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Court of Appeals
Division III
State of Washington

NO. 32228-9-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DANIEL CHRISTOPHER LAZCANO,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The State failed to prove, beyond a reasonable doubt, all of the necessary elements of the felony-murder alternative to first degree murder.

2. The State failed to prove, beyond a reasonable doubt, that Daniel Lazcano premeditated the murder of Marcus Schur.

3. The trial court's refusal to amend the Information and accept a plea agreement to second degree manslaughter, following two (2) mistrials, was in violation of CrR 4.2(a) and (e), as well as CrR 2.1(d).

4. The prosecuting attorney committed misconduct by introducing plea agreements requiring certain witnesses to testify truthfully, examining those witnesses concerning truthfulness, and also examining witnesses who were granted immunity as to their truthfulness.

5. The prosecuting attorney committed misconduct when he vouched for the "truthfulness" of Ben Evensen's testimony.

6. The trial court's exclusion of a potential juror based upon the juror's economic status and over objection of Mr. Lazcano was error.

7. The trial court erred in determining that Mr. Lazcano is a "felony firearm offender."

8. Cumulative error deprived Mr. Lazcano of his due process right to a fair and impartial trial.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. (a) Did the State prove, beyond a reasonable doubt, that Mr. Lazcano knew that his brother, Frank Lazcano, was going to commit the crime of first degree burglary when he entered the Nick Bachman residence on December 27, 2011?

(b) Can first degree burglary, based upon assault, substantiate