumption against the validity of the waiver. *Lewis v. Mytle*, at 997.

(3/16/06) 45-48. Accusing a former client of rape and murder necessarily creates a potential conflict that could easily ripen into actual conflict. *Hatfield, supra*. Furthermore, the absence of proof (that the public defenders received confidential information) is irrelevant: the correct inquiry is into the kind of confidential information that would ordinarily have been obtained during the prior representation.²⁶ *Hunsaker, supra*. The statements of counsel, no matter how sincere, are not to be taken at face value. *Belmontes v. Brown, supra*, at 1119.

Mr. Covarrubias was also misinformed by his own attorney, Mr. Anderson. Mr. Anderson erroneously believed that juvenile convictions were never admissible for impeachment. RP (3/22/06) 100. According to Mr. Anderson, this precluded even the possibility of a conflict with any of his former juvenile clients. RP (3/27/06) 83. Although Mr. Anderson eventually realized that he was mistaken, this did not occur until after execution of the waivers, during the second week of trial. RP (4/3/06) 25-27.

When the prosecution listed additional witnesses just prior to trial, Mr. Covarrubias signed additional waivers. RP (3/30/06) 44-54. There is

²⁶ In addition, Mr. Gasnick indicated to the court that he would not be reviewing closed files for confidential information. RP (3/8/06) 9-12.

no indication that he consulted with his own attorneys on any potential for conflict with these witnesses. Nor did he consult with Mr. Ritchie. Nothing in the record suggests that these waivers were made knowingly, intelligently, and voluntarily.

In light of the misinformation provided by Mr. Ritchie, by Mr. Anderson, and by the trial judge, as well as the absence of any meaningful discussion of the March 30th waivers, and given the standard of review (which requires this court to indulge every reasonable presumption against the validity of each waiver), Mr. Covarrubias did not waive his rights knowingly, intelligently, and voluntarily. *Lewis v. Mayle, supra*. The waivers were ineffective, and the issues raised by the actual conflicts must be examined on their merits. *Lewis v. Mayle, supra*.

IX. MR. COVARRUBIAS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEYS' DEFICIENT PERFORMANCE PREJUDICED HIM.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that,

but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, ___ P.3d ___ (2007). There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130.

- A. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys’ failure to request instructions on the inferior degree offense of Murder in the Second Degree.

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused’s own testimony. *Fernandez-Medina, supra*. For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given. *Fernandez-Medina*, at 460-461.

A defendant is entitled to an instruction on an inferior degree offense if (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.²⁷ *State v. Fernandez-Medina*, 141 Wn.2d 448 at 455, 6 P.3d 1150 (2000). To satisfy the third requirement, the defendant must show that the evidence, viewed in the light most favorable to him, would allow the jury to find the defendant not guilty of the charged offense but guilty of the inferior degree offense. *State v. Pittman*, 134 Wn. App. 376 at 386, ___ P.3d ___ (2006); *State v. McDonald*, 123 Wn. App. 85 at 89, 96 P.3d 468 (2004).

Defense counsel's failure to seek an inferior degree offense instruction can deprive an accused of the effective assistance of counsel. *Pittman, supra*; *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004). Counsel's failure to request appropriate instructions constitutes ineffective assistance if (1) there is a significant difference in the penalty between the greater and the inferior degree. (2) the defense strategy would be the same

²⁷ This is different from the test for lesser included offenses, which requires that the lesser offense meet both a legal and a factual prong. *Fernandez-Medina*, at 455.

for both crimes, and (3) sole reliance on the defense strategy in hopes of an outright acquittal is risky, i.e. because of credibility problems if the defendant testifies. *Pittman, supra; Ward, supra.*

In *Pittman, supra*, the defendant was charged with attempted residential burglary. At trial, his attorney failed to request the lesser-included instruction of attempted trespass. The Court of Appeals reversed his conviction, finding that defense counsel's failure to request the instruction constituted ineffective assistance:

[C]ounsel's failure to request a lesser included offense instruction left Pittman in [a] tenuous position... One of the elements of the offense charged was in doubt--his intent to commit a crime inside [the] home--but he was plainly guilty of some offense. Under those circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense....His entire defense was that he never intended to commit a crime once he was inside [the] home. This was a risky defense [because] he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.
Pittman, at 387-389.

