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DIVISION II

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STATE OF WASHINGTON

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NO. 38556-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ORLIN A. CAMPOS-CERNA,

Appellant.

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BRIEF OF APPELLANT

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ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it admitted the defendant's confession into evidence because the police obtained that confession through the use of deceptive *Miranda* warnings that violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. RP 1-59<sup>1</sup>; Exhibit 2 from CrR 3.5 hearing.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment of conviction against him for first degree murder and attempted first degree murder because the state failed to present substantial evidence of premeditation. RP 264-671.

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<sup>1</sup>The record in this case includes eight volumes of continuously numbered verbatim reports of the CrR 3.5 hearing (volume I), the hearing on the admissibility of gang evidence (volume II), and the trial (volumes III, IV, Va, Vb, VI, and VII). They are referred to herein as "RP [page #]."

*Issues Pertaining to Assignment of Error*

1. Does a trial court err if it admits a defendant's confession into evidence when the police obtained that confession through the use of deceptive Miranda warnings that violated the defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment of conviction against him for first degree murder and attempted first degree murder when the record does not contain substantial evidence of premeditation?

## STATEMENT OF THE CASE

### *Factual History*

Sometime during the evening of October 11, 2007, the then 17-year-old Defendant Orlin Campos-Cerna was driving his aunt's car westbound on East Fourth Plain Boulevard in Vancouver, when he pulled up beside a car driven by Jose Avila and with Anthony Tirado in the front passenger seat. RP 332-334. East Fourth Plain is a four lane major arterial running east and west through the City of Vancouver. *Id.* As the defendant pulled up in the outside lane, both Jose Avila and Anthony Tirado turned and saw the defendant giving them what Mr. Tirado described as an "ugly face." *Id.* In fact, both Jose Avila and Anthony Tirado were then members of a violent Hispanic gang known as the "Norteños," which is itself part of the Hispanic prison gang known as "Nuestra Familia." RP 327-331, 361-363. Members of the Norteños are known to always carry firearms or other weapons, particularly if they are going to attack another person. RP 361-363.

The defendant himself was a member of a violent Hispanic gang known as the "Sureños," which was a part of a Hispanic prison gang known as the Mexican Mafia. RP 393-396. Members of the Sureños typically wear red clothing and have specific gang tattoos to advertise who they are. RP 521-586. Members of the Norteños typically wear blue clothing and also have specific gang tattoos to advertise who they are. *Id.* Members of both

gangs also use hand signs to communicate their gang affiliation. *Id.* The members of both the Norteños and the Sureños are particularly in conflict with each other, and each is well aware of the other's violent tendencies towards the other. *Id.*

In a statement later given to the police, the defendant said that when he pulled up beside the vehicle Jose Avila and Anthony Tirado were in, he could immediately see that they were Norteños. RP 400-402; Trial Exhibit 84. In fact, he also told the police that Anthony Tirado flashed gang signs at him, although Anthony Tirado denied this claim. RP 400-402. In any event, after this brief moving encounter, the defendant passed Mr. Avila and Mr. Tirado, and continued westbound on Fourth Plain. RP 334-349. As he did, Mr. Avila pulled his vehicle over into the far lane and began following the defendant's vehicle. *Id.* After driving about a mile or so, the defendant pulled right onto Fairmont Avenue into a residential area. *Id.* Mr. Avila also turned right and stayed directly behind the defendant, although neither Mr. Avila nor Mr. Tirado had any business in that area, and had in fact been headed west on Fourth Plain to another area of town. *Id.*

