NO. 37217-7

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

IN RE PERSONAL RESTRAINT PETITION OF

FELIX JOSEPH D'ALLESANDRO

PERSONAL RESTRAINT PETITION
AND OPENING BRIEF IN SUPPORT

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A. STATUS OF PETITIONER

Petitioner Felix Joseph D'Allesandro (hereinafter "D'Allesandro"), by and through his attorneys Rita J. Griffith and Jeffrey E. Ellis, applies for relief from confinement. D'Allesandro is currently incarcerated at the Washington State Reformatory in Monroe, Washington, serving a 344-month sentence for a murder conviction.

B. FACTS

1. Procedural History

D'Allesandro was charged and convicted by a jury of first-degree murder in Thurston County Superior Court (Case No. 03-1-01389-1). He was originally sentenced on March 31, 2004, by Judge Richard D. Hicks who imposed an exceptional sentence of 384 months. *See* (First) Judgment and Sentence attached as Appendix A.

D'Allesandro appealed, challenging both his conviction and sentence. This Court affirmed his conviction, but reversed his exceptional sentence finding it violated the *Blakely* rule. *See* Direct Appeal Opinion attached as Appendix B. The Supreme Court later denied review. *See* Appendix C. The mandate issued on October 17, 2006.

D'Allesandro was then returned to Thurston County Superior Court, where on November 28, 2006, he was sentenced to 344 months. *See*

(Second) Judgment and Sentence attached as Appendix D. No appeal followed that Judgment.

This is D'Allesandro's first collateral attack on his Judgment.

2. Facts

a. Summary of facts regarding the homicide[1]

In July, 2003, Felix Joseph D'Allesandro lived in a converted garage next to his parents' home. RP 1640. He had graduated from high school and was working on his Associate of Technical Arts degree from South Puget Sound Community College; he worked as well at his mother's shop in Olympia, Washington. RP 1641-1642. D'Allesandro had known David George, the stabbing victim, for approximately one and a half years at the time of the incident and had purchased cocaine from him. RP 1642. D'Allesandro considered George to be a friend. RP 1646.

Mert Celebisoy was also a friend of D'Allesandro. Both D'Allesandro and Celebisoy, as well as David George, bought and sold cocaine. RP 1646.

[1] D'Allesandro is separately moving to incorporate the entire appellate record, including the verbatim report of proceedings, as additional support for this personal restraint petition. The trial transcripts are designated "RP," while voir dire is designated "1RP."

According to his trial testimony, on the morning of the day George was stabbed, D'Allesandro had slept late. Celebisoy called and asked him to get in touch with George because Celebisoy needed to purchase cocaine. RP 1648. Celebisoy called first and then drove to D'Allesandro's. RP 1648. D'Allesandro paged George who responded a short time later. RP 1649. D'Allesandro drove his car. RP 1650. Celebisoy's license to drive had been suspended and so D'Allesandro did not permit him to drive. RP 1646. When they met up with George as arranged on the phone, Celebisoy got out of the car and he and George had a brief conversation which D'Allesandro could not hear. RP 1651-1652. After the conversation, George got into the front seat and Celebisoy into the back seat. RP 1652.

Celebisoy asked D'Allesandro to drive to Boston Harbor Road where he was going to deliver the drugs to someone who would pay for them. RP 1653. Celebisoy got out of the car and was gone for a few minutes. RP 1656. George got out of the car as well to purchase a scratch lottery ticket at a Shell Station. RP 1654. D'Allesandro testified that he was listening to the radio and not paying attention to the conversation between George and Celebisoy after they got back into the car until it got loud and threatening. RP 1658. Celebisoy stabbed George in the back and continued stabbing him multiple times. RP 1658-1659.

D'Allesandro swerved and stopped. RP 1660. George grabbed his arm. RP 1660. George then opened the passenger door and he and Celebisoy got out of the car. RP 1661. The two moved towards the rear of the car. RP 1661. Celebisoy came around to the front of the car, popped open the trunk, walked back and pushed George's upper torso into the trunk, lifted his feet in and closed the trunk. RP 1662.

D'Allesandro was too shaken to drive so he got into the passenger side of the car. RP 1663. Celebisoy was driving so erratically, however, that D'Allesandro resumed driving. RP 1664. He drove home. Approximately seven hours later, D'Allesandro followed Celebisoy's car to a house on Governor Stevens Road. RP 1668-1669. Celebisoy entered the house and came out though the garage; D'Allesandro pulled into the garage and Celebisoy closed the door. RP 1672. Celebisoy moved the body from the trunk after placing it on a tarp. RP 1673-1674. He directed D'Allesandro to clean his car. RP 1674, 1679. Celebisoy took a trash bag and placed everything from the car into it. RP 1677. D'Allesandro believed that the body was in a green trash bin when they left the house. RP 1675. D'Allesandro never returned to the house, but he spoke with Celebisoy many times a day between the time of the stabbing and his arrest. RP 1682.

Parts of George's dismembered body were found buried on property on Libby Road owned by Jay Barrett, a man who had previously employed Mert Celebisoy. RP 289-293, 363. Celebisoy had cut wood and used a chainsaw and a sawzall adeptly while working for Barrett. RP 364. Barrett had taught Celebisoy to use the sawzall. RP 365. The police later learned that a sawzall was likely used to dismember the body. RP 418, 654, 913-915, 939-940, 946.

Barrett's friends, Jessica and Charles Cortelyou, who also had befriended Celebisoy and who lived at the house on Governor Steven's Road, found trash bags with blood and hair and the items from D'Allesandro's car at their house. RP 322-327, 388-391, 411-415, 686, 689, 694, 711-713. D'Allesandro's insurance card and student notebook in the trash bags led the police to him and eventually to Celebisoy. RP 327. D'Allesandro told the police about the incident, although he denied going to the house on Governor Stevens Road after the stabbing. RP 956-965, 967-969.

Cortelyou had been transferred to Forks and only returned to his house in Olympia on Governor Stevens Road on weekends. RP 386-387. Celebisoy knew that the house was empty at the time. RP 376-377. Cortelyou had asked Celebisoy to return the key he had to the house, but Celebisoy had not done so. RP 407-409.

Neither Barrett nor Cortelyou knew D'Allesandro. RP 381, 428. Celebisoy's prints were recovered from plastic bags found at Governor Stevens Road. RP 1228-1231, 1236-1237. George died of stab wounds which were consistent with being inflicted by someone sitting in the back seat of the car. RP 885-886, 895.

In spite of the evidence that George was stabbed by someone in the back seat of the car and the evidence tying him to the Cortelyou and Barrett properties and use of the sawzall, Celebisoy's account of the incident placed the entire blame on D'Allesandro. He said that D'Allesandro came to his house and asked him to drive D'Allesandro's car to meet someone. RP 1493. Celebisoy claimed D'Allesandro wanted money back from an earlier drug purchase. RP 1497. Celebisoy said he got out of the car when D'Allesandro started stabbing George. RP 1500-1503. According to Celebisoy, after the stabbing, D'Allesandro told him to help get the body into the trunk. RP 1504-1507. He said he helped because D'Allesandro threatened him and his family. RP 1516-1543. Celebisoy said that D'Allesandro dismembered the body, and denied helping to bury the body. RP 1526-1529, 1538. To try to offset the testimony about his own proficiency with the sawzall, Celebisoy presented testimony in his case to the jury that D'Allesandro carried a leatherman, a multi-tool implement, and a taser. RP 1628-1631, 1634.

The state presented the testimony of some of D'Allesandro's friends about what he supposedly said to them. Meghan Graham, who had gone to the jail with her mother to see D'Allesandro, after reading about the incident in the paper, testified that he told her while in jail that after George had been stabbed George grabbed D'Allesandro's arm and begged for his life. RP 516-518, 548. Graham's mother, Gidget King, testified that D'Allesandro said, at the jail, that he was driving the car and that George grabbed his arm and begged him for help. RP 807. According to King, D'Allesandro said he lured George there and went there knowing what was going to happen and it had to do with cocaine. RP 808-809. King said D'Allesandro denied doing the stabbing. RP 812. King called the police to report her alleged conversation nine days after her visit to the jail. RP 824. Another acquaintance of D'Allesandro's testified that D'Allesandro brought up the subject of a body being found on Libby Road and said that he thought he could get away with murder by hiding the body where no one would find it. D'Allesandro mentioned David George in the same conversation and said that no one would miss him if he were gone. RP 601-602. Jailhouse informant Dennis Hargrove said D'Allesandro showed him a newspaper clipping and said it was his handiwork. RP 1313-1316.

b. Facts relevant to court's decision to close the courtroom

At the start of jury selection, D'Allesandro's attorney asked to privately question certain jurors before the lawyers questioned the entire prospective jury panel. 1RP 2. Defense counsel suggested that the questioning take place in an "empty" courtroom, explaining "[b]y that I mean apart from the remaining prospective jurors." 1RP 2. In response, the trial court agreed and additionally proposed "temporarily" closing the courtroom to the public. Counsel for both defendants and the prosecutor agreed to the Court's proposal. 1RP 5.

The court then told the "observers" that they were welcome throughout the trial and most of voir dire, but not when those prospective jurors who requested privacy were questioned. 1RP 5-8. Members of the public, including Mr. D'Allesandro's parents, were asked to leave and were excluded through the questioning of approximately one-third of the prospective jurors. Fourteen jurors were excused while the courtroom was closed. 1RP 25, 160.[2]

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[2] Virtually none of the jurors discussed highly personal matters when questioned privately. Most who were questioned in the closed courtroom had read about the crime, knew a witness or knew someone who had been a victim of a crime or convicted of a crime. For example, Juror 20 reported that her husband had received a threatening phone call and the county prosecutor declined to press charges, although the city attorney did. 1RP 29-31. Juror 22 reported that his brother had been murdered in 1989, and the perpetrator had never been found. 1RP 35. Juror 24's friend's ex-husband had been convicted of murdering two people. 1RP 65. Juror 25 recognized the co-defendant's name as having passed

Later, during the trial, the court again closed the courtroom to inquire whether a juror knew one of the witnesses. RP 734-735. The court asked "all of you [the audience] to just file out temporarily and then you'll be welcome to come back in." The court closed the courtroom reasoning that it was easier than moving the parties into chambers. RP 733. During the inquiry, Juror 11 reported that the witness "may have gone to school with one of my friends, to college. I just recognize her so I'm not sure if it's for sure the same person." RP 734. Juror 11 assured the court that she could remain impartial. RP 737. After the court determined that there was no basis for disqualifying the juror, the courtroom was re-opened. RP 738.

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bad checks. 1RP 58-60. Juror 30 indicated that he feared that there might be some retribution against jurors. 1RP 74-77. Juror 47 had been accused of arson when he was a teenager in 1966, but the case had been dismissed. 1RP 83-85. Juror 49's brother-in-law was a reserve deputy and had been to the scene of the crime to look for evidence. 1RP 86-89. Juror 53 helped raise a young man who had been convicted of a sexual offense six years earlier. 1RP 93-94. Juror 55 had read about the crime in the paper and did not believe he could be fair. 1RP 96-97. Juror 82's nephew was convicted for murder twenty-two years earlier. 1RP 112-113. Juror 62's husband's nephew had been murdered and decapitated ten years earlier. 1RP 132. Juror 65's neighbor had killed his wife. 1RP 141. Other prospective jurors (28, 43, 66, 67, 72, 73, 76, 82, 89) had either read about the crime in the paper or knew one of the witnesses. 1RP 99-100, 103, 111-112, 118, 122-124, 130-131.

Only two jurors had personally been victims of a crime; one had been convicted of a misdemeanor. Juror 23 had been a victim of an assault in 1967, but assured counsel and the court that it had not bothered her traumatically in some time. 1RP 42-44. Juror 71 had been a victim of a sexual assault, but indicated that she did not mind talking about it. 1RP 162-164. Juror 90 said he was embarrassed because he had a prior DWI conviction. 1RP 119.

As the attached declarations attest, D'Allesandro's parents were present at every part of the trial, except when the court was closed when they sat outside of the courtroom. *See* Appendices E and F.

C. GROUNDS FOR RELIEF

<u>FIRST GROUND</u>: D'ALLESANDRO WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A PUBLIC AND OPEN TRIAL WHEN THE TRIAL COURT TWICE CLOSED THE COURTROOM WITHOUT FIRST CONDUCTING A HEARING OR ENTERING FINDINGS JUSTIFYING CLOSURE.