Similarly, in *Ward*, the defendant was charged with two counts of second degree assault, with firearm enhancements. His attorney failed to offer the lesser included offense instruction for unlawful display of a weapon. The Court of Appeals reversed for ineffective assistance:

First, the potential jeopardy for Ward was considerable. He faced 89 months in prison for the two assaults, including the mandatory firearm enhancements. Unlawful display of a weapon, by contrast, is a gross misdemeanor carrying a maximum penalty of one year in jail and revocation of a concealed weapons permit.

Misdemeanor offenses are not subject to the imposition of firearm enhancements.

Second, Ward's defenses were the same on both the greater and lesser offenses. His theory at trial was lawful defense of self and property. These are complete defenses to both second degree assault and unlawful display of a weapon. An instruction on the lesser included offense was therefore at little or no cost to Ward. If the jury had believed Ward acted lawfully, he would have been acquitted of both the greater and lesser offenses. If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor.

Finally, self-defense as an all or nothing approach was very risky in these circumstances, because it relied for its success chiefly on the credibility of the accused. Ward testified he believed Tuttle and Baldwin were there to steal his car...But the arresting officers testified Ward told them he was trying to stop a repossession. This greatly impeached Ward's credibility on the defense of property theory and also called into question his testimony that Baldwin was carrying a crowbar in a menacing fashion, thus undermining his theory of self-defense as well. Ward's credibility was further damaged when his testimony about the methamphetamine directly conflicted with his counsel's opening statement. Given the developments at trial and the starkly different potential penalties, it was objectively unreasonable to rely on such a strategy.

In these circumstances, we can see no legitimate reason to fail to request a lesser included offense instruction. The all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults.

Ward, supra, at 249-250, citations and footnotes omitted.

In this case, defense counsel's failure to request instructions on the inferior degree offense of Murder in the Second Degree denied Mr. Covarrubias the effective assistance of counsel. Second Degree Felony Murder is an inferior degree offense of First Degree Felony Murder. *Fernandez-Medina, at 455.* When taken in a light most favorable to Mr.

Covarrubias, the evidence suggested that he was guilty only of Second Degree Felony Murder, with a predicate felony of either Rape in the Third Degree or Rape of a Child in the Third Degree. The evidence presented at trial was consistent with consensual sexual activity followed by death, or with nonconsensual but unforced sexual activity followed by death. RP (4/5/06) 167; RP (4/18/06) 110, 140. Accordingly, Mr. Covarrubias was entitled to the inferior degree instruction.

As in *Ward* and *Pittman*, an all-or-nothing strategy exposed Mr. Covarrubias to enormous potential jeopardy. As charged, he faced a mandatory minimum sentence of 20 years in prison. RCW 9.94A.540. His standard range was 312 to 416 months. CP 8. However, under the inferior degree offense of Second Degree Felony Murder, he faced no mandatory minimum, and his standard range was only 195 to 295 months.

As in *Ward* and *Pittman*, Mr. Covarrubias' defense-- that he had consensual sex with Ms. Carter but was neither present for nor involved in her death-- would have been the same for both charges. The inferior degree offense would not require an inconsistent strategy; thus, there was no cost to Mr. Covarrubias in submitting the inferior degree instruction.