The defendant, who perceived Mr. Avila's actions in following him right onto Fairmont as a serious threat, drove through the intersections at Fairmont and East 24<sup>th</sup> and Fairmont and East 25<sup>th</sup> with Mr. Avila and Mr. Tirado still right behind him. RP 400-402; Trial Exhibit 84. As he came up

to the intersection of Fairmont and East 26<sup>th</sup>, the defendant turned left and pulled his vehicle over. RP 341-352. Once he had stopped, he got a .22 caliber pistol out of his backpack with which to defend himself and got out of his car. RP 400-402; Trial Exhibit 84. As the defendant stopped his vehicle and got out, Mr. Avila turned right in the intersection, stopped his vehicle, and quickly backed up toward the defendant. RP 344-352, 367-368. In fact, he backed up toward the defendant at what Mr. Tirado estimated was the car's maximum speed in reverse. RP 271. At about this time, the defendant pointed his pistol at Mr. Avila's car and shot seven times. RP 400-402; Trial Exhibit 84. The defendant then ran back to his car and left the area. *Id.*

At least one of the rounds the defendant shot went through the back window of Mr. Avila's car, and a number of them hit other locations in the vehicle, including the head liner on the passenger side and the instrument panel in front of the driver. RP 457-488. Although none of the bullets hit Mr. Tirado, one of the bullets hit Mr. Avila in the back of the head, and pierced his skull. RP 279-281, 618-622. He died as a result of this wound. *RP 618-622.* None of the neighbors saw what had happened, although some did hear gunshots from inside their homes, and Mr. Tirado was unable to identify either the defendant or the vehicle to the police, who arrived within five to ten minutes. RP 293-300, 301-310, 363-374.

About a month after the shooting, the police received a tip from an informant that the defendant had been the shooter. RP 388-392. As a result, two detectives went to the defendant's house, and asked him to come to the police station for questioning. *Id.* The defendant agreed, and once at the police station the police interviewed the defendant for about three hours. RP 393-396. For the majority of this time, the defendant disavowed any involvement with the shooting. RP 396-399. However, he eventually told the police that he had been the shooter, although he consistently claimed that he had feared for his life and that he only shot to scare the two Norteños in the car. RP 399-404; Trial Exhibit 84.

In fact, just two weeks prior to the shooting, the defendant had been at the Town Pump gas station in an adjacent area of Vancouver when two other members of the Norteños gang had accosted him. RP 623-630. According to the gas station attendant who witnessed the incident, the defendant was a regular customer at the gas station. *Id.* On that day he came in to buy a couple of items out of the minute mart, and as he went outside, two members of the Norteños, both wearing gang colors, confronted him aggressively, demanding to know "what he was about." *Id.* The defendant calmly stepped backwards and stated that he did not want any trouble. RP 636-637. As he did this, the gas station attendant stepped out and yelled that he didn't want any trouble and didn't want to have to call the police. RP 623-

630. After he said this, the defendant left the area and the two Norteño gang members went inside the minute mart to purchase alcohol. *Id.* After making their purchase, the two Norteño gang members exited the minute mart and drove off in the direction the defendant had gone. *Id.*

### ***Procedural History***

By information filed November 19, 2007, the Clark County Prosecutor charged the defendant Orlin Antonio Campos-Cerna with one count of murder in the first degree and one count of attempted murder in the first degree. CP 1-2. The court later allowed the state to amend the information to add second degree murder as an alternative to count I, and first degree assault as an alternative to count II. CP 13-14. On September 15, 2008, the court called the case for a hearing under CrR 3.5, during which the state called the two Vancouver Police Officers who had interviewed the defendant and took his taped statement. RP 9, 34. During this testimony, both of the police officers testified concerning their actions in going to the defendant's home, to bringing him back to the police station, to questioning him at the station, and to taking his video taped statement. RP 9-34, 35-45. The officers also explained that prior to beginning their questioning and prior to beginning the taped statement, one of the officers read the defendant his *Miranda* rights, including the juvenile addition to those rights as both officers knew that the defendant was 17-years-old. *Id.* According to the officers, the

defendant acknowledged both times that he understood his rights. *Id.* However, while the defendant did not want to sign the rights form when first read to him, he did sign it the second time prior to giving the taped statement. RP 28-29. The first officer's testimony concerning the rights form went as follows:

Q. Okay. So you testified earlier that you -- you read him those same rights at the beginning of your contact with the defendant and he chose not to sign the first time; but then on the video we saw you advise him of his rights again and he -- and he -- he did sign that second time.