1. It is reversible error to close a courtroom without first holding a hearing and entering findings.

It is indisputable that D'Allesandro's trial judge twice closed the courtroom, each time without first conducting a hearing or making the necessary findings justifying closure. Because it is now clear this issue can neither be invited nor waived and always constitutes reversible error, this Court should grant this petition and remand D'Allesandro's case for a new trial. *See* Washington Constitution, Article I, sections 10 and 22; United States Constitution, Amend I (public's right of access), Amend VI (defendant's right to a public trial); Amend XIV (applying these protections to states). *See also In re Oliver,* 333 U.S. 257, 266, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1948) (federal constitutional right to a public trial applicable to the states through 14th Amendment); *State v. Easterling*, 157

Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials).

Whether a defendant's right to a public trial has been violated is a question of law that is reviewed *de novo*. *State v. Brightman,* 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

2. The accused and the public share a right to open and public trials.

The state and federal constitutions guarantee to both a criminal defendant and any interested persons[3] the right to a public and open trial—a right which extends to pretrial proceedings, including voir dire. *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during voir dire and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system). As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984), "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system."

[3] "Justice in all cases shall be administered openly, and without unnecessary delay." Art. 1, section 10. This gives the public and the press the right to open courtroom proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

3. Any contemplated closing triggers certain mandatory steps that must be taken by the trial court.

The Washington Supreme Court has "strictly watched over the accused's and the public's right to open public criminal proceedings." *Easterling*, 157 Wn.2d at 174 (citing *State v. Brightman*, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) (reversible error to close the courtroom during jury selection); *Orange*, 152 Wn.2d at 812 (reversible error to close the courtroom during voir dire); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion)). As a consequence, "a trial court may not close a courtroom without, first, applying and weighing five requirements set out in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, at 175 (citing *Bone-Club*, at 258-259).

The *Bone-Club* requirements are:

1. The proponent of closure. . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;

4. The court must weigh the competing interests of the proponent of the closure and the public;

5. The order must be no broader in its application or duration than necessary to serve its purpose;

Easterling, at 175, n.5; *Bone-Club*, at 258-259.

These requirements are necessary to protect both the accused's right to a public trial *and* the public's right to opening proceedings. *Easterling*, at 175. Because the trial court must protect both interests, it is "the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error." *Easterling*, at 180.

Specifically, the *Easterling* Court held that this outcome was compelled by "our prior decisions relating to article 1, section 22 of our state constitution, which require trial courts to strictly adhere to the well-established guidelines for closing a courtroom, and . . .[by] public policy as made manifest by the federal and state constitutions which favors keeping criminal judicial proceedings open to the public unless there is a compelling interest warranting closure." *Easterling*, at 177.

A court is "closed" when spectators are excluded for at least some portion of the trial. *See Brightman,* 155 Wn.2d at 511; *Orange,* 152 Wn.2d at 802; *Bone-Club,* 128 Wn.2d at 256-57.

4. A specific finding must precede closing a courtroom.

Any contemplated closing, whether requested by a party or considered *sua sponte* by the court, triggers the court's duty to conduct a hearing and enter findings, if a decision is made to close the courtroom. The constitutional presumption of openness may be overcome only by "an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Orange,* 152 Wn.2d at 806 (emphasis added) (quoting *Waller v. Georgia,* 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by *Bone-Club,* [the court on appeal] cannot determine whether the closure was warranted." *Brightman,* 155 Wn.2d at 518.

There is a strong presumption that courts will remain open. Protection of this basic constitutional right requires a trial court to "resist a closure motion except under the most unusual circumstances." *Bone-Club,* 128 Wn.2d at 259.

5. A defendant cannot waive the trial court's duty to conduct a hearing and enter findings prior to closing a courtroom.

Because the trial court must act to protect the rights of both a defendant and the public to open proceedings, "the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right." *Brightman,* 155 Wn.2d at 517. This follows as a matter of logic: a defendant cannot waive the second *Bone-Club* requirement of allowing any interested spectators an opportunity to object before closing a courtroom. In other words, a defendant cannot invite or waive the public's right to an open trial. *Id. See also United States v. Raffoul,* 826 F.2d 218, 225-26 (3d Cir. 1987) (when request is made to close courtroom members of press and public who are present in the courtroom and subject to removal as a result of a closure order must be allowed a hearing on their objections in advance of closure).

6. Closing a courtroom without making the requisite findings is automatically reversible whether raised on direct appeal or in a PRP.

"Prejudice is necessarily presumed where a violation of the public trial right occurs." *Easterling,* 157 Wash.2d at 181, 137 P.3d 825. "The

denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Id.* The remedy is reversal and a new trial. *Id.* at 174.

When a claim of constitutional error is raised in a personal restraint petition, the petitioner must show by a preponderance of the evidence that the alleged error caused actual prejudice. *Orange,* 152 Wn.2d at 804. This burden is waived, however, if the error gives rise to a conclusive presumption of prejudice. *Id* . (quoting *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 328, 828 P.2d 492 (1992)). *See also McGurk v. Stenberg,* 163 F.3d 470 (8th Cir.1998) (habeas case involving a structural error does not require petitioner to prove prejudice).

7. The trial court closed the courtroom in this case without conducting a hearing and without making any of the *Bone-Club* findings.

It is indisputable that the trial court closed the courtroom twice—once during a portion of voir dire and later when it questioned a juror during trial. It is also indisputable that neither closing was preceded by the requisite hearing and findings by the court. Based on those facts alone reversal is required.

In response to defense counsel's request to speak to certain prospective jurors privately, *i.e.*, "apart from the remaining jurors," the trial court decided to question prospective jurors "outside of what's open

to the general public," so that "personal" or "embarrassing" matters would not be disclosed to the "glare of the whole community." 1RP 4. *See also* 1 RP 7 ("I'm thinking maybe what we'll do is maybe close this courtroom temporarily...we'll just ask members of the public to leave."). The record is clear that courtroom was, in fact, closed: "I'm going to ask all the public to now leave, except for the jurors. If you'd do that please." 1RP 25. The transcript then notes: "Public leaves." *Id.*

Prior to closing the courtroom, the trial judge conducted no hearing. No members of the public (who were required to leave) were given an opportunity to address the court. In addition, the trial court made no formal findings justifying the closure. His brief remarks preceding closure make no mention of weighing competing interests or why complete closure was the least restrictive means available to protect the privacy interests of potential jurors.

D'Allesandro does not need to show that he was prejudiced by closing the courtroom, nor does he need to show that closing the courtroom was unjustifiable in order to prevail. Instead, the absence of any findings automatically merits reversal. Because no "closure" hearing was held and no findings made, it makes no difference whether the State can now muster a justification for the closure. The failure to conduct a

hearing and enter findings contemporaneously with closing the courtroom alone merits reversal of D'Allesandro's conviction.

However, it is important to note for purposes of any future cases that the closure of voir dire to the public was not "the least restrictive means available for protecting the threatened interest[ ]" and does not satisfy the third *Bone-Club* factor. *Bone-Club,* 128 Wn.2d at 259. Indeed, the court could have protected the threatened interest to an impartial jury by bringing prospective jurors into the courtroom for voir dire one at a time. Likewise, there was no need to remove the public in order to ask one juror if she knew one of the witnesses during trial. It made sense to question that juror apart from other jurors, but it did not merit removing the public.

The recent decision in *State v. Frawley*, __ Wn. App. __, 167 P.3d 593 (2007), is directly on point. In *Frawley,* the State attempted to justify the full closure of the courtroom for a portion of jury selection arguing that the privacy interests of potential jurors outweighed the right to an open and public trial. *Frawley* rejected this distinction: "We can find no material distinction between individual voir dire of jurors in camera and

general voir dire of the jury panel. Jury selection is jury selection." 167 P.3d at 596.[4]

8. A change in the law justifies raising this issue again.

On direct appeal, D'Allesandro raised this issue in his *pro se* supplemental brief. This Court ruled against him holding that the defense "invited" this error and that D'Allesandro failed to demonstrate "prejudice flowing from the trial court's limited interviewing of potentially tainted jurors *in camera*, as he requested."

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[4] Like the case at bar, the trial court in *Frawley* did not conduct the requisite hearing before closing the courtroom. The Court rejected the State's argument that the appellate court should weigh the factors for the first time on appeal. "We review a trial judge's consideration of these factors as found in the record; we do not consider them for the first time on appeal." 167 P.3d at 597. Indeed, it is impossible to conduct the *Bone- Club* analysis on appeal since the rule requires a judge to ask any members of the public if they object and then to weigh the interests of the public against the asserted interest favoring closure. Neither a trial nor an appellate court can weigh competing interests when there has been no opportunity for the expression of the various interests of the press and public to closing a courtroom. A court cannot weigh the unknown.

In this case, two of the members of the public who were forced to leave without an opportunity to object were D'Allesandro's parents. *See* Appendix E and F. In *Orange*, the court noted the particular detriments of precluding the defendant's family from contributing to the jury selection process and the inability of the venire to see the interested family members. *Orange*, at 812 (citing *Watters v. State*, 328 Md. 38, 48, 612 A.2d 1288 (1992)). *Orange* concluded that "what the prospective jurors saw, as they entered and exited the courtroom, during at least the first two days of voir dire, was not the participation of family members in the jury selection process, but their conspicuous exclusion from it." *Orange*, at 812. The same was true here. Just as in *Orange*, Mr. D'Allesandro's parents "had a strong desire to sit through the entire trial." *Orange*, 152 Wn. 2d at 809. D'Allesandro was "at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 U.S. at 272.

Ordinarily, an issue previously raised and resolved on direct review cannot be raised again in a PRP. In order to merit a second look, the petitioner must show the ends of justice would be served by reexamining the issue. *In re Restraint of Vandervlugt,* 120 Wn.2d 427, 432, 842 P.2d 950 (1992); *In re Restraint of Taylor,* 105 Wn.2d 683, 688, 717 P.2d 755 (1986). This burden is met by showing an intervening change in the law "'or some other justification for having failed to raise a crucial point or argument in the prior application.' " *Taylor,* 105 Wn.2d at 688 (quoting *Sanders v. United States,* 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)); *see Vandervlugt,* 120 Wn.2d at 432. For example, this Court recently held that a change in the law of confrontation (the *Crawford* decision) which took place during the pendency of a direct appeal, but where the direct appeal decision did not rely on the new case, justified re-raising the confrontation issue in a PRP. *In re Restraint of Hegney,* 138 Wn.App. 511, 544, 158 P.3d 1193 (2007) ("Because Hegney's direct appeal was pending when the Supreme Court announced *Crawford,* and we did not rely on *Crawford* in our opinion, 'the ends of justice would be served' by reexamining this case...").

This Court decided this case on January 4, 2006. However, D'Allesandro's direct appeal did not become final until October 10, 2006. Prior to that time, on June 29, 2006, the Washington Supreme Court

decided *Easterling*, which rejects application of the waiver and invited error doctrines to the closed courtroom issue. Thus, *Easterling* represents a change in the law applicable to this case (*State v. Hanson,* 151 Wn.2d 783, 790, 91 P.3d 888 (2004) (new rule of law applies to all cases pending on direct review)), which also justifies raising this issue again. *Easterling* completely undermines both prongs of this Court's direct appeal analysis.

First, *Easterling* holds that neither "a criminal defendant's or the public's right to a public trial is waived simply because a codefendant in a joint criminal trial requested the courtroom closure." 157 Wn.2d at 180. *Easterling* further reasons that a defendant cannot invite this error because "[i]t was the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements." *Id.*

In any event, trial counsel did not ask for the public to be excluded, only that other members of the venire be excluded. It was the trial court that suggested excluding members of the public from voir dire. *See* 1 RP 2-5. However, no matter how trial counsel's request is characterized, *Easterling* makes it clear that counsel's request triggered the trial court's required duty to consider the requirements of *Bone-Club* and give members of the gallery the opportunity to protest closure. That duty arose

no matter who requested the closure; the duty was not only to Mr. D'Allesandro, but to the public, including his family and friends.

Second, on the issue of harm, *Easterling* makes it clear that "denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." To the extent that this Court concluded on direct appeal that D'Allesandro had not demonstrated harm because the courtroom was closed only for a limited amount of time, *Easterling* also rejects that analysis. It is correct that in *Orange* a concurring and a dissenting justice posited that some unjustified courtroom closures may be so "trivial" that they would not implicate the right to a public trial. *Orange,* 152 Wn.2d at 824-28. However, *Easterling* made it clear that "a majority of this court has never found a public trial right violation to be *de minimis*." In addition, *Easterling* held "there will be no need for Washington's appellate courts to engage in a triviality-type analysis if our trial courts correctly apply the *Bone-Club* guidelines in the first instance." 157 Wn.2d at 181, n. 12.

Even if a triviality-type analysis applied, the trial court in this case closed the courtroom during a substantial portion of voir dire -- during which fourteen prospective jurors were dismissed and approximately one-third of the ninety prospective jurors were questioned. Characterizing

such a closure as "trivial" is both factually impossible and legally incorrect. *Frawley, supra.*

9. Petitioner's conviction should be reversed.

As noted previously, the constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts. It is integral to our system of government. When the courtroom doors are locked or a portion of the trial takes place behind the judge's closed chambers door without a proper prior hearing reversal is required.