Finally, as in *Ward* and *Pittman*, relying solely on the complete defense (that he wasn't present for or involved in Ms. Carter's death) was extremely risky. First, since Mr. Covarrubias admitted to a sex offense

(oral sex with a fifteen-year-old), it is more likely that the jury, “with no option other than to convict or acquit,” would choose conviction, even if they had doubts about his guilt of the charged crime. *Pittman*, at 389. Second, the defense was based on Mr. Covarrubias’ own testimony, but (as in *Ward, supra*) his credibility was badly damaged-- he had denied sexual contact when interviewed by the police, he admitted to lying (during the interview as well as to Ms. Carter’s friends), he was impeached with his prior conviction for theft, and he was attempting to avoid arrest on a DOC warrant. RP (4/19/06) 48-162. Third, the officers claimed that Mr. Covarrubias had cried and come close to confessing during their interview with him. RP (4/11/06) 159-200; RP (4/13/06) 72-113. Fourth, Mr. Covarrubias was last seen pursuing Ms. Carter after leaving the party. RP (4/6/06) 36-37. Fifth, Mr. Sonnabend’s testimony that he had seen the couple on the waterfront trail suggested that Mr. Covarrubias was present for Ms. Carter’s death, even if it didn’t occur during a forcible rape. Given all these facts, an “all or nothing” strategy was unreasonable. Mr. Covarrubias was denied the effective assistance of counsel by his attorney’s failure to request an instruction on the inferior degree offense of Second Degree Felony Murder.

There is a reasonable probability that the jury would have convicted Mr. Covarrubias of Second Degree Felony Murder had the

appropriate inferior degree instructions been given. The state didn't present any evidence of forcible compulsion, and Mr. Covarrubias testified that he had consensual sex with Ms. Carter. Given the evidence, the jury could reasonably have concluded that Mr. Covarrubias had consensual sex with Ms. Carter (Rape of a Child in the Third Degree), or that he had nonconsensual sex without forcible compulsion (Rape in the Third Degree), and that he intentionally or accidentally caused her death thereafter. In either case, he would have been guilty Second Degree Felony Murder and not First Degree Felony Murder.

Mr. Covarrubias was prejudiced by his attorney's failure to pursue an inferior degree offense. Both prongs of the *Strickland* test are met, and Mr. Covarrubias was denied the effective assistance of counsel. *Pittman, supra; Ward, supra*. The conviction must be reversed and the case remanded for a new trial.

B. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys' failure to seek exclusion of certain evidence.

Where a claim of ineffective assistance is based on a failure to challenge the admission of evidence, the appellant must show (1) an absence of legitimate strategy for the failure to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998). The same analysis applies where defense counsel elicits damaging inadmissible evidence, either intentionally or inadvertently. *Saunders, supra*.

In *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004), the defendant was charged with possession of methamphetamine. His trial counsel did not move to suppress the drugs, which the Supreme Court described as “the most important evidence the State offered” at trial. *Reichenbach*, at 130. Because an argument in favor of suppression was available to counsel, the Court ruled that “his failure to challenge the search...cannot be explained as a legitimate tactic, [and thus his] conduct was deficient.” *Reichenbach*, at 131. The Court then turned to the merits of the suppression argument, found that the methamphetamine was illegally seized, and reversed the conviction:

Because the methamphetamine was illegally seized and there was no tactical reason for failing to move to suppress, counsel's deficient performance was clearly prejudicial. Reichenbach's conviction for possession of methamphetamine was dependant on the baggie that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. Reichenbach's right to the effective assistance of counsel was violated. *Reichenbach*, at 137.

1. Defense counsel should have moved to exclude Mr. Covarrubias' statement under the *corpus delicti* rule.

Under the *corpus delicti* rule, a defendant's statement may not be admitted into evidence unless the state produces independent evidence establishing the "body of the crime." *State v. Brockob*, 159 Wn.2d 311 at 327-328, 150 P.3d 59 (2006). Traditionally, the *corpus delicti* of any homicide charge was established by proof of a causal connection between a death and a criminal act. *See, e.g., State v. Rooks*, 130 Wn. App. 787 at 802, 104 P.3d 670 (2005); *State v. Finch*, 137 Wn.2d 792 at 838, 975 P.2d 12 (1999). Thus, in felony murder cases, the rule did not require independent proof of the predicate felony. *See, e.g., State v. C.M.C.*, 110 Wn. App. 285 at 289 n. 10, 40 P.3d 690 (2002); *State v. Medlock*, 86 Wn. App. 89 at 100, 935 P.2d 693 (1997).