A. He did, the -- both the waiver and the juvenile warning as well.

RP 28-29.

In addition, during the hearing, the court admitted State's Exhibit No. 2, which was the rights form the officers' read to the defendant. *See* Exhibit 2 from CrR 3.5 Hearing on 9/15/08. The bottom half of this form states as follows:

**ADDITIONAL WARNING TO PERSONS UNDER 18**

If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for juvenile offenses and can also be used against you in an adult court criminal prosecution if the juvenile court decides that you are to be tried as an adult.

Exhibit 2 from 9/15/08.

The defendant signed this additional warning and Detective Ringo witnessed his signature. *Id.* Following the admission of this exhibit and

argument from counsel, the trial court ruled that all of the defendant's statements to the police would be admitted at trial. RP 51-52.

The court later held a hearing concerning the admission through an expert of evidence outlining the existence and nature of Hispanic gangs on the West Coast of the United States. RP 65-165. At this hearing the state called Marshall Henderson, whom the court found qualified to testify on these issues. *Id.* Actually, following the hearing, the defense itself indicated that it would potentially call its own gang expert since (1) the state's two complaining witnesses were gang members as was the defendant, and (2) the introduction of that evidence was critical to the claim of self-defense. RP 62-64, 153-156.

The case later came on for trial before a jury, with the state calling thirteen different witnesses, including Officer Henderson, who testified concerning Hispanic gangs, Anthony Tirado, who testified concerning the shooting, and the officers who took the defendant's statements. RP 264-671. These witnesses also testified concerning the facts contained in the preceding factual history. *See* Factual History. During the presentation of this evidence, the prosecutor also played the defendant's videotaped statement to the jury. RP 404. Just prior to Anthony Tirado's testimony, the defense moved for permission to introduce the fact that Mr. Tirado had prior convictions for both second degree assault as well as Fourth Degree Assault.

RP 315-326. Specifically, the defense argued that this evidence was probative and admissible to support the defendant's argument that he acted out of reasonable fear that Mr. Tirado and Mr. Avila both intended him great bodily harm. *Id.* The trial court denied this motion and precluded the introduction of this evidence on the basis that there was no indication at the time of the shooting that the defendant knew about these convictions. *Id.*

Following the presentation of the state's witnesses, the state rested. RP 685-694. The defense rested without putting on any evidence. *Id.* At this point, the defense asked the court to instruct on a number of lesser included offenses and to instruct the jury on self-defense. RP 678-797; CP 59-88, 89-121. The court granted both requests, and instructed the jury that the state had the burden to prove beyond a reasonable doubt on both counts that the defendant did not act in self-defense. CP 177-182. After argument, the jury retired for deliberation and returned verdicts of "guilty" on both primary counts. CP 188, 190. The jury also returned special verdicts that the defendant was armed with a firearm when he committed these crimes. CP 192, 194. The court later sentenced the defendant to 320 months on count I, 220 months on count II, to be served consecutively, and 60 months for each enhancement, to run consecutive and the substantive sentences, for a total commitment of 660 months. CP 212, 213-227. Following imposition of the sentence, the defendant filed timely notice of appeal. CP 228-243.

## ARGUMENT

### **I. THE TRIAL COURT ERRED WHEN IT ADMITTED THE DEFENDANT'S CONFESSION INTO EVIDENCE BECAUSE THE POLICE OBTAINED THAT CONFESSION THROUGH THE USE OF DECEPTIVE MIRANDA WARNINGS THAT VIOLATED THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT.**

The Fifth Amendment to the United States Constitution states that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . .” Similarly, Washington Constitution, Article 1, § 9 provides that “[n]o person shall be compelled in any criminal case to give evidence against himself . . . .” Prior to the admission of any confession made to the police, the state has the burden of proving that the waiver of the state and federal right to silence was “knowing and voluntary.” Indeed, “[s]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege.” *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