SECOND GROUND: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLOSED COURTROOM ISSUE IN D'ALLESANDRO'S PETITION FOR REVIEW.

Easterling, which controls the outcome of this case, was decided when D'Allesandro's petition for review was pending. Despite that fact, appointed counsel did not raise the issue, but instead wrote a letter indicating that D'Allesandro could raise this issue in a PRP. *See* Appendix H. While counsel's prediction of the future proved accurate, counsel's failure to raise a clearly meritorious claim during the pendency of the direct appeal constitutes ineffective assistance of counsel.

To show ineffective assistance of counsel, a defendant must demonstrate (1) that his attorney's performance was deficient and (2) that

this deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional errors, appellant would have prevailed on appeal. *See In re Brown,* 143 Wn.2d 431, 452, 21 P.3d 687 (2001) ("[T]o prevail on the appellate ineffectiveness claim, [Petitioner] must show the merit of the underlying legal issues his appellate counsel failed to raise"). Appellate counsel's failure to raise a meritorious issue, one that would have resulted in the reversal of a conviction, clearly constitutes deficient performance.

In fact, *Orange* itself is an ineffective assistance of appellate counsel case. *Orange,* 152 Wn.2d at 814 ("[T]he failure of . . . appellate counsel to raise the issue on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel."). The Supreme Court found in *Orange* that the failure to raise the courtroom closure issue was not the product of "strategic" or "tactical" thinking. 127 Wn.2d at 336. The same is true in this case. Further, because this issue merits reversal of D'Allesandro's conviction he can easily satisfy the prejudice

prong. This Court should grant D'Allesandro a new trial based on ineffective assistance on appeal.

<u>THIRD GROUND</u>: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE BOTH FOR A CURATIVE INSTRUCTION AND A MISTRIAL IN REPONSE TO THE REPEATED, FLAGRANT AND IMPROPER CROSS-EXAMINATION OF D'ALLESANDRO BY COUNSEL FOR THE CO-DEFENDANT.

1. **Trial counsel had no strategic reason for failing to ask for a curative instruction or mistrial to cure the prejudice of the flagrant misconduct.**

D'Allesandro testified and was subject to cross-examination by the prosecutor and co-defendant's counsel. RP 1640-1847. During cross-examination the prosecutor struck a number of hard blows. From start to finish, counsel for the co-defendant repeatedly struck foul blows, often times simply repeating or slightly rephrasing a question after a sustained objection. In addition to repeatedly asking D'Allesandro why other witnesses would lie, co-defendant's counsel began several prejudicial lines of impeachment which she failed to complete, leaving her in the position of an unsworn witness against D'Allesandro.

Despite this overwhelming amount of misconduct, counsel for D'Allesandro never sought a single curative instruction. In addition, he never moved for a mistrial. As the attached declaration from counsel attests, this was not a strategic decision. Because D'Allesandro was

prejudiced, his counsel's failure to seek any remedy for this flagrant misconduct constitutes ineffective assistance of counsel.

2. D'Allesandro's co-defendant's counsel conducted improper cross-examination.

The cross-examination of D'Allesandro by Ms. Stenberg was a barrage of improper questions, which Stenberg repeated even after the objections of D'Allesandro (and sometimes the prosecutor) were sustained.

Ms. Stenberg asked D'Allesandro the following objectionable questions:

> "Keith Baker testified that Mr. Celebisoy drove your car. How do you explain that if you insist he never did?" (Objection sustained). RP 1741;
>
> "Are you telling us that Mr. Baker was lying?" (Objection sustained). *Id.*;
>
> "Was Mr. Baker telling the truth?" (Objection sustained). *Id.;*
>
> "So then you're saying Mr. Baker was lying?" (Objection sustained. Court states, "In Washington one witness is not permitted to testify about another witness's credibility." RP 1742;
>
> "Was he mistaken?" (Objection sustained; Prosecutor objects). *Id.;*
>
> "Do you agree with Mr. Gertsner, who said you picked up a weapon...every time you left the house?" (Objection sustained). RP 1746;
>
> "...in order to believe you, we have to disbelieve Dennis Hargrove, disbelieve Gidget King, disbelieve Meghan Graham, disbelieve

> Mert Celebisoy, if we are to buy your version of events, correct? " (Objection sustained). RP 1750;
>
> "Now, **let's go back to your fable**, sir, and discuss it one more time." (Objection sustained) (emphasis added). RP 1750;
>
> After D'Allesandro answers a question, Ms. Stenberg states: "Is that your answer?" (Objection sustained). Stenberg then states: "**That's the problem with lies, sir,** you can't cinch up all – " (Objection sustained. Request to address court outside presence of the jury) (emphasis added). RP 1754.

At this point, outside the presence of the jury, the trial court told Ms. Stenberg, "You're going too far," and that "you have to stay within the rules or the whole system unravels." RP 1756. During this discussion, DPA Bruneau noted "the persistent attempts of Ms. Stenberg to ask questions of this witness about the credibility of other witnesses, which is one of those fundamentals that just isn't done," and then added: "if I was engaged in the type of cross-examination as a prosecutor . . . . I'd be hammered by the [trial] court and probably by the Court of Appeals for prosecutorial misconduct." RP 1755.[5]

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[5] This wasn't the first time either that the prosecutor objected to one of Ms. Stenberg's questions on the grounds that it improperly asked a witness to comment on the credibility of another witness and thereby invaded the jury's fact-finding function. Earlier in the trial, Ms. Stenberg asked Det. Haller whether the differences between two witness statements "set off alarm bells in your head." RP 999. On that occasion, too, the objection was sustained. Even earlier in the trial, Ms. Stenberg told the Court (outside the jury's presence) that she intended to ask the lead detective "whose scenario he ultimately came to believe." RP 992. Despite the fact that she was told then by the Court that such questions were improper, she apparently paid no attention to the Court, as her

Despite Stenberg's promise that she understood, she then asked D'Allesandro whether he "agreed" with the testimony of the forensic scientist that "there's no blood evidence in that car," (RP 1766), and whether he thought it was a "coincidence" that Dennis Hargrove testified that the victim looked "surprised" when he was stabbed. *Id.*

Ms. Stenberg repeatedly attempted to force D'Allesandro to comment on the credibility of various witnesses. For more than a decade, these questions have constituted clear and obvious misconduct. *See State v. Padilla,* 69 Wn. App. 295, 846 P.2d 564 (1993) (cross examination designed to compel a witness to express an opinion as to whether other witnesses were lying constitutes misconduct); *State v. Walden*, 69 Wash.App. 183, 847 P.2d 956 (1993) (it is improper to invite a witness to comment on another witness' accuracy or credibility by asking whether the witness was mistaken). *See also State v. Casteneda-Perez,* 61 Wash.App. 354, 363, 810 P.2d 74, *review denied,* 118 Wash.2d 1007 (1991) ("Likewise, we find the practice improper and condemn it."); *State v. Barrow,* 60 Wash.App. 869, 809 P.2d 209, *review denied,* 118 Wash.2d 1007, (1991).

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subsequent determination to violate the rules of evidence and Mr. D'Allesandro's right to a fair trial is clearly evident.

Although the above-cited cases involve the misconduct of a prosecutor, the rule applies with equal force to any attorney. *See generally State v. Dickerson,* 69 Wn. App. 744, 747, 850 P.2d 1366 (1993) (comments by co-defendant's counsel can deprive a defendant of a fair trial). *See also United States v. Patterson,* 819 F.2d 1495, 1506 (9th Cir.1987) (misconduct requires reversal only if there is a substantial likelihood that the misconduct affected the verdict). *Barrow,* 60 Wash.App. at 876, 809 P.2d 209; *Casteneda-Perez,* 61 Wash.App. at 363, 810 P.2d 74.

3. D'Allesandro co-defendant's counsel failed to complete impeachment.

In addition to repeatedly asking D'Allesandro to comment on the credibility of other witnesses, Ms. Stenberg began several lines of impeachment which she did not attempt to complete. For example, she asked D'Allesandro whether his nickname in the jail was "Slasher." RP 1742. She asked him if he kept an article about the homicide "neatly" folded up in his pocket. RP 1743. She asked him if he bought beef jerky just after the homicide. RP 1749.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. *See State v. Yoakum,* 37 Wash.2d 137, 222 P.2d 181 (1950); *State v. Babich*, 68 Wash.App. 438, 842 P.2d 1053

(1993). Where an attorney begins impeachment, she must finish it, unless it is prohibited impeachment on a collateral matter. *United States v. Bohle,* 445 F.2d 54, 74 (7th Cir.1971) ("the duty to follow up foundation with evidence is breached at the risk of reversal of any tainted victory"). "[A] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." A lawyer who asks an accused a question that implies the existence of a prejudicial fact "must be prepared to prove that fact". *United States v. Silverstein,* 737 F.2d 864, 868 (10th Cir.1984).

In *State v. Amos,* 490 S.W.2d 328, 331 (Mo.Ct.App.1972), the Missouri court reversed a conviction because the prosecutor, in cross-examining the defendant about whether he had been convicted of prior crimes, made a show of consulting an offense record, then failed to produce evidence the defendant had been convicted of a prior offense. The court reasoned: "The prosecutor offered no evidence to rebut the defendant's denial that he had been convicted of that offense. Rather, he undertook a persistent inquiry into other identities and aliases the defendant may have assumed, and those which defendant had denied having used were tied to him by an uncanny coincidence of personal detail obviously derived from the FBI report to which the prosecutor was making reference .... The prejudice arose when evidence of identity of

person was shown but evidence of conviction under the assumed name was not, for *although the prior conviction which had been the focus of the protracted impeachment interrogation had not been proved, the impression or inference of prior crime was implanted in the jury's consciousness.*" 490 S.W. 2d at 331 (emphasis added).

Ms. Stenberg engaged in similar tactics. She made several references to information of the most inflammatory nature. Then she failed to follow it up—leaving the jury with the hint of accusation. Stenberg's failure to complete impeachment constitutes a violation of D'Allesandro's right to confront. Constitutional error is harmless only if the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Guloy,* 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Ms. Stenberg's repertoire was not limited to these two improper methods of cross-examination. Indeed, her cross-examination was further marked by insinuations and personal asides. For example, she mockingly called D'Allesandro a "hapless dupe," (RP 1750), and later asked if, on the date of the crime, he should have instead been in prison for drug dealing at the time of the crime. RP 1752.

4. The misconduct by co-defendant's counsel is subject to review.

Most trial misconduct cases involve the improper questions or argument by a prosecutor. There are few cases involving the misconduct of counsel for a co-defendant. As a result, the law applicable to such situations is not well developed. On the other hand, the law regarding the permissible scope of cross-examination is well-developed in this state.

In reviewing a conviction, it is important to focus on an individual defendant's right to a fair trial, rather than which party is committing the misconduct. The direction of a blow is less important than the wound inflicted. Thus, the analysis applicable to prosecutorial misconduct, if not a perfect template, is at least a useful guide for the review of misconduct committed by counsel for a co-defendant. *See People v. Estrada*, 63 Cal.App.4th 1090, 75 Cal.Rptr.2d 17 (1998).

Misconduct by a lawyer may violate a defendant's due process right to a fair trial. Most misconduct can be cured by an objection and a curative instruction. However, sometimes misconduct is so flagrant or ill-intentioned that a curative instruction could not have obviated any prejudice. *State v. Belgarde,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Where the comments of counsel are so flagrant and ill-intentioned that they "cause an enduring and resulting prejudice that could not have been

neutralized by an admonition to the jury," they deprive the defendant of a fair trial. *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Evans,* 96 Wn.2d 1, 5, 633 P.2d 83 (1981); *State v. Charlton,* 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

When a lawyer continues to ask similar questions or the same question, despite the sustained objections to similar questions during the trial, the lawyer is on notice that content was objectionable. In these situations, reviewing courts have found such conduct flagrant and ill-intentioned. *State v. Alexander*, 64 Wn.App. 147, 156, 822 P.2d 1250 (1992).

For example, in *State v. Jerrels,* 83 Wash.App. 503, 504, 925 P.2d 209 (1996), the State charged the defendant with raping his daughter and two stepchildren. During the trial, the prosecutor repeatedly asked Jerrels' wife, and the mother of the three children, if she believed the children were telling the truth about the defendant's actions. 83 Wn.App. at 506-07. The questioning focused on the mother's belief in the truth of the specific sexual abuse incidents about which the children had testified. 83 Wn.App. at 507. The court found that the mother's opinion as to her children's veracity could not easily be disregarded, and that the repeated questioning had a cumulative effect. *Jerrels,* 83 Wash.App. at 508. *See also United*

States v. Cruthchfield, 26 F.3d 1098 (11th Cir. 1994); *Locken v. United States,* 383 U.S. F.2d 340 (9th Cir. 1967).