However, in *Brockob, supra*, the Supreme Court clarified that the rule requires "the State to present evidence that is independent of the defendant's statement and that corroborates not just a crime but the specific crime with which the defendant has been charged." *Brockob*, at 329. Furthermore, the independent evidence must be consistent with guilt and inconsistent with innocence as to the charged crime. *Brockob at 329*. In other words, if the independent evidence supports both a hypothesis that the defendant is guilty of the charged crime and a hypothesis that the defendant is innocent of the charged crime, it is insufficient to permit the defendant's statements to be admitted into evidence. *Brockob, at 330*.

332. Under the rule as explained by *Brockob*, the traditional *corpus* for a general homicide is no longer sufficient to admit a defendant's statements. Instead, the state must present independent evidence establishing the *corpus delicti* of the actual crime charged, including (in the case of felony murder) the predicate felony.

Defense counsel's failure to object to admission of a statement on *corpus* grounds may constitute ineffective assistance. *State v. C.D.W.*, 76 Wn. App. 761, 887 P.2d 911 (1995). To prevail, a defendant must show the absence of a legitimate strategy, a valid *corpus delicti* objection, and prejudice. *C.D.W.* at 764-765.

In this case, defense counsel was ineffective for failing to object to the admission of Mr. Covarrubias' statement²⁸ in violation of the *corpus delicti* rule. First, there was no legitimate strategic reason that would favor admission of the statement. During the interview, Mr. Covarrubias denied sexual contact with Ms. Carter, a statement that directly contradicted the physical evidence. RP (4/11/06) 157-165, 202; RP (4/12/06) 15-24. He also made a number of ambiguous statements, which could be used to imply guilt, such as "You have to understand how fucked

²⁸ As the Supreme Court has made clear, the *corpus delicti* rule applies to all statements, whether inculpatory, neutral, or exculpatory. *State v. Brockob, supra*, at 328 n. 11.

up we were...” RP (4/11/06) 198. And he placed himself in an extremely unsympathetic light by making a derogatory statement toward Ms. Carter, calling her a bitch. RP (4/12/06) 20. Furthermore, his verbal statements were (according to the officers) accompanied by changes in demeanor indicating distress with certain topics. Finally, he ended the interview at a point where (again, according to the officers) he was extremely distressed, and on the verge of making an admission. RP (4/11/06) 200-201.

With the statement excluded, there was not sufficient evidence to submit the case to the jury.²⁹ Furthermore, if, in the absence of the statement, Mr. Covarrubias were forced to go to trial on a lesser charge, he would have had the option of choosing to remain silent during trial, or he could have testified, acknowledging prior inconsistent statements without the additional injurious testimony about ambiguous statements and his demeanor during the interview. For all these reasons, defense counsel should have moved to exclude the statement under the *corpus delicti* rule.³⁰

²⁹ As argued elsewhere in the brief, the evidence was insufficient to convict Mr. Covarrubias, even with his statements.

³⁰ Although *Brockob* was published in December, 2006, the arguments in *Brockob* were all available to defense counsel. As the eight justice majority in *Brockob* made clear, the decision in *Brockob* was based squarely on the Court’s 1996 decision in *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). *Brockob*, at 327-333.