Confessions induced by coercion and improper inducements are not knowing and voluntary and are not admissible as evidence against a defendant. *State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002). They are not only inadmissible as a violation of the Fifth Amendment right to silence;

they are also inadmissible as a violation of the Fifth Amendment due process right to fundamental fairness. *Id.* For example, in *Lynnum v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), the United States Supreme Court held that a defendant's confession was admissible as coerced where police told the defendant, who had no previous criminal contact with police, that her children would be placed in foster homes and her welfare taken away if she did not cooperate, but if she confessed, the judge would go easy on her;

In order to uphold the constitutional right to silence recognized in the Fifth Amendment, the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), held that before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In the case at bar, the trial court ruled that the defendant was not in custody at the time he gave his confession to the police. Thus, the police were not required to give the defendant his rights under *Miranda*. However, the police, in an apparent abundance of caution, did read the defendant his rights under *Miranda*. The problem that occurred was that the waiver that the police used was erroneous and improperly induced the defendant into giving up his right to silence under United States Constitution, Fifth Amendment and Washington Constitution, Article 1, § 9, thus rendering the defendant's subsequent confession inadmissible. The following carefully examines the *Miranda* rights form that the police used, and explains what this error was and how it improperly induced the defendant's waiver of his right to silence.

In the case at bar, the police twice read the defendant his rights under *Miranda*, and allowed the defendant to read and sign that form. The second half of the form stated the following:

**ADDITIONAL WARNING TO PERSONS UNDER 18**

If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for juvenile offenses and can also be used against you in an adult court criminal prosecution if the juvenile court decides that you are to be tried as an adult.

Exhibit 2 from 9/15/08.

The problem with this warning is that it erroneously told the defendant that as a juvenile, the state may only bring criminal charges against

him in juvenile court, and the only way he can then be transferred into adult court is “if the juvenile court decides that you are to be tried as an adult.” While this statement does not guarantee that a juvenile defendant will be allowed to stay in juvenile court, it does guarantee original jurisdiction within the juvenile court. As the following explains, this is not the law of Washington.

Under RCW 13.04.030(1)(b), the Juvenile Courts of the various counties of this state have original jurisdiction in all criminal matters relating to juveniles, unless the case meets one of the four exceptions stated in RCW 13.04.030(1)(e)(i)-(iv). Under exception (iv), the Superior Courts assume exclusive original jurisdiction in juvenile criminal cases under the following circumstances.

(iv) The juvenile is sixteen or seventeen years old and the alleged offense is: (A) A serious violent offense as defined in RCW 9.94A.030 committed on or after June 13, 1994; or (B) a violent offense as defined in RCW 9.94A.030 committed on or after June 13, 1994, and the juvenile has a criminal history consisting of: (I) One or more prior serious violent offenses; (II) two or more prior violent offenses; or (III) three or more of any combination of the following offenses: Any class A felony, any class B felony, vehicular assault, or manslaughter in the second degree, all of which must have been committed after the juvenile's thirteenth birthday and prosecuted separately. In such a case the adult criminal court shall have exclusive original jurisdiction.

RCW 13.04.030(1)(e)(iv)

In the case at bar, the Superior Court exercised exclusive original

jurisdiction under subsection (A) based upon the fact that the defendant was 17-years-old at the time of the offense, and the “alleged offense” was First Degree Murder, a serious violent offense as defined in RCW 9.94A.030. Defendant does not now challenge the Superior Court’s preliminary assumption of jurisdiction, since the defendant’s case clearly fell within the requirements for the exception found in RCW 13.04.030(1)(e)(iv). Thus, not only did the defendant’s case not start in juvenile court, but the juvenile court never did have jurisdiction. When the police, through the repeated use of the waiver, told the defendant that his case would start in juvenile court and could only be sent to adult court if the juvenile court decided he should be tried as a adult, the police grossly misstated the law and improperly induced the defendant to waive his right to silence.