This case essentially turned on the credibility of the two defendants. In such a swearing contest, the likelihood of the jury's verdict being affected by improper questioning is substantial. *State v. Padilla*, 69 Wn. App. at 302.

5. Defense counsel failed to seek any remedy for the persistent and flagrant misconduct.

Ms. Stenberg's repeated misconduct provided D'Allesandro's counsel with numerous opportunities to object, request curative instructions, and ultimately a mistrial. *See State v. Hamilton,* 47 Wash.App. 15, 18, 733 P.2d 580 (1987). Nevertheless, counsel for D'Allesandro never sought a curative instruction. Counsel should have sought an instruction telling the jury that Ms. Stenberg's questions were improper, that the jury was the sole judge of the credibility of a witness, that no witness can be asked to comment on the credibility of another witness, and that the jury should not consider any of Ms. Stenberg's questions (or any of D'Allesandro's answers prior to any sustained objection) in determining D'Allesandro's credibility. When Stenberg failed to cease and desist after numerous sustained objections, counsel should have sought a mistrial.

It is apparent that Ms. Stenberg sought to obtain an advantage for her client at the expense of D'Allesandro's right to a fair trial. The prosecutor was absolutely correct when he stated he'd be hammered by this Court if he engaged in such improper tactics. In addition, the trial court accurately stated that the "whole system unravels," when an attorney intentionally ignores the rules of evidence. Based on these statements alone, it is clear that D'Allesandro was harmed. However, the Court was not required to give a curative instruction unless requested nor grant a mistrial unless defense counsel made such a request. Counsel now candidly admits that he did not consider these options—a failure that constitutes deficient performance. Counsel's declaration explains that this failure was not tactical. *See* Appendix G.

D'Allesandro was prejudiced by his counsel's failures. Credibility was a central issue at trial. Ms. Stenberg attacked D'Allesandro's credibility though persistent misconduct. Given the prosecutor's and court's contemporaneous recognition that such misconduct was improper and harmful, Petitioner has established that there was a reasonable likelihood of a mistrial, if counsel had made such a request. This Court should grant D'Allesandro's PRP on this claim and remand for a new trial.

D. CONCLUSION

Petitioner respectfully submits that his Personal Restraint Petition should issue: he was denied his right to a public and open trial and to the effective assistance of counsel.

Respectfully submitted this 19th day of November, 2007.

JEFF ELLIS for

Rita J. Griffith, WSBA 14360
Counsel for Petitioner

Jeffrey R. Ellis, WSBA 17139
Counsel for Petitioner

Appendix A

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

04 MAR 31 AM 11: 26

BETTY J. GOULD, CLERK

BY_____
DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff, v. FELIX JOSEPH [redacted] D'ALLESANDRO, Defendant. PCN: 766763596 SID: WA21810064 DOB: 06/28/84	No.03-1-1389-1 **(FOR CRIMES COMMITTED ON OR AFTER 7-1-00)** **JUDGMENT AND SENTENCE (JS)** [x] Prison [ ] Jail One Year or Less [ ] First-Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative

I. HEARING

1.1 A sentencing hearing was held on MARCH 31, 2004 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on MARCH 25, 2004 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
1	MURDER IN THE FIRST DEGREE	9A.32.030(1)(a), 9A.08.020(2)(c), & 9.94A.125	ON OR BETWEEN JUNE 15, 2003 TO JULY 1, 2003

as charged in the FIRST Information.

[ ] The court finds that the defendant is subject to sentencing under RCW 9.94A.712

[ ] A special verdict/finding for use of **firearm** was returned on Count(s) _____. RCW 9.94A.602, .510.

[X] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) 1. RCW 9.94A.602, .510.

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _____. RCW 9.94A.835.

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s)_____ _____,RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) _____. RCW 9.94A.605, RCW 69.50.401(a), RCW 69.50.440.

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[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s) _____ involve(s) **domestic violence.**

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	NONE					
2						
3						
4						
5						

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS-NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XV	240-320 MOS	24 MONTHS (D)	264 - 344	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [X] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence [X] above [ ] within [ ] below the standard range for Count(s) ___I___. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [X] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial

resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: _____

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE			
	$_____	Restitution to: _____	
RTN/RJN	$_____	Restitution to: _____	
	$_____	Restitution to: _____ (Name and Address–address may be withheld and provided confidentially to Clerk's Office)	
PCV	$ 500	Victim assessment	RCW 7.68.035
CRC	$ 110	Court costs, including	RCW 9.94A.760, 9.94A.505, 10.01.160
		Criminal filing fee $ _____	FRC
		Witness costs $ _____	WFR
		Sheriff service fees $ _____	SFR/SFS/SFW/WRF
		Jury demand fee $ _____	JFR
		Extradition costs $ _____	EXT
		Other _____ $ _____	
PUB	$ ~~5,000~~	Fees for court appointed attorney	RCW 9.94A.760
WFR	$ —	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$_____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/FCD NTF/SAD/SDI	$_____	Drug enforcement fund of _____	RCW 9.94A.760
CLF	$_____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
	$ 100.00	Felony DNA collection fee [ ] not imposed due to hardship	RCW 43.43.754
	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
	$_____	Other costs for: _____	
	$_____	TOTAL	RCW 9.94A.753

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
[ ] shall be set by the prosecutor
[ ] is scheduled for _____

[ ] RESTITUTION. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:. _____
NAME of other defendant CAUSE NUMBER (Victim name) (Amount-$)

RJN

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ _____ per month commencing _____ . RCW 9.94A.760.

[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760.

[X] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.2 DNA TESTING. For anyone convicted on or after July 1, 2002, regardless of when the crime occurred, of a felony, stalking, harassment, or communicating with a minor for immoral purposes, the defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to defendant's release from confinement. RCW 43.43.754.

[ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340

4.3 The defendant shall not have contact with _____ _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 **OTHER**: _____

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

360 months on Count	1	_____ months on Count	_____
+ 24 months on Count	_____	_____ months on Count	_____
_____ months on Count	_____	_____ months on Count	_____

Actual number of months of total confinement ordered is: 384 months

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(b) **CONFINEMENT.** RCW 9.94A.712: The defendant is sentenced to the following terms of confinement in the custody of Department of Corrections:

Count _____ minimum term _____ maximum term
Count _____ minimum term _____ maximum term
Count _____ minimum term _____ maximum term

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 [X] **COMMUNITY CUSTODY** for count(s) I, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

[ ] **COMMUNITY PLACEMENT** is ordered as follows: Count _____ for _____ months; Count _____ for _____ months; Count _____ for _____ months;

✓ [X] **COMMUNITY CUSTODY** is ordered as follows:

Count I for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offensese committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[ ] Defendant shall have no contact with: _____

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

[ ] For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven (7) working days.

4.7 [ ] **WORK ETHIC CAMP**. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT**. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION**. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION**. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

[X] Defendant waives any right to be present at any restitution hearing (sign initials): FJWD

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

5.8 **OTHER**: Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

[ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

DONE in Open Court and in the presence of the defendant this date: March 30, 2004

RICHARD D. HICKS

JUDGE :

Deputy Prosecuting Attorney WSBA #6830 Print name: DAVID BRUNEAU	Attorney for Defendant WSBA #20257 Print name: JAMES DIXON	Defendant FELIX JOSEPH WELC D'ALLESANDRO

Interpreter signature/Print name:_____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the

_____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case:03-1-1389-1
I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

Appendix B

State v. Celebisoy
Wash.App. Div. 2,2006.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,Division 2.
STATE of Washington, Respondent,
v.
Mert Cem CELEBISOY, Appellant,
State of Washington, Respondent,
v.
Felix Joseph D'Allesandro, Appellant.
Nos. 31597-1-II, 31599-8-II.

Jan. 4, 2006.

Appeal from Superior Court of Thurston County; Hon. Richard D. Hicks, J.

Peter B. Tiller, The Tiller Law Firm, Centralia, WA, Patricia Anne Pethick, Attorney at Law, Tacoma, WA, for Appellant.
David Harold Bruneau, Thurston Co. Pros. Aty. Office, Olympia, WA, for Respondent.

UNPUBLISHED OPINION

HUNT, J.

***1** Mert Celebisoy and Felix D'Allesandro appeal their convictions for first degree murder while armed with a deadly weapon.[FN1] Additionally, D'Allesandro appeals his exceptional sentence, arguing that it violates the recent Supreme Court decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

FN1. The State charged both Celebisoy and D'Allesandro as principal or accomplice; the State charged them alternatively with premeditated intentional murder or felony murder during the course of a kidnapping or attempted kidnapping. The trial court instructed the jury on the lesser included offense of second degree murder. A jury found D'Allesandro guilty of first degree premeditated murder. It found Celebisoy guilty of first degree felony murder.

Both defendants argue that the trial court erred by (1) refusing to instruct the jury on the lesser included offenses of first or second degree manslaughter; (2) denying a motion to sever their trials; (3) allowing evidence of the victim's dismemberment; and (4) denying a motion for change of venue. In addition, Celebisoy argues that (1) a deficient court interpreter deprived him of due process; and (2) he received ineffective assistance of counsel. D'Allesandro also argues: (1) denial of his right to a speedy and public trial; (2) erroneous admission of interrogation statements and physical evidence; and (3) lack of the proper nexus to support the deadly weapon enhancement. Both defendants further contend that cumulative error denied them fair trials.

The State concedes that we should vacate D'Allesandro's exceptional sentence and remand for resentencing. Finding no other reversible error, we otherwise affirm.

FACTS

I. Murder and Mayhem

On July 17, 2003, on his rural Thurston County property, Jay Barrett discovered a human leg lying on a trail and other skeletal remains in two disinterred shallow graves; he called the police. Police found two legs, a left arm, a partial shoulder, and a torso, with five stab wounds to the back, of a dismembered, decomposing body. The arm and partial shoulder were in a garbage bag. The right arm and head were missing.

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That same day, while cleaning out his Olympia home's attic, Barrett's friend Charlie Cortelyou discovered a pile of foul-smelling garbage bags. With the assistance of his wife, Jessica Huntting, Cortelyou put the bags into the garbage bin. After Barrett told them about finding human remains on his property, Huntting contacted the police about the garbage bags from their attic. When police inspected the attic debris, they found blood-covered floor mats, a trunk liner, clothing, a spare tire cover, an insurance card for Felix D'Allesandro with a description of a 1994 Toyota, and a notebook containing D'Allesandro's name.

Both Barrett and Cortelyou gave Mert Celebisoy's name to police. Celebisoy had lived for a time at the Cortelyou residence, and Cortelyou had obtained a job for Celebisoy on the Barrett property. Cortelyou had moved away, but when he returned to his vacant home and unexpectedly discovered Celebisoy at the residence, he demanded Celebisoy's key. When Celebisoy did not return the key, Cortelyou changed the locks and subsequently discovered the foul-smelling garbage bags in the attic.

Believing that they had identified **D'Allesandro** as a possible homicide victim, police went to his address. There, police found the Toyota described on the insurance card in Cortelyou's attic debris. Speaking with **D'Allesandro's** father, Detective Haller learned that **D'Allesandro** was alive and at home. **D'Allesandro** appeared and told police that his father owned the Toyota but that he drove it.

***2** When Detective Haller asked **D'Allesandro** if he had ever loaned the Toyota to anyone, **D'Allesandro** replied that he was the only driver and he had not loaned it to anyone. Haller told **D'Allesandro** that he wanted to look in the car's trunk. **D'Allesandro** asked, 'Why?' and **D'Allesandro's** father directed **D'Allesandro** to retrieve the car keys. When **D'Allesandro** opened the trunk, Haller observed it was clean and empty, with no spare tire cover and an ill-fitting floor covering that appeared to have been freshly cut.

Detective Haller told **D'Allesandro** and his parents that he was investigating a homicide and that bloodstained items had been found with **D'Allesandro's** insurance card. When Haller again asked **D'Allesandro** whether he had loaned his car to anyone, **D'Allesandro** replied that a month before he had loaned the car to Celebisoy, who had failed to return it when he was supposed to. When Haller reminded **D'Allesandro** that he was conducting a homicide investigation in which it appeared the Toyota was involved, **D'Allesandro** replied that 'there was more to be told.'

D'Allesandro then admitted having driven the Toyota when Celebisoy killed a man named 'Dave' [FN2] during a meeting about drugs; **D'Allesandro** also gave a tape recorded statement in his parents' presence at their home, during which Detective Haller told **D'Allesandro** he was not under arrest. [FN3]

FN2. The victim's name was David George.