Second, a valid *corpus delicti* argument was available. To establish the *corpus delicti* under the rule (as clarified by the Supreme Court in *Brockob*), the state was required to produce independent evidence that Ms. Carter's death occurred "in the course of or in furtherance of... or in immediate flight" from a forcible rape. RCW 9A.32.050. The evidence was consistent with this scenario, but it was also consistent with a "hypothesis of innocence" of the charged crime. *Brockob*, at 329-330, 332. As the experts testified, sexual contact could have occurred hours before the death, or even hours after the death, with no connection between the two events. RP (4/5/06) 167; RP (4/18/06) 140. Similarly, the experts agreed that any sexual contact may well have been consensual, rather than forcible and nonconsensual. RP (4/5/06) 167; RP (4/18/06) 140. Accordingly, the *corpus delicti* of first degree felony murder based on forcible rape was not established by independent evidence. *Brockob*, *supra*. Had defense counsel objected on *corpus delicti* grounds to admission of Mr. Covarrubias' statement, the objection would have been sustained, and the statement excluded.

Third, Mr. Covarrubias was prejudiced by his attorney's deficient performance. Without his statements (including the ambiguous statements and the alleged demeanor evidence), the prosecution lacked sufficient

evidence to submit the case to the jury.³¹ Furthermore, Mr. Covarrubias' statement damaged him in the eyes of the jury because (1) it was inconsistent with the physical evidence, (2) it included ambiguous statements that could be interpreted as admissions, as well as derogatory statements toward Ms. Carter, (3) it was accompanied (according to the officers) with changes in Mr. Covarrubias' demeanor indicating distress about certain topics, and (4) Mr. Covarrubias cut off the interview (according to the officers) when he was on the verge of confessing.

Admission of the statement also tied his hands with regard to the need to testify. Without the statement, he could have exercised his right to remain silent. With the statement in evidence, he could not avoid testifying to explain and deny the officers' versions of events. Even if he chose to testify, he would only be subject to impeachment with prior inconsistent statements-- not with ambiguous statements or the officers' observations regarding his demeanor. His testimony could have included proactive explanations of any prior inconsistent statements-- for example, that he denied sexual contact with Ms. Carter because he feared prosecution for a sex offense, after he'd learned from Mr. Criswell that she

³¹ As argued elsewhere in the brief, the evidence was insufficient to convict Mr. Covarrubias, even with his statements.

was underage. Instead, the jury first heard about his lies, his ambiguous remarks, his derogatory statement about Ms. Carter, his demeanor, and his decision to end the interview, and he was forced to play “catch up” to try and repair the damage done by the admission of his statement.

Because defense counsel failed to object to admission of the statement on *corpus* grounds, Mr. Covarrubias was denied the effective assistance of counsel. *Brockob, supra; State v. C.D.W., supra.* His conviction must be reversed and his case remanded for a new trial. *Reichenbach, supra.*

2. Defense counsel should have moved to suppress Mr. Covarrubias’ statement because it was obtained in violation of *Miranda v. Arizona.*

As argued elsewhere in this brief, Mr. Covarrubias’ statement should have been excluded because the prosecution failed to establish compliance with *Miranda, supra.* If the issue is not preserved for review, then Mr. Covarrubias was denied the effective assistance of counsel. First, there was no strategic purpose favoring admission, as outlined in the preceding section relating to the *corpus delicti* rule. Second, the statement was inadmissible under *Miranda* and *Missouri v. Seibert, supra.* Third, Mr. Covarrubias was prejudiced by admission of the statement, for the reasons outlined in the preceding section relating to the *corpus delicti* rule.

For all these reasons, the conviction must be reversed and the case remanded for a new trial. *Reichenbach, supra*.

3. Defense counsel should have moved to suppress Mr. Sonnabend's out-of-court identification of Mr. Covarrubias from a newspaper photograph.