The exercise of juvenile court jurisdiction is a significant benefit to a defendant for a number of reasons. First, the goal of the juvenile court criminal adjudication is rehabilitative, as opposed to punitive goal in adult court. *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006). Second, the standard punishments for persons adjudicated in juvenile court are commonly much lighter than those in adult. *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997). Third, the juvenile court does not have authority to extend its punishment beyond a defendant’s 21<sup>st</sup> birthday, even on a Class A felony, while there is no limit to the superior court’s continued authority over a

person convicted of a Class A felony. RCW 13.40.300. Indeed, our case law recognizes the rule that while juveniles who commit a crime shortly before their 18th birthday run the risk of prosecution as an adult, when the state's negligent or intentional failure to timely file a charge results in the loss of juvenile court jurisdiction, prejudice is presumed and the charges must be normally be dismissed. *State v. Dixon*, 114 Wash.2d 857, 860, 792 P.2d 137 (1990).

The fact that a person receives much more lenient treatment in juvenile court is a very powerful inducement for that person to do whatever is necessary to secure juvenile court jurisdiction. In the case at bar, the erroneous juvenile warning that the police gave the defendant emphasized the necessity for the defendant to do whatever was necessary in order to inure himself into the good graces of the juvenile court and thereby convince that court to refrain from sending him to adult court. For the defendant, this state was to waive his right to silence under both the state and federal constitutions and give a complete confession. However, this decision to waive his rights was induced by the false hope of juvenile court jurisdiction that the police planted in him by using an erroneous warning. Thus, in the case at bar, the trial court erred when it found that the defendant had knowingly and voluntarily waived his right to silence under United States Constitution, Fifth Amendment and Washington Constitution, Article 1, § 9.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In this case at bar, the state had only one and only one piece of evidence that connected the defendant to the shooting in this case: his confession. Absent this confession, there was no evidence at all to support a conclusion that the defendant was the shooter. Consequently, the erroneous admission of the defendant’s confession caused prejudice under any standard of review. As a result, the court should reverse the defendant’s conviction and, since there is insufficient evidence to support a conviction absent the confession, this court should remand for dismissal of both charges with prejudice.

**II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT OF CONVICTION AGAINST HIM FOR FIRST DEGREE MURDER AND ATTEMPTED FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF PREMEDITATION.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that the record does not contain substantial evidence on the element of premeditation sufficient to support either the conviction for first degree murder or the conviction for attempted first degree murder. The following presents this argument.

Under RCW 9A.32.030(1)(a), in order to sustain a conviction for first degree murder, the state has the burden of proving beyond a reasonable doubt that a defendant, “[w]ith a premeditated intent to cause the death of another person, . . . causes the death of such person or of a third person.” Under RCW 9A.28.020(1), “[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” Thus, in order to

prove the offenses charged in this case, that state had the burden of proving the following separate elements:

(1) that in both counts the defendant acted with the “intent to cause the death of another person,”

(2) that in both counts the defendant premeditated that intent, and

(3) that in the first count the defendant “caused the death of such person or of a third person.”

RCW 9A.32.030(1)(a). *See also, State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991) (offense of attempted murder requires the specific intent to kill and any lesser *mens rea* does not suffice).

In *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986), the court addressed what constituted substantial evidence of premeditation. In this case, the defendant appealed his conviction for first degree murder, arguing that the state had failed to present substantial evidence of premeditation. At the trial, the state had presented evidence that the defendant had strangled the decedent (that act taking at least from three to five minutes), held his hand over her mouth, and raped her. The state argued in reply that the three to five minutes it took the defendant to strangle the decedent was sufficient time at law to premeditate the commission of the crime. However, the Washington Supreme Court disagreed. After a lengthy review of authority on the issue, the court held as follows.

As was recognized in *Austin v. United States*, 382 F.2d 129,

138-39 (D.C.Cir.1967):

The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and that these are in law only murder in the second degree. The [State's] evidence suffice[s] to establish an intentional and horrible murder--the kind that could be committed in a frenzy or heat of passion. However the core responsibility of the court requires it to reflect on the sufficiency of the [State's] case.

Exercising our responsibility, we find manual strangulation alone is insufficient evidence to support a finding of premeditation.