FN3. Detective Haller neither arrested nor advised **D'Allesandro** of his Miranda warnings at this time. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

D'Allesandro's parents signed a consent form, authorizing Haller to take the Toyota into evidence. Haller took possession of the Toyota.

Detectives then went to arrest Celebisoy, about whom Haller was already aware from the information Barrett and Cortelyou had previously provided. Detective Bergt interviewed Celebisoy in custody. Celebisoy related an account of events similar to D'Allesandro's but claimed D'Allesandro had done the killing and that he had only helped dispose of the body afterwards.

II. Procedure

The State charged Celebisoy and D'Allesandro, each as principal or accomplice, with first degree murder of George while armed with a deadly weapon. The State charged them alternatively with premeditated intentional murder or felony murder

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during the course of a kidnapping or attempted kidnapping.

A. Pretrial

1. D'Allesandro

D'Allesandro waived his speedy trial rights until February 15, 2004; trial was set for February 9. On January 23, the State moved to continue because the forensic analysis of physical evidence was not complete. D'Allesandro objected, but the trial court found good cause and granted a continuance until the week of March 8, noting the 'large body of evidence,' which could be inculpatory or exculpatory, and that the delay would be 22 additional days.

D'Allesandro moved in limine to suppress evidence from the trunk of his car and his statements. After a hearing, the trial court entered unchallenged findings of fact, including that (1) **D'Allesandro's** father had cooperated voluntarily in the search of the Toyota's trunk; (2) **D'Allesandro** had made his statements at home, in the presence of both parents; and (3) Detective Haller had said he would not arrest and did not arrest **D'Allesandro**.

***3** The trial court ruled that (1) Detective Haller had valid consent to search the Toyota's trunk; (2) **D'Allesandro** was not in custody at the time of his statements; (3) because there was no custodial interrogation, Miranda warnings were not required; and (4) therefore, **D'Allesandro's** statements were admissible. The trial court denied the motions to suppress, but it ordered redaction of **D'Allesandro's** statement to replace references to Celebisoy with ' the driver' and 'friend.'

2. Celebisoy

Celebisoy moved to sever his trial from **D'Allesandro's**, arguing mutually antagonistic defenses. The trial court denied the motion, ruling that Celebisoy had failed to demonstrate that any prejudicial effect of joinder outweighed concerns of judicial economy.

Celebisoy also moved to suppress all testimony regarding
dismemberment, arguing that such testimony was not relevant to the murder and was highly prejudicial and inflammatory. The trial court denied the motion, ruling that dismemberment of the body was 'part of this case and so to deny all reference to the dismemberment or to not allow any reference to dismemberment ... would even be an error....' Report of Proceedings

(RP) at 242.

B. Trial

Defendants' joint jury trial commenced on March 9, 2004. Both defendants testified similarly to their police interview statements.

1. Celebisoy's testimony

Celebisoy testified that **D'Allesandro** had asked him to drive to a meeting with George. **D'Allesandro** was not satisfied with a recent marijuana purchase and wanted to talk with George. They met George on the street and he got into the car and Celebisoy drove while George and **D'Allesandro** talked. **D'Allesandro** demanded his money back and George refused. **D'Allesandro** became irate, reached over the seat, and stabbed George several times. Celebisoy stopped the car and got out; then George got out of the car, stumbled, and fell near the trunk. Threatening with the bloody knife, **D'Allesandro** ordered Celebisoy to '{p}op the trunk.' Celebisoy complied and, at **D'Allesandro's** request, helped lift George into the trunk. Celebisoy denied having any advance knowledge that **D'Allesandro** was planning to kill George.

D'Allesandro then drove to his parents' home, where he ordered Celebisoy to help clean the blood out of the car. When **D'Allesandro** threatened Celebisoy and his family, Celebisoy suggested that they take the car to the Cortelyou residence to finish

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cleaning the car. At the Cortelyou residence, they removed the victim from the trunk and moved his body to a bathroom, where Celebisoy provided **D'Allesandro** with a 'Sawzall' power saw. **D'Allesandro** dismembered the body, and Celebisoy helped place the pieces in garbage bags.

D'Allesandro placed six bags of dismembered parts into the car's trunk and then Celebisoy helped him move the blood-soaked debris (floor mats, trunk liner, clothing, spare-tire cover, notebook, and **D'Allesandro's** insurance card) from the Toyota to Cortelyou's attic. After borrowing jumper cables from a neighbor to start **D'Allesandro's** car, they left.

*4 Two days later, **D'Allesandro** called Celebisoy and told him they needed to get rid of George's body. Celebisoy took **D'Allesandro** to the Barrett property, where **D'Allesandro** buried some of the remains while Celebisoy remained in the barn.

2. **D'Allesandro's** testimony

D'Allesandro testified that Celebisoy called him to arrange a meeting so he (Celebisoy) could purchase cocaine from George. **D'Allesandro** arranged the meeting and drove Celebisoy to meet George. George sat in the front passenger seat while Celebisoy sat in the back seat. As **D'Allesandro** drove around, Celebisoy and George conversed. They started to argue loudly, and Celebisoy said, ' Here you go, motherf* * *er,' and Celebisoy stabbed George multiple times in the back. RP at 1658.

D'Allesandro stopped the car, George staggered out of the car, and Celebisoy guided George toward the trunk. Celebisoy ordered **D'Allesandro** to 'pop' the trunk, but **D'Allesandro** stayed immobilized in a state of shock. Celebisoy left George slumped over the trunk and came around the car to pop open the trunk using the driver's side release. Celebisoy returned to George and pushed him into the trunk.

Because **D'Allesandro** was unable to drive at this point, Celebisoy started driving. When Celebisoy drove erratically, **D'Allesandro** took over and drove to his parents' home. At the **D'Allesandro** residence, they changed clothes and gathered garbage bags, gloves, and cleaning supplies. They left seven hours later.

D'Allesandro followed Celebisoy to the Cortelyou residence. There, Celebisoy removed the body from the trunk, wrapped it in tarps, and told **D'Allesandro** to start cleaning the car. Celebisoy first dragged the body into the house and later placed it in a yard trash bin along the side of the house. Celebisoy then gathered the contents of **D'Allesandro's** car in garbage bags while **D'Allesandro** cleaned the front seat. After cleaning for four or five hours, **D'Allesandro** tried to leave. But his car would not start, so he borrowed jumper cables from a neighbor. Celebisoy and **D'Allesandro** then drove back to **D'Allesandro's** parents' house.

D'Allesandro further testified that he did not find out that the body had been dismembered until the next month and that he had never been to the Barrett property.

3. Instructions

Both defendants took exception to the trial court's failure to give their proposed instructions on the lesser included offenses of first and second degree manslaughter.

4. Verdict

The jury found D'Allesandro guilty of first degree premeditated murder with a deadly weapon. The jury found Celebisoy guilty of felony first degree murder while armed with a deadly weapon.[FN4]

FN4. The verdict forms contained blank spaces with instructions to write in 'yes,' ' no,' or 'unable to unanimously agree.' In finding D'Allesandro 'guilty,' the jury wrote 'yes' under Alternative A, Premeditated First Degree Murder. In finding Celebisoy 'guilty,' the jury wrote '

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unable to unanimously agree' under Alternative A, Premeditated First Degree Murder, and 'yes' under Alternative B, Felony First Degree Murder.

C. Sentencing

The State requested exceptional sentences for both defendants based on 'the manner in which death was inflicted as well as the dismemberment of the victim thereafter.'Clerk's Papers (CP) (Celebisoy) at 178.

The trial court denied the State's request for an exceptional sentence for Celebisoy and sentenced him to a standard range sentence of 320 months, with an additional 24-month deadly weapon enhancement, for a total of 344 months.

***5** The trial court sentenced D'Allesandro to an exceptional sentence of 360 months, with an additional 24-month deadly weapon enhancement, for a total of 384 months. Because the Supreme Court had not yet issued its Blakely decision, the trial court did not submit the exceptional sentence factual issues to the jury. The trial court entered written findings presenting substantial and compelling reasons to justify an exceptional sentence: (1) abuse of trust, (2) dismemberment of the victim's body, (3) lack of remorse, (4) deliberate cruelty, and (5) efforts to conceal the commission of the crime.

Celebisoy and D'Allesandro appeal.

ANALYSIS

I. Speedy Trial

In his Statement of Additional Grounds [FN5] (SAG), D'Allesandro asserts that the trial court denied his constitutional right to a speedy trial. He focuses his challenge on the trial court's grounds for granting the State's request for a continuance of the trial date under CrR 3.3. He argues that the delay improperly served the State's purpose to augment its dismemberment evidence. We disagree.

FN5.RAP 10.10.

The decision to grant a continuance rests with the trial court. We do not disturb such a decision absent a manifest abuse of discretion and prejudice.*State v. Torres,* 111 Wn.App. 323, 330, 44 P.3d 903 (2002) , *review denied,*148 Wn.2d 1005 (2003). We find no such abuse or prejudice here.

First, D'Allesandro waived his CrR3.3(b) right to have trial commence within the specified period, by written agreement, continuing the trial until February 15, 2004. Thereafter, the trial court granted the State's request for a continuance until March 8, 2004, to complete forensic analysis of physical evidence. This continuance delayed the trial by 22 days. Even assuming, without deciding, that this continuance was not granted for good cause, this short delay was permissible under CrR 3.3(b)(5), which allows up to 30 days delay, after excluded periods such as the period covered by D'Allesandro's agreed continuance.

We hold, therefore, that (1) D'Allesandro's trial commenced within the time requirements of CrR 3.3, and (2) he has failed to show any violation of his constitutional right to a speedy trial under either the state or federal constitutions.

II. D'Allesandro's Motions to Suppress

D'Allesandro next argues that the trial court erred in denying his motions to suppress statements he made to detectives at his parents' home and the evidence seized during a search of his car. We disagree.

A. Police Interview

D'Allesandro contends he was in custody when he gave his statement and, therefore, police should have read him the required Miranda warnings. Our Supreme Court has held that Miranda warnings are required when an interview constitutes (1) custodial (2) interrogation (3) by a State agent. *State v. Sargent,* 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). Here, the police first went to D'Allesandro's home thinking he was a possible murder victim.

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When they discovered he was alive, they interviewed him as part of their investigation to determine who had been murdered, noting specifically that D'Allesandro was not then a suspect, nor was he under arrest.

***6** A person is not under custodial interrogation 'if {his} freedom of action is not curtailed to a degree associated with a formal arrest.'*State v. Harris,* 106 Wn.2d 784, 790, 725 P.2d 975 (1986). Such is the case here. The police were inside D'Allesandro's parents' home with permission. D'Allesandro was not in custody; rather, he was free to leave. Because the police interview of D'Allesandro was not custodial, Miranda warnings were not required. *Harris,* 106 Wn.2d at 780.

Moreover, D'Allesandro does not challenge the trial court's findings of fact that he made his statements at home, in the presence of both parents, and that Detective Haller said he would not and did not arrest him. These '{u} nchallenged findings of fact entered following a suppression hearing are verities on appeal.'*State v. Gaines,* 154 Wn.2d 711, 716, 116 P.3d 993 (2005). These unchallenged findings support the trial court's conclusion of law that D'Allesandro was not in custody when he made his statements. We agree with the trial court that no ' reasonable person {would feel} he or she was not at liberty to terminate the interrogation and leave.' *State v. Rehn,* 117 Wn.App. 142, 152, 69 P.3d 379 (2003) (quoting *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)).

Accordingly, we hold that the trial court did not err in denying D'Allesandro's motion to suppress his statements.

B. Evidence Seized During Car Search

D'Allesandro argues that (1) the warrantless search of the car violated his state and federal constitutional rights against unreasonable searches and seizures; and (2) 'Haller's failure to tell D'Allesandro that he was considered a suspect and to produce a valid consent form makes his search illegal.'SAG at 34. Again, we disagree.

Consent to a search excuses the need for a warrant. *Schneckloth v. Bustamonte,* 412 U.S. 218, 242-43, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Walker,* 136 Wn.2d 678, 682, 965 P.2d 1079 (1998) . Whether consent to search is voluntary is a question of fact to be determined considering the totality of circumstances surrounding the consent. *State v. Smith,* 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

Here, the trial court entered the following finding of fact regarding consent to search the car's trunk:
The senior D'Allesandro said to his son: 'go get the keys', and the defendant did. It is clear that when Detective Haller asked to look into the trunk of the vehicle that Mr. D'Allesandro (senior) was cooperating voluntarily. He had nothing to hide, and only desired to assist the investigation. The defendant was likewise cooperative.

CP (D'Allesandro) at 208 (Finding # 8). Because D'Allesandro failed to assign error to this finding, we treat it as a verity on appeal. Gaines, supra. This finding supports the trial court's legal conclusion that Detective Haller had valid consent to look in the trunk.[FN6]We hold, therefore, that the trial court did not err in denying D'Allesandro's motion to suppress the evidence seized from the Toyota's trunk.