As noted elsewhere in this brief, the admission of Mr. Sonnabend's out-of-court identification from a newspaper photograph violated Mr. Covarrubias' constitutional right to due process. If the issue is not preserved for review due to defense counsel's failure to object, then Mr. Covarrubias was denied the effective assistance of counsel. First, Mr. Sonnabend's identification was damaging, as it placed Mr. Covarrubias on the waterfront trail with a young woman on the night Ms. Carter disappeared. There was no strategic purpose served by admission of the out-of-court identification. *See Reichenbach, supra*. Second, as argued elsewhere in this brief, admission of Mr. Sonnabend's identification violated due process because it was unduly suggestive.

Third, Mr. Covarrubias was prejudiced by the testimony. Mr. Sonnabend provided the only evidence placing Mr. Covarrubias near where Ms. Carter's body was discovered. He also provided testimony from which lack of consent could be inferred. Without his testimony, some jurors might well have decided that the state had not met its burden beyond a reasonable doubt. For all these reasons, Mr. Covarrubias was

denied the effective assistance of counsel. *Reichenbach, supra*. The conviction must be reversed and the case remanded for a new trial.

4. Defense counsel should have moved to exclude expert testimony that this was a “typical” and/or “classic” rape and murder case.

As noted elsewhere in this brief, the admission of expert testimony that Mr. Covarrubias was guilty violated his constitutional right to a jury trial. If that issue is determined not to present a manifest error affecting a constitutional right, or if the error was invited, then Mr. Covarrubias was denied the effective assistance of counsel by his attorneys’ failure to object to the evidence.

First, there was no strategic purpose served by admitting the evidence. The state had no way of establishing that Ms. Carter’s death occurred during a forcible rape. The doctors’ characterizations of the case as a “typical” or “classic” sexual assault homicide comprised a direct opinion on every element of the offense. Admission of the evidence provided no benefit to Mr. Covarrubias, and an objection should have been made.

Second, there were several bases to exclude the testimony. As argued elsewhere, it violated his constitutional right to a jury trial as an explicit opinion on his guilt. *Kirkman, supra*. Furthermore, the doctors’ testimony amounted to opinions that Ms. Carter fit the profile of a

“typical” or “classic” sexual assault homicide. Such victim profile evidence is “highly undesirable as substantive evidence.” because it is inherently prejudicial and has very little probative value. *State v. Suarez-Bravo*, 72 Wn. App. 359 at 365, 864 P.2d 426 (1994), *citations omitted*; *see also State v. Braham*, 67 Wn. App. 930 at 937, 841 P.2d 785 (1992), *State v. Black, supra*, at 348-350. Thus the evidence should have been excluded under ER 401 and ER 403. *Suarez-Bravo*, at 365; *Black*, at 348-350.

Third, the evidence prejudiced Mr. Covarrubias. The state had no evidence to show that Ms. Carter was forcibly raped, or that her death was contemporaneous with any kind of sexual activity. The jury could have erroneously viewed this opinion testimony as sufficient for a conviction, when combined with evidence that Mr. Covarrubias’ semen was discovered on the body.

Accordingly, defense counsel’s failure to object to the improper opinion testimony denied Mr. Covarrubias the effective assistance of counsel. *Reichenbach, supra*. His conviction must be reversed and the case remanded for a new trial.

C. Mr. Covarrubias was denied the effective assistance of counsel by his attorneys' failure to offer evidence that Mr. Criswell had harbored thoughts of killing Ms. Carter.

A claim of ineffective assistance based on a failure to offer evidence is evaluated under the *Strickland* standard: appellant must show deficient performance and resulting prejudice. *Daniels v. Woodford*, 428 F.3d 1181 at 1209 (9th Cir. 2005); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). Prejudice is determined by comparing the evidence that actually was presented to the jury with that which could have been presented had counsel acted appropriately. *Daniels v. Woodford*, at 1201.

Here, defense counsel's failure to introduce Mr. Criswell's statements-- that he'd thought of "removing Ms. Carter from this world"-- fell below an objective standard of reasonableness. RP (3/30/06) 7. The evidence was critical to the defense strategy of implicating Mr. Criswell as a suspect in Ms. Carter's death. Mr. Criswell's statements provided strong support for the defense theory, and there was no downside to presenting it to the jury. The trial court held that "other suspect" evidence was admissible as to Mr. Criswell, thus the evidence would have been admitted had defense counsel offered it. RP (4/20/06) 127-129.