*State v. Bingham*, 105 Wn.2d at 827-28.

In this case, the court held that manual strangulation alone over a three to five minute period was insufficient evidence to support a finding of premeditation where no evidence was presented of deliberation or reflection before or during the strangulation. A review of the evidence in the case at bar indicates that the defendant had even less time, and that there is no evidence of deliberation or reflection.

In this case, the admissible evidence, seen in the light most favorable to the state, proves the following facts: (1) that Jose Avila and Anthony Tirado were members of a violent Hispanic street gang known as the the Norteños, (2) the defendant was a member of a violent street gang known as

the Sureños, (3) that the Norteños and the Sureños shared an extreme antipathy towards each other, (4) that three weeks prior to the shooting, two members of the Norteños had accosted and threatened the defendant, who peaceably withdrew from the confrontation, (5) that on the evening in question, the defendant drove by Jose Avila and Anthony Tirado and both sides immediately recognized the gang affiliation of the other side, (6) that after the defendant passed in his vehicle, Jose Avila specifically followed behind the defendant, including following him in to a residential neighborhood away from the path he had intended to travel, (7) that when the defendant stopped his vehicle and got out, Jose Avila stopped his vehicle and backed toward the defendant as fast as his vehicle would travel in reverse, and (8) that as Jose Avila quickly backed up, the defendant raised up a gun and shot at Jose Avila and Anthony Tirado approximately seven times, hitting and killing Jose Avila.

Although the defendant claimed that he had only shot to scare the two Norteños in the car, and although he claimed to the police that he had only acted in self defense, it was in the province of a reasonable jury to disbelieve both assertions and find that the defendant shot with the intent to cause the death of both Jose Avila and Anthony Tirado. However, the same is not true on the issue of premeditation. In this case, the evidence only supports one conclusion concerning the defendant's driving: that he was attempting to get

away from a potentially violent situation by driving off Fourth Plain and into a residential neighborhood, in the same manner that he had attempted to get out of a potentially violent situation two weeks previous at the gas station. Even though the defendant's act of stopping and taking out the firearm could support a conclusion that at that point he intended to kill, in the same manner that the three to five minutes alone in the *Bingham* case was insufficient to support a finding of premeditation, so the even shorter period in the case at bar was insufficient to support a finding of premeditation. Indeed, in the case at bar, even the state admitted that the shooting started only after Jose Avila backed his vehicle toward the defendant at the maximum speed it would go. Thus, in the case at bar, as in *Bingham*, there is insufficient evidence to support a finding of premeditation.

The first part of the holding in *Bingham* quoted above finds particular application to the case at bar and bears reexamination. In that part of the holding, the court notes:

The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis.

*State v. Bingham*, 105 Wn.2d at 827.

This observation by the court is extra ordinally apropos in the case at

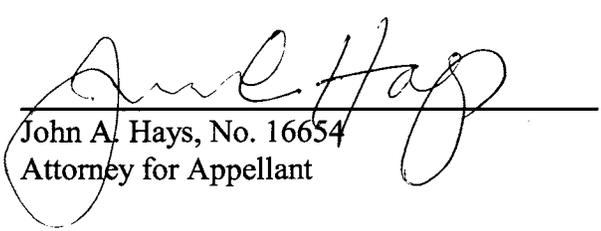
bar. The case before this court involved a confrontation between rival members of what the jury had described to them as extremely violent and lawless Hispanic street gangs. While the presentation of this evidence was a necessary part of both the state's case as well as the defendant's case, it none the less also generated a "powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available," to use the words of the court in *Bingham*. Indeed, this evidence of gang affiliation and rival gang antipathy, undoubtedly compelled the jury to find premeditation, not based upon the facts, but based solely upon the defendant's status as a member of one of the rival gangs. This court should hold that this evidence is not sufficient to support a finding of premeditation.