FN6. Additionally, we note, the record does not suggest that D'Allesandro's father, who gave the consent to search, was not of average or higher intelligence and education. And although Detective Haller did not affirmatively advise D'Allesandro's father of his right to refuse consent, Haller made no show of authority to induce consent; rather, he merely explained that he was investigating a possible murder. Moreover, there was no prior illegal police action. Nor did D'Allesandro or his father previously or contemporaneously refuse to cooperate. Smith, supra.

III. Celebisoy's Motion to Sever

***7** Celebisoy and D'Allesandro argue that the trial

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court abused its discretion in denying Celebisoy's pre-trial motion to sever their trials. Defendants contend that their defenses were mutually antagonistic because the jury must disbelieve one defendant's testimony if they were to believe the other's testimony, resulting in prejudice. We disagree.

CrR 4.4(c)(2) provides:
(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:
(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.[FN7]

FN7. The severance rule also requires a defendant to renew his motion before or at the close of all evidence if the motion was previously overruled in order to preserve it. Celebisoy renewed his motion to sever during trial; thus, he has preserved this issue for appeal. CrR 4.4(a)(2).

A. Standard of Review

We review a trial court's decision on a severance motion for manifest abuse of discretion. *State v. Hoffman,* 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Our state does not favor separate trials and, thus, the party seeking severance has 'the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.'*Hoffman,* 116 Wn.2d at 74. Accordingly, the defendant must point to specific prejudice to support his motion. *State v. Canedo-Astorga,* 79 Wn.App. 518, 527, 903 P.2d 500 (1995), *review denied,* 128 Wn.2d 1025 (1996). This demonstration may show:
(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

Canedo-Astorga, 79 Wn.App. at 528 (quoting *United States v. Oglesby,* 764 F.2d 1273, 1276 (7th Cir.1985)).

B. Mutually Antagonistic Defenses

Mutually antagonistic defenses alone are insufficient to warrant separate trials. *Hoffman,* 116 Wn.2d at 74. Rather, the moving party must demonstrate 'that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'*Hoffman,* 116 Wn.2d at 74.

The trial court here relied on *State v. Grisby,* 97 Wn.2d 493, 647 P.2d 6 (1982), in ruling that Celebisoy failed to establish that 'a joint trial would be so prejudicial as to outweigh the concerns for judicial economy.'RP at 199. We agree and find Grisby dispositive:
Mutually antagonistic defenses may on occasion be sufficient to support a motion for severance but this is a factual question which must be proved by the defendant. It does not represent sufficient grounds as a matter of law. Furthermore, in this case the defenses do not appear to be inherently antagonistic. Both agree they went to the Walker apartment armed with two pistols to resolve the drug dispute. The sole disagreement is who killed which victims. This conflict is not sufficient to find an abuse of discretion by the trial court for failing to grant a motion to sever.

***8** 97 Wn.2d at 508 (emphasis added). As in Grisby, here, the only substantial disagreement in defendants' testimonies was over who stabbed George. Such disagreement is not sufficient to demonstrate that the trial court abused its discretion in keeping the trials joined, especially in light of the

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trial court's articulated concern for judicial economy.

Accordingly, we hold that the trial court did not abuse its discretion in denying Celebisoy's motion to sever.

C. Redaction of Defendants' Statements

Defendants further argue that the trial court abused its discretion in admitting redacted versions of statements they had made to police investigators, because the cross-implicating statements violated each other's confrontation rights.[FN8]We disagree.

FN8.U.S. Const. amend. VI.

We first note that both defendants testified at trial and were subject to cross examination by each other. Thus, under the Supreme Court's recent Crawford decision, their confrontation rights were not jeopardized by the introduction of their respective, redacted out-of-court statements. *Crawford v. Washington,* 541 U.S. 36, 59 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ('{W}hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.').

In Bruton v. United States, 391 U.S. 123, 127-28, 88 S.Ct. 160, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that admission of a co-defendant's incriminating pretrial statement denied a defendant his constitutional confrontation rights where the co-defendant did not testify at trial. The Supreme Court refined the Bruton rule in *Richardson v. Marsh,* when it held that a confession redacted to omit all references to the codefendant falls outside Bruton's prohibition because such a statement is not 'incriminating on its face' and becomes incriminating 'only when linked with evidence introduced later at trial.'[FN9]481 U.S. 200, 208, 107 S.Ct. 1702, 95 L.Ed.2d. 176 (1987).

FN9. We followed Richardson in *State v. Cotten,* 75 Wn.App. 669, 691, 879 P.2d 971 (1994), *review denied,*126 Wn.2d 1004 (1995), remarking: The only way in which Cotten is implicated by the out-of-court statements is through linkage with other evidence presented by the State. The fact that the State links a nontestifying codefendant's confession through other evidence to the defendant's complicity in the crime is not, however, a sufficient reason to exclude the testimony under Bruton, nor does it mandate severance.

Similarly, CrR 4.4(c) contemplates redaction of co-defendants' statements:
(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:
....
(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

We have previously enumerated the following related requirements for admission of co-defendants' out-of-court statements:Redacted statements must be (1) facially neutral, i.e., not identify the nontestifying defendant by name (*Bruton* {391 U.S. 123}); (2) free of obvious deletions such as 'blanks' or 'X' (Gray [FN10]); and (3) accompanied by a limiting instruction (Richardson {481 U.S. 200}).

FN10.*Gray v. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d. 294 (1998).

State v. Larry, 108 Wn.App. 894, 905, 34 P.3d 241 (2001).

Our review of the State's offer of proof, and the actual statements admitted through Detectives Haller's and Bergt's testimonies, reveals that both defendants' statements were properly redacted to be facially neutral: The redacted statements contained no obvious deletions, and they referred to the codefendant as 'friend' or 'driver' on the few occasions that they specifically mentioned a third party. In addition, the trial court properly instructed

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the jury not to consider 'an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.'CP (Celebisoy) at 142.

***9** Accordingly, we hold that the trial court did not violate the defendants' constitutional confrontation rights in admitting the redacted statements.

IV. Venue

Both defendants argue that, in light of prejudicial pretrial publicity, the trial court should have granted the defense motion to change venue. D'Allesandro also argues pro se that the trial court erred in denying a change of venue in light of pretrial publicity.

Although Celebisoy claims his trial counsel was ineffective in failing to move for a change of venue, the record shows that his trial counsel did move for a change of venue, apparently in connection with the discussion about how best to conduct voir dire to minimize the impact of pretrial publicity on potential jurors. Celebisoy's trial counsel stated:
I think preliminarily in order to preserve the issue, a motion to change venue should be made at this time, although I understand we have not interviewed the jurors. We do have a questionnaire which demonstrates that well over half the panel has read about this case in the paper or has heard it on the news, and it's quite concerning to me and so I want to make the record that we would at this point move for a change of venue. Understanding that the Court is not yet in a position to rule on that, we can leave it in a preliminary status right now.

RP (Voir Dire) at 5.

We cannot locate in the record before us where the trial court ruled on the motion for change of venue. But because the trial took place in the same county where the murder had occurred, we presume the trial court denied the motion. The lack of a detailed record on appeal, however, prevents our consideration of the substantive issue.

Defendants have failed to identify any portion of the record detailing the extent of pretrial publicity and its potential prejudicial effect on the fairness of their trial. Moreover, although Celebisoy alleges pretrial publicity about gruesome and inflammatory facts, he expressly acknowledges the lack of a record to support these allegations: 'Although not contained in the record, it is reasonable to presume that aspects of the case were reported to the community.'Br. of Appellant (Celebisoy) at 40 (emphasis added). Nor does our review of the record reveal any details about the extent of pretrial publicity or its impact on the trial.

We will not consider on appeal matters not in the record.[FN11]RAP 9.2(b). See *State v. Cerrillo,* 122 Wn.App. 341, 347, 93 P.3d 960 (2004) (noting that appellate courts will not review an argument 'if the facts necessary to adjudicate the alleged error are not in the record.'). Accordingly, we do not further address the venue issue.

FN11. And if there is no record below, 'a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record.' *State v. McFarland,* 127 Wn.2d 322, 338 n. 5, 899 P.2d 1251 (1995).

V. Voir Dire

D'Allesandro next argues that the trial court violated his right to a public trial by closing the courtroom and excluding the public and his family during a portion of the voir dire process. Because the trial court took this action at D'Allesandro's request to protect his right to a fair and impartial jury, we disagree.

***10** Before voir dire, D'Allesandro's counsel asked the trial court to interview privately certain prospective jurors who had responded to a questionnaire about pretrial publicity and personal privacy.[FN12]All trial counsel and the trial court agreed that this procedure was the best way to avoid tainting the whole jury pool with individual recollections of publicity reports and to expedite the jury selection process. Because of the large number of potential jurors, the trial court decided to conduct

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these interviews in camera, using the closed courtroom because there were too many people to accommodate in chambers.

FN12. D'Allesandro's attorney expressly requested that certain jurors be interviewed privately:
{I}t would make sense for the parties and the Court to interview prospective jurors who wished to speak with us privately, to do those interviews prior to voir dire, and my rationale is that if those interviews result in any excuses for cause, it would diminish the pool right off the bat, and secondly and perhaps more importantly from my perspective we don't run the risk of tainting the remaining pool, if we do it on the front end as opposed to doing it on the back end. And I know ... at least in my experience, those interviews are conducted in chambers, and I would suggest that those interviews take place in an empty courtroom.
RP (Voir Dire) at 2.

During the in camera interviews, the trial court excused some jurors. Those whom the court did not excuse rejoined the jury pool for voir dire in open court, where the trial court conducted most of the jury voir dire.

The doctrine of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'*State v. Pam,* 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds; *State v. Olson,* 126 Wn.2d 315, 893 P.2d 629 (1995). Moreover, we note that D'Allesandro has failed to demonstrate any prejudice flowing from the trial court's limited interviewing of potentially tainted jurors in camera, as he requested. Thus, D'Allesandro's claim fails.[FN13]

FN13. We note our Supreme Court's recent decision in *State v. Brightman,* 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005), which followed *In re Personal Restraint of Orange,* 152 Wn.2d 795, 100 P.3d 291 (2004), in holding that the trial court erred in closing the courtroom to spectators during the entire jury selection process, even though the defendant did not object to the closure.
Even assuming, without deciding, that the partial courtroom closure here rose to the level of the closures in Brightman and Orange, these cases are distinguishable. D'Allesandro not only failed to object to the closure, as in Brightman and Orange; but also he expressly requested in camera interviews of prospective jurors in order to avoid tainting the jury pool. The trial court granted this request for a limited time and a limited purpose, resulting in excusing several potentially tainted jurors for cause.
We acknowledge that our review would have been easier had the trial court articulated its application of the five *Brightman and State v. Bone-Club,* 128 Wn.2d 254, 906 P.2d 325 (1995), factors before granting D'Allesandro's request to exclude the public from this limited portion of the jury voir dire. We further note, however, that even had D'Allesandro not requested limited 'closure' of the courtroom, (1) such in camera interviews are appropriate, and (2) it could be a legitimate trial strategy not to object where such proceedings preserve the impartiality of the jury pool.

VI. Interpreter

Celebisoy contends the trial court denied his right to due process [FN14] by appointing an uncertified interpreter to aid in the court proceedings rather than to perform as a sequential or simultaneous interpreter. The record does not support this contention.

FN14. Right to confront witnesses. U.S. Const. amend. VI.

When a defendant notifies the trial court about a significant language difficulty, the trial court must determine whether an interpreter 'is needed.' *State*

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v. Woo Won Choi, 55 Wn.App. 895, 901, 902, 781 P.2d 505 (1989), *review denied,*114 Wn.2d 1002 (1990). Appointment of an interpreter is a matter of trial court discretion, which we disturb only upon a showing of abuse. *State v. Trevino,* 10 Wn.App. 89, 94-95, 516 P.2d 779 (1973), *review denied,*83 Wn.2d 1009 (1974). We find no abuse of discretion here.

The State made an offer of proof comprising evidence from witnesses who had contacts with Celebisoy, tape recordings of his extensive conversations with police, and court records of other criminal proceedings in which Celebisoy had not requested or used an interpreter. The trial court ruled:
But I also after listening to this and keeping it in the context, not just of the two prior District Court cases, but even in this case with months of communication between he and his counsel, this issue has never come up.
But even more strongly than that is my own impression after listening to his live discourse or recorded discourse on the tapes that he does readily speak and understand the English language, and I think his language skills are adequate enough to attend trial proceedings, and as a consequence I think if an interpreter were not available that one would not be necessary. He can and does understand what's going on and can communicate.

***11** RP at 178.

Having decided that Celebisoy did not need an interpreter to understand the proceedings, the trial court denied his request for an interpreter 'as a simultaneous {}or a sequential interpreter.'