The error prejudiced Mr. Covarrubias, and undermines confidence in the outcome. The "other suspect" evidence implicating Mr. Criswell

included the couple's argument at the party, the fact that she hit him up to five times before storming away, his warning that she'd never see him again, and the fact that his closest friend knew of her death and its location before her body was discovered. RP (4/6/06) 79; RP (4/11/06) 39; RP (4/17/06) 112-145. Although this was strong evidence of Mr. Criswell's involvement in Ms. Carter's death, it would have been stronger had defense counsel introduced evidence that he had harbored thoughts of killing her. There is a reasonable probability that the additional evidence would have produced a reasonable doubt in the mind of at least one juror and changed the outcome of the proceeding. Accordingly, counsel's failure to offer the evidence deprived Mr. Covarrubias of his constitutional right to the effective assistance of counsel. His conviction must be reversed and the case remanded for a new trial. *Strickland, supra*.

X. CUMULATIVE ERROR REQUIRES REVERSAL OF MR. COVARRUBIAS' CONVICTION.

Reversal may be required due to the cumulative effects of more than one error, even if each error examined on its own would otherwise be considered harmless. *State v. Chamroeum Nam*, 136 Wn. App. 698 at 708, 150 P.3d 617 (2007); *State v. Coe*, 101 Wn.2d 772 at 789, 684 P.2d 668 (1984).

In this case, numerous errors undermined confidence in the outcome of Mr. Covarrubias' trial. The trial court erroneously admitted (1) a tainted identification, (2) Mr. Covarrubias' statements, (3) inadmissible hearsay testimony about Ms. Carter's state of mind more than six months prior to her death, and (4) expert testimony directly commenting on Mr. Covarrubias' guilt. The prosecutor committed misconduct by presenting her own unconstitutional definition of reasonable doubt, which contradicted the court's definition, and by injecting her own personal belief into the case. Defense counsel was hampered by numerous conflicts of interest, and failed to provide effective assistance. Taken together, these errors were significant.

Furthermore, if the evidence is deemed sufficient to establish beyond a reasonable doubt that Mr. Covarrubias caused Ms. Carter's death in connection with a forcible rape, it is only barely sufficient. Given the number of errors and the weakness of the state's case, reversal is required.

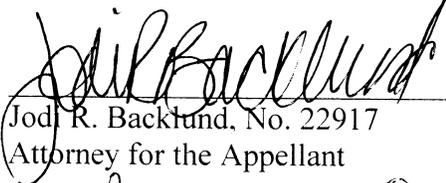
Nam, supra.

CONCLUSION

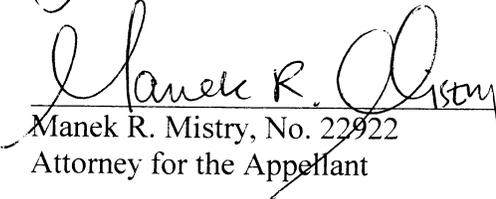
For all of the foregoing reasons, Robert Covarrubias' conviction for Felony Murder in the First Degree must be reversed.

Respectfully submitted on April 23, 2007.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant

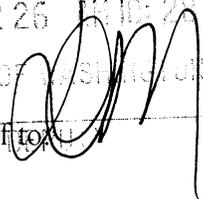


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DIVISION II

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BY 

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to

Robert Covarrubias, DOC #810822
Stafford Creek Corrections Center, IMU FB02
191 Constantine Way
Aberdeen, WA 98520

and to:

Clallam County Prosecuting Attorney
Deborah Snyder Kelly
223 East 4th Street, Suite 11
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 23, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 20, 2007.


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