## CONCLUSION

The erroneous admission of the defendant's confession entitles him to a dismissal with prejudice since, absent the confession, the state has no evidence that the defendant committed the crimes for which he was convicted. In the alternative, this court should vacate the defendant's convictions for first degree murder and attempted first degree murder and remand with instruction to enter judgement for second degree murder and attempted second degree murder because the record does not contain substantial evidence of premeditation.

DATED this 8<sup>th</sup> day of June, 2009.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

### **RCW 13.04.030**

(1) Except as provided in this section, the juvenile courts in this state shall have exclusive original jurisdiction over all proceedings:

(a) Under the interstate compact on placement of children as provided in chapter 26.34 RCW;

(b) Relating to children alleged or found to be dependent as provided in chapter 26.44 RCW and in RCW 13.34.030 through \*13.34.170;

(c) Relating to the termination of a parent and child relationship as provided in RCW 13.34.180 through 13.34.210;

(d) To approve or disapprove out-of-home placement as provided in RCW 13.32A.170;

(e) Relating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations as provided in RCW 13.40.020 through 13.40.230, unless:

(i) The juvenile court transfers jurisdiction of a particular juvenile to adult criminal court pursuant to RCW 13.40.110;

(ii) The statute of limitations applicable to adult prosecution for the offense, traffic or civil infraction, or violation has expired;

(iii) The alleged offense or infraction is a traffic, fish, boating, or game offense, or traffic or civil infraction committed by a juvenile sixteen years of age or older and would, if committed by an adult, be tried or heard in a court of limited jurisdiction, in which instance the appropriate court of limited jurisdiction shall have jurisdiction over the alleged offense or infraction, and no guardian ad litem is required in any such proceeding due to the juvenile's age: PROVIDED, That if such an alleged offense or infraction and an alleged offense or infraction subject to juvenile court jurisdiction arise out of the same event or incident, the juvenile court may have jurisdiction of both matters: PROVIDED FURTHER, That the jurisdiction under this subsection does not constitute "transfer" or a "decline" for purposes of RCW 13.40.110(1) or (e)(i) of this subsection: PROVIDED FURTHER, That courts of limited jurisdiction which confine juveniles for an alleged offense or infraction may place juveniles in juvenile detention

facilities under an agreement with the officials responsible for the administration of the juvenile detention facility in RCW 13.04.035 and 13.20.060;

(iv) The alleged offense is a traffic or civil infraction, a violation of compulsory school attendance provisions under chapter 28A.225 RCW, or a misdemeanor, and a court of limited jurisdiction has assumed concurrent jurisdiction over those offenses as provided in RCW 13.04.0301; or

(v) The juvenile is sixteen or seventeen years old and the alleged offense is:

(A) A serious violent offense as defined in RCW 9.94A.030;

(B) A violent offense as defined in RCW 9.94A.030 and the juvenile has a criminal history consisting of: (I) One or more prior serious violent offenses; (II) two or more prior violent offenses; or (III) three or more of any combination of the following offenses: Any class A felony, any class B felony, vehicular assault, or manslaughter in the second degree, all of which must have been committed after the juvenile's thirteenth birthday and prosecuted separately;

(C) Robbery in the first degree, rape of a child in the first degree, or drive-by shooting, committed on or after July 1, 1997;

(D) Burglary in the first degree committed on or after July 1, 1997, and the juvenile has a criminal history consisting of one or more prior felony or misdemeanor offenses; or

(E) Any violent offense as defined in RCW 9.94A.030 committed on or after July 1, 1997, and the juvenile is alleged to have been armed with a firearm.

In such a case the adult criminal court shall have exclusive original jurisdiction.