Nonetheless, 'in an abundance of caution,' the trial court appointed an interpreter 'as an aid to the defendant and/or his counsel,' in case Celebisoy were to need clarification on 'some English presentation.' RP at 179-81.

We hold that the court did not abuse its discretion in ruling that Celebisoy did not require a simultaneous interpreter and in appointing instead an interpreter to aid Celebisoy and his counsel to clarify the proceedings when needed.

VII. Evidence

Defendants argue that we should reverse their convictions because the trial court improperly admitted evidence that was more prejudicial than probative. We disagree.

A. Standard of Review

We review a trial court's admission of evidence for abuse of discretion.*State v. Pirtle,* 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied,*518 U.S. 1026 (1996). Abuse occurs when the trial court's discretion is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State ex rel Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz,* 32 Wn.App. 186, 190, 647 P.2d 39 (1982), reversed on other grounds, 99 Wn.2d 538 (1983).

Erroneous admission of evidence is not grounds for reversal 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'*State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Erroneous admission of evidence that is merely cumulative is not prejudicial. *State v. Acheson,* 48 Wn.App. 630, 635, 740 P.2d 346 (1987), *review denied,*110 Wn.2d 1004 (1988).

B. Dismemberment

Defendants argue that the trial court abused its discretion in admitting evidence of the victim's dismemberment because it (1) was not necessary to prove any essential element of the charged crimes; and (2) inflamed the passions of the jury, thus prejudicing both defendants.

The trial court admitted extensive testimony concerning the post-mortem dismemberment of the victim and disposal of his remains, and photographic and videographic exhibits depicting the remains discovered at the Barrett property. In denying defendants' motion to suppress, the trial court ruled that dismemberment was 'part of this

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case and so to deny all reference to the dismemberment or to not allow any reference to dismemberment I think would even be an error.'RP at 242.

No published Washington cases address this issue. Several other states' courts, however, have held that postmortem dismemberment is relevant to the issue of whether a defendant premeditated murder. See, e.g., *Mason v. Lockhart,* 881 F.2d 573 (8th Cir.1989); *State v. Smith,* 669 N.W.2d 19 (Minn.2003); *State v. Sokolowski,* 522 S.E.2d 65 (N.C.1999); *State v. Helmer,* 545 N.W .2d 471 (S.D.1996). Agreeing with these cases and the trial court below, we hold that dismemberment and disposal of the victim's body here was circumstantial evidence that defendants planned to kill George and then to dispose of the evidence to avoid discovery. We further note that evidence of the police discovery of the victim's dismemberment and the police investigative follow up was relevant to inform the jury about (1) the progression of the police investigation, including that it was their initial belief that D'Allesandro was the murder victim that lead them to his house; (2) the identification of the defendants and the relationship between them; (3) the location of the murder (the D'Allesandro Toyota) and the resulting evidence trail; and (4) the cause and manner of the victim's death.

C. Photos and Videotape

***12** We next turn to the photographs and videotapes of the Barrett property where police discovered the victim's body parts. 'Photographs are not inadmissible merely because they are gruesome.' *State v. Adams,* 76 Wn.2d 650, 655, 458 P.2d 558 (1969).'A bloody, brutal crime cannot be explained to a jury in a lily-white manner to save the members of the jury the discomforture of hearing and seeing the results of such criminal activity.'*Adams,* 76 Wn.2d at 656. And here, although the subject matter was obviously gruesome, the photos and videotape did not focus on or amplify the gruesomeness of the victim's remains; rather, they depict where and how the remains were found. With the exception of one leg in the middle of the trail, the objects in the photos, taken from some distance away, are not readily distinguishable as body parts. The pictures are not needlessly replicated, nor do they create an overwhelming sense of revulsion at first sight. Similarly, the video depicts the same scene, briefly panning over the remains and zooming in on the nearly unrecognizable leg for a brief moment before surveying the surrounding crime scene. As in Adams, the photos and video here 'were used to prove relevant and material facts such as the scene of the crime and the physical facts of the case. The potential prejudicial effect of these photographs does not appear to be great and does not outweigh their probative value.'*Adams* 76 Wn.2d at 658.

Accordingly, we hold that the trial court did not abuse its discretion in denying Celebisoy's motion to suppress the dismemberment evidence, including the photos and video tape.

D. Deadly Weapon

D'Allesandro also argues that the State failed to demonstrate the requisite nexus connecting him to the weapon that Celebisoy used to murder George. We disagree. Regardless of whether D'Allesandro was the principal or the accomplice, the sentence enhancement of RCW 9.94A.602 applies to him.

RCW 9.94A.602 provides, in part:
In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find {s} the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

(emphases added).

Relying on the plain language of this statute,

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Division I of this court has held that the State is not required to prove that a defendant had actual knowledge that an accomplice was armed in order to establish a deadly weapon sentencing enhancement. *State v. Bilal,* 54 Wn.App. 778, 781-82, 776 P.2d 153,*review denied,*113 Wn.2d 1020 (1989). The Bilal court reasoned that use of ' the words 'or an accomplice' leaves no doubt that the statute was intended to apply whenever the defendant or an accomplice was armed.'*Bilal,* 54 Wn. App at 782.

***13** Here, the State presented substantial evidence, and both defendants so testified, that the co-defendant in the back seat of the car was armed with a knife and stabbed George in the back. The jury answered 'yes' on the special verdict forms, finding that both defendants were armed with a deadly weapon during the murder.

The record shows that the State proved a sufficient nexus between the murder weapon and D'Allesandro's role in George's murder to support the jury's special verdict and the trial court's deadly weapon sentence enhancement under RCW 9.94A.602.

VIII. Ineffective Assistance of Counsel

Celebisoy argues that his trial counsel was ineffective because (1) he failed to cross examine Keith Baker, and (2) Celebisoy was unable to assist or to consult with his counsel while the interpreter was busy interpreting on behalf of his mother during her testimony. These arguments fail.

A. Standard of Review

To show ineffective assistance of counsel, an appellant must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas,* 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Celebisoy fails to meet this test.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson,* 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied,*523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have differed. *In the Matter of the Personal Restraint Petition of Pirtle,* 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We give great judicial deference to counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. Examination of Keith Baker

Celebisoy argues that his trial counsel was ineffective for failing to cross examine Keith Baker about D'Allesandro's alleged propensity to carry weapons. We disagree.

The State called Keith Baker to testify about D'Allesandro's drug association with Celebisoy as well as about D'Allesandro's remarks that he was ' getting away' with murder. After resting, Celebisoy's counsel moved to reopen his case in order to question Baker about whether D'Allesandro carried weapons.

The trial court denied the motion, noting that Baker had already been cross examined and that 'there was a full opportunity to ask him these kinds of questions' during the State's case or during Celebisoy's case in chief. RP at 1725. The trial court also noted, ' {T}his is somewhat redundant because we've got people saying that Mr. D'Allesandro carries knives, carries a Leatherman, carries a Taser. There's plenty of evidence of that so this would be somewhat cumulative and redundant.' RP at 1725. After D'Allesandro's testimony, the court denied Celebisoy's motion to introduce Baker's testimony in rebuttal to D'Allesandro's testimony.

***14** Even assuming, without deciding, that

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Celebisoy's attorney performed deficiently in failing to cross examine Baker about D'Allesandro's carrying weapons, Celebisoy fails to show how this alleged deficiency prejudiced his case. In his case in chief, Celebisoy had already elicited testimony from Josh Gertsner that D'Allesandro carried a knife and a Taser. Thus, cross examination of Baker on the same or similar issue would have been 'cumulative and redundant.' We hold, therefore, that counsel's failure to cross examine Baker on this matter does not amount to ineffective assistance. See *United States v. Schaflander,* 743 F.2d 714, 718 (9th Cir.1984) (holding that appellant failed to show prejudice where uncalled witnesses would have presented testimony cumulative to the evidence already presented at trial).

C. Mother's Testimony

Celebisoy also claims ineffective assistance because he was unable to consult with his counsel during trial while the interpreter was translating his mother's testimony. He asserts, 'Without a second interpreter during the portion of his mother's testimony, Celebisoy did not have the protection of the opportunity for continual consultation during trial.'Br. of Appellant (Celebisoy) at 27. But Celebisoy not only fails to show how the interpreter's actions caused counsel to render ineffective assistance, but he also acknowledges the record's lack of any specific thwarted attempt by him to consult with counsel.

Having already affirmed the trial court's exercise of discretion in deciding Celebisoy did not need a simultaneous interpreter, we do not further address this issue.

IX. Lesser Included Offense Instruction

Defendants both argue that the trial court erred in denying their requests for jury instructions on the lesser included offenses of first and second degree manslaughter. They contend their individual testimonies support a manslaughter instruction because the driver's actions could be characterized as merely reckless or criminally negligent. We disagree.

A. Standard of Review

We review for abuse of discretion a trial court's refusal to give instructions to a jury, if based on a factual dispute. *State v. Lucky,* 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by*State v. Berlin,* 133 Wn.2d 541 (1997). We review de novo a trial court's refusal to give an instruction based on a ruling of law. *Lucky,* 128 Wn.2d at 731. The usual test for the propriety of a requested jury instruction is whether 'it correctly states the law, is not misleading, and permits counsel to argue his theory of the case.'*State v. Mark,* 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

A defendant is entitled to a jury instruction on a lesser included offense if (1) each of the elements is a necessary element of the charged offense (legal test), and (2) the evidence supports an inference that the defendant committed the lesser offense (factual test).*State v. Berlin,* 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). To satisfy the factual prong, 'the evidence must raise an inference that only the lesser included ... offense was committed to the exclusion of the charged offense.'*State v. Fernandez-Medina,* 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). A mere possibility that the jury might disbelieve the State's evidence is not justification for a lesser included offense instruction. *State v. Pettus,* 89 Wn. App 688, 700, 951 P.2d 284,*review denied,*136 Wn.2d 1010 (1998).

***15** We view the evidence in support of a requested instruction in the light most favorable to the requesting party. *Fernandez-Medina,* 141 Wn.2d at 455-56. It is error to give an instruction the evidence does not support. *State v. Benn,* 120 Wn.2d 631, 654, 845 P.2d 289 (1993).

B. Manslaughter

Manslaughter is not a lesser included offense of first degree felony murder.*State v. Dennison,* 115 Wn.2d 609, 627, 801 P.2d 193 (1990). Nonetheless, 'first and second degree manslaughter may be lesser

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included offenses of premeditated murder and instructions should be given to a jury when the facts support such an instruction .'*State v. Warden,* 133 Wn.2d 559, 563, 947 P.2d 708 (1997). Thus, we turn to whether the testimonies of Celebisoy and D'Allesandro supported a manslaughter instruction.

We agree with the trial court that neither testimony, even if taken as true, warranted a manslaughter instruction: The asserted negligence or recklessness of driving with a mortally wounded man in the trunk neither bore on the charged offense of premeditated first degree murder nor described a lesser negligent or reckless manslaughter offense. All the evidence and reasonable inferences about George's killing led only to the conclusion that the killer acted intentionally; there was no evidence that the killing was only reckless or negligent.[FN15]

FN15. Even if the stabbing was not premeditated, letting George bleed to death was evidence of premeditation of his death.

Both defendants testified that his codefendant in the back seat became angry with George during an argument about drugs and reached over the back seat to stab George multiple times in the back. This intentional stabbing was the act that caused George's death, even if he did not die immediately. Moreover, both defendants' failure to obtain medical treatment for George after the stabbing and, instead, letting him bleed to death was neither negligent nor reckless; rather, it showed their intention that George die. Thus, neither defendant's testimony supported instructions on the lesser manslaughter offenses, and the trial court did not abuse its discretion.[FN16]

FN16. We note that the trial court thought there might be a genuine issue as to premeditation and, thus, allowed an instruction on the lesser included offense of second degree murder.

X. Cumulative Error

Defendants argue that cumulative error denied them a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord,* 123 Wn.2d 296, 332, 868 P.2d 835,clarified, 123 Wn.2d 737,*cert. denied,*513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Lord,* 123 Wn.2d at 332.

Having found no single error, we do not address the cumulative error issue.*State v. Stevens,* 58 Wn.App. 478, 498, 794 P.2d 38,*review denied,*115 Wn.2d 1025 (1990).

XI. Exceptional Sentence

Finally, D'Allesandro argues that his exceptional sentence violated his Sixth Amendment [FN17] right to a jury trial, contrary to the Supreme Court's recent decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We accept the State's concession that Blakely mandates re-sentencing of D'Allesandro.

FN17.U.S. Const. amend. VI.

***16** Accordingly, we affirm both defendants' convictions, vacate D'Allesandro's exceptional sentence, and remand D'Allesandro's case for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: BRIDGEWATER, J., and QUINN-BRINTNALL, C.J.
Wash.App. Div. 2,2006.
State v. Celebisoy
Not Reported in P.3d, 131 Wash.App. 1003, 2006 WL 14519 (Wash.App. Div. 2)

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Appendix C

Westlaw.

158 Wash.2d 1004, 143 P.3d 828 (Table)
(Cite as: 158 Wash.2d 1004, 143 P.3d 828 (Table))

State v. Celebisoy
Wash. 2006.
(The Court's decision is referenced in a Pacific Reporter table captioned "Supreme Court of Washington Table of Petitions for Review.")

Supreme Court of Washington
State
v.
Mert Cem Celebisoy; State v. Felix Joseph D'Allesandro
NO. 78258-0

October 10, 2006

Appeal From: 31597-1-II

Petition For Review: Denied.

Wash. 2006.
State v. Celebisoy
158 Wash.2d 1004, 143 P.3d 828 (Table)

END OF DOCUMENT

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Appendix D

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SUPERIOR COURT
THURSTON COUNTY, WASH.

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SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff, v. FELIX JOSEPH D'ALLESANDRO, Defendant.	No.03-1-01389-1 (FOR CRIMES COMMITTED ON OR AFTER 7-1-00) ***AMENDED*** **JUDGMENT AND SENTENCE (JS) (FOLLOWING APPEAL)**
PCN: 766763596 SID: WA21810064 DOB: 06/28/84	[x] Prison [ ] Jail One Year or Less [ ] First-Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative

I. HEARING

1.1 A sentencing hearing was held on MARCH 31, 2004 and ,a re-sentencing was held on NOVEMBER 28, 2006, following appeal, the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on MARCH 25, 2004 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
I	MURDER IN THE FIRST DEGREE	9A.32.030(1)(a), 9A.08.020(2)(c), & 9.94A.125	ON OR BETWEEN JUNE 15, 2003 TO JULY 1, 2003

as charged in the FIRST Information.

[ ] The court finds that the defendant is subject to sentencing under RCW 9.94A.712

[ ] A special verdict/finding for use of **firearm** was returned on Count(s) _____. RCW 9.94A.602, .510.

[X] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) I. RCW 9.94A.602, .510.

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _____. RCW 9.94A.835.

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

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04-9-10809-1 COPY TO DOC

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____, RCW 9.94A.605, RCW 69.50.401(a), RCW 69.50.440.

[ ] The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s) _____ involve(s) domestic violence.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	NONE					
2						
3						
4						
5						

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS -NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XV	240-320 MOS	24 MONTHS (D)	264-344 MTHS	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] within [ ] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: _____

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE			
	$_____	Restitution to: _____	
	$_____	Restitution to: _____	
RTN/RJN	$_____	Restitution to: _____ (Name and Address—address may be withheld and provided confidentially to Clerk's Office).	
PCV	$ 500.	Victim assessment	RCW 7.68.035
CRC	$ 110.	Court costs, including	RCW 9.94A.760, 9.94A.505, 10.01.160
		Criminal filing fee $_____	FRC
		Witness costs $_____	WFR
		Sheriff service fees $_____	SFR/SFS/SFW/WRF
		Jury demand fee $_____	JFR
		Extradition costs $_____	EXT
		Other _____ $_____	
PUB	$_____	Fees for court appointed attorney	RCW 9.94A.760
WFR	$_____	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$_____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/FCD NTF/SAD/SDI	$_____	Drug enforcement fund of _____	RCW 9.94A.760
CLF	$_____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
	$ 100.00	Felony DNA collection fee [ ] not imposed due to hardship	RCW 43.43.754
	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
	$_____	Other costs for: _____	
	$ 710.	TOTAL	RCW 9.94A.753

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
[ ] shall be set by the prosecutor
[ ] is scheduled for _____

[ ] RESTITUTION. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with: _____

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-$)

RJN

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.760.

[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760.

[X] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.2 DNA TESTING. For anyone convicted on or after July 1, 2002, regardless of when the crime occurred, of a felony, stalking, harassment, or communicating with a minor for immoral purposes, the defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to defendant's release from confinement. RCW 43.43.754.

[ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340

4.3 The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER: _____

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

320 months on Count	1	____ months on Count	____
+24 months on Count	____	____ months on Count	____
344 months on Count	____	____ months on Count	____

Actual number of months of total confinement ordered is: 344 (Three - hundred forty-four) mos.
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

(b) **CONFINEMENT.** RCW 9.94A.712: The defendant is sentenced to the following terms of confinement in the custody of Department of Corrections:
Count _____ minimum term _____ maximum term
Count _____ minimum term _____ maximum term
Count _____ minimum term _____ maximum term

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 [X] **COMMUNITY CUSTODY** for count(s) I, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.
[ ] **COMMUNITY PLACEMENT** is ordered as follows: Count _____ for _____ months;
Count _____ for _____ months; Count _____ for _____ months;
[X] **COMMUNITY CUSTODY** is ordered as follows:
Count I for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;
or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offensese committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]
While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.
[ ] The defendant shall not consume any alcohol.
[ ] Defendant shall have no contact with: _____
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[X] The defendant shall comply with the following crime-related prohibitions: _____
VOTING RIGHTS ARE RESCINDED by virtue of conviction

FJWD

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

[ ] For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven (7) working days.

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**
[X] Defendant waives any right to be present at any restitution hearing (sign initials): EJWD

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

5.8 **OTHER:** Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

[ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

DONE in Open Court and in the presence of the defendant this date: 11/28/06

JUDGE: RICHARD D. HICKS

Deputy Prosecuting Attorney WSBA #6830 Print name: DAVID BRUNEAU	Attorney for Defendant WSBA #20257 Print name: JAMES DIXON	Defendant FELIX JOSEPH D'ALLESANDRO

Interpreter signature/Print name:_____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the

_____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case:03-1-1389-1

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. WA21810064 (If no SID take fingerprint card for State Patrol)

Date of Birth 06/28/84

FBI No. 283978CC6

Local ID No. _____

PCN No. 766763596

Other _____

Alias name, SSN, DOB: _____

Race:

[ ] Asian/Pacific Islander [ ] Black/African-American [X] Caucasian

[ ] Native American [ ] Other: _____

Ethnicity:
[ ] Hispanic
[X] Non-Hispanic

Sex:
[X] Male
[ ] Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court:, Deputy Clerk [signature] Dated: 11-28-06

DEFENDANT'S SIGNATURE: [signature]

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

Appendix E

DECLARATION OF CAROL WELCH

I, Carol Welch, declare:

1. I am over 18 and am competent to make this declaration.

2. I am the mother of Felix Joseph D'Allesandro, the petitioner.

3. I was present for my son's trial, except for the two times when I was excluded by order of the court.

4. The day before trial started, the local newspaper in Olympia (The *Olympian*) ran an article about my son's case that I considered very inflammatory.

5. Although I had always planned to attend trial, as a result of the article I was especially interested in hearing what prospective jurors had to say about the pre-trial publicity.

6. In addition, given the negative portrayal in the press, I thought it was especially important to make sure that potential jurors knew my husband and I were completely supportive of our son.

7. For those reasons, my husband and I planned to attend all of voir dire. My husband and I were in the courtroom when the trial began. After the attorneys had a brief discussion with the judge about how to conduct voir dire in light of the pretrial publicity, the judge told us (as well the other members of the public who were present) that we would have to leave the courtroom.

8. My husband and I approached the bailiff to make sure we had to leave the courtroom. We explained that one of the defendants was our son. He said the judge had ordered the public out of the courtroom, and that included family members.

9. Prior to being told to leave, I was not given an opportunity to object. No one was.

10. If I had been asked if I objected to closing the courtroom, I would have objected.

11. If I had been given an opportunity, I would have explained that I thought jury selection was the most important part of my son's trial.

12. Because we were excluded, we were not able to assist our son and his attorney during jury selection. Because I was aware of the publicity surrounding my son's case and know many people who live in the Thurston County area, I felt that I should have been able to pass along any information or insights regarding prospective jurors to my son's attorney. Obviously, I was not able to do this as a result of the courtroom closure.

13. When the court ordered us to leave, my husband and I reluctantly left and sat outside the courtroom.

14. As we sat outside with the other people who had been excluded, we talked among ourselves about why we had been excluded and whether it was right. We did not think it was fair.

15. After we were told that we could come back in the courtroom, we did.

16. However, sometime after testimony had begun, we were told for the second time that we would need to leave the courtroom so that the judge could question a juror. We were surprised that the judge could close the courtroom and exclude the public whenever he wanted.

17. Once again, we were not given a chance to object before we were told to leave.

18. Once again, I would have objected if given the opportunity.

19. I have since read the transcript of the portion of jury selection from which I was excluded. Having read the transcript I feel even more strongly that I should not have been excluded.

20. For example, I now know that Juror 11 (who was questioned in a closed courtroom during trial) stated that she knew one of the witnesses. That witness was the girlfriend of the co-defendant's brother. I am aware that the juror, the co-defendant's brother, and the girlfriend all attended Evergreen State College. This is especially concerning given the antagonistic defenses presented by my son and his co-defendant. Had we heard her statements, I feel that I could have assisted my son and his attorney.

21. I have always believed that our courts must be open. I was shattered when that did not happen in my son's case.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

11/06/07 Olympia, WA

Date and Place

Carol Welch

Appendix F

DECLARATION OF FELIX D'ALLESANDRO, JR.

I, Felix D'Allesandro, Jr., declare:

1. I am over 18 and am competent to make this declaration.

2. I am the father of Felix Joseph D'Allesandro, the petitioner.

3. I was present for my son's trial, except for the two times when I was excluded by order of the court.

4. I have read my wife's declaration, agree with it, and adopt it as mine, too.

5. I would like to add the following comments.

6. I was particularly concerned about whether my son could receive a fair trial in Thurston County given the intense pretrial publicity which I felt was unfair and highly prejudicial. Because my wife and I are long time members of this community and because we paid particular interest to all of the pretrial publicity, I felt it was very important for us to be present during jury selection. I understood the need to talk to each juror separately from other jurors—to avoid contaminating the entire group. However, I did not understand why the jurors needed to be questioned in a closed courtroom.

7. I know that prior to being excluded defense counsel asked the judge (at sidebar) if the parents of both defendants could stay for voir dire. If asked, I certainly would have objected to closing the courtroom.

8. However, I did not feel like I had any choice—or any voice in the matter. I was told to leave and followed the court's direction. Sometimes I wish I had interrupted the court proceedings and made my feelings known. However, I respect the justice system and would not do anything to jeopardize a fair trial for my son, or for anyone else.

9. I remain concerned to this day that my wife and I were not present when jurors were first questioned about this case. We had no input into jury selection. Also, we have always supported our son. The only reason we were not in the courtroom at that time is because we were ordered to leave.

Appendix G

DECLARATION OF JAMES JOSEPH DIXON

I, James Joseph Dixon, declare:

1. I am over 18 and am competent to make this declaration.

2. I am an attorney, admitted to the Washington State Bar since 1990

3. I represented Felix Joseph D'Allesandro, the petitioner, at trial.

4. During the course of trial, I became very concerned about how Ms. Stenberg, attorney for the co-defendant, was conducting herself.

5. This was especially true during her cross-examination of Mr. D'Allesandro. During her cross-examination, Ms. Stenberg repeatedly asked Mr. D'Allesandro improper questions. For example, she asked him if certain witnesses, who she believed testified inconsistently, were liars.

6. I tried my best to object to these improper questions. I recall that most of my objections were sustained. However, Ms. Stenberg would often just simply ask the same question a slightly different way.

7. I had no tactical reason for failing to ask for a curative instruction. If I had thought to do so, I would have requested such an instruction.

8. I also had no tactical reason for failing to request a mistrial.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

8 November, 07
Date and Place Olympia, WA.

James Dixon

Appendix H

PATRICIA A. PETHICK

Attorney at Law
P.O. Box 7269
Tacoma, WA 98406-0269
(253) 475-6369

July 10, 2006

Carol Welch
Felix D'Allesandro
P.O. Box 2333
Olympia, WA 98507-2333

Dear Ms. Welch and Mr. D'Allesandro:

In response to your letter, at this time Joseph's petition is still pending, which means we have not yet heard whether the State Supreme Court has accepted review. Once we receive the State Supreme Court's decision we will notify Joseph. If the State Supreme Court does not accept review, Joseph will be able to file a personal restraint petition (PRP) arguing any issue he feels the court should consider including those related to the Easterling decision. As always thank you for your input and patience with regard to the appellate process.

Sincerely,

Patricia A. Pethick
Patricia A. Pethick
Attorney at Law

VERIFICATION OF PETITION

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this 16th day of November, 2007.

F. Joseph D'

Felix Joseph D'Allesandro