If the juvenile challenges the state's determination of the juvenile's criminal history under (e)(v) of this subsection, the state may establish the offender's criminal history by a preponderance of the evidence. If the criminal history consists of adjudications entered upon a plea of guilty, the state shall not bear a burden of establishing the knowing and voluntariness of

the plea;

(f) Under the interstate compact on juveniles as provided in chapter 13.24 RCW;

(g) Relating to termination of a diversion agreement under RCW 13.40.080, including a proceeding in which the divertee has attained eighteen years of age;

(h) Relating to court validation of a voluntary consent to an out-of-home placement under chapter 13.34 RCW, by the parent or Indian custodian of an Indian child, except if the parent or Indian custodian and child are residents of or domiciled within the boundaries of a federally recognized Indian reservation over which the tribe exercises exclusive jurisdiction;

(i) Relating to petitions to compel disclosure of information filed by the department of social and health services pursuant to RCW 74.13.042; and

(j) Relating to judicial determinations and permanency planning hearings involving developmentally disabled children who have been placed in out-of-home care pursuant to a voluntary placement agreement between the child's parent, guardian, or legal custodian and the department of social and health services.

(2) The family court shall have concurrent original jurisdiction with the juvenile court over all proceedings under this section if the superior court judges of a county authorize concurrent jurisdiction as provided in RCW 26.12.010.

(3) The juvenile court shall have concurrent original jurisdiction with the family court over child custody proceedings under chapter 26.10 RCW as provided for in RCW 13.34.155.

(4) A juvenile subject to adult superior court jurisdiction under subsection (1)(e)(i) through (v) of this section, who is detained pending trial, may be detained in a detention facility as defined in RCW 13.40.020 pending sentencing or a dismissal.

### **RCW 13.40.300**

(1) In no case may a juvenile offender be committed by the juvenile court to the department of social and health services for placement in a juvenile correctional institution beyond the juvenile offender's twenty-first birthday. A juvenile may be under the jurisdiction of the juvenile court or the authority of the department of social and health services beyond the juvenile's eighteenth birthday only if prior to the juvenile's eighteenth birthday:

(a) Proceedings are pending seeking the adjudication of a juvenile offense and the court by written order setting forth its reasons extends jurisdiction of juvenile court over the juvenile beyond his or her eighteenth birthday;

(b) The juvenile has been found guilty after a fact finding or after a plea of guilty and an automatic extension is necessary to allow for the imposition of disposition;

(c) Disposition has been held and an automatic extension is necessary to allow for the execution and enforcement of the court's order of disposition. If an order of disposition imposes commitment to the department, then jurisdiction is automatically extended to include a period of up to twelve months of parole, in no case extending beyond the offender's twenty-first birthday; or

(d) While proceedings are pending in a case in which jurisdiction has been transferred to the adult criminal court pursuant to > RCW 13.04.030, the juvenile turns eighteen years of age and is subsequently found not guilty of the charge for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense, and an automatic extension is necessary to impose the disposition as required by > RCW 13.04.030(1)(e)(v)(E).

(2) If the juvenile court previously has extended jurisdiction beyond the juvenile offender's eighteenth birthday and that period of extension has not expired, the court may further extend jurisdiction by written order setting forth its reasons.

(3) In no event may the juvenile court have authority to extend jurisdiction over any juvenile offender beyond the juvenile offender's twenty-first birthday except for the purpose of enforcing an order of

restitution or penalty assessment.

(4) Notwithstanding any extension of jurisdiction over a person pursuant to this section, the juvenile court has no jurisdiction over any offenses alleged to have been committed by a person eighteen years of age or older.

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STATE OF WASHINGTON  
BY cm  
DEPUTY

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

STATE OF WASHINGTON,  
Respondent,

NO. 38556-2-II

vs.

AFFIRMATION OF SERVICE

CAMPOS-CERNA, Orlin  
Appellant.

STATE OF WASHINGTON )  
County of Clark ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On June 8<sup>th</sup>, 2009 , I personally placed in the mail the following documents

1. BRIEF OF APPELLANT
2. 2<sup>nd</sup> SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
3. AFFIDAVIT OF MAILING

to the following:

ARTHUR D. CURTIS  
CLARK COUNTY PROSECUTING ATTY  
1200 FRANKLIN ST.  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000

ORLIN CAMPOS-CERNA, #324754  
WASH STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVE.  
WALLA WALLA, WA 99362

Dated this 8<sup>th</sup> day of JUNE, 2009 at LONGVIEW, Washington.

Cathy Russell  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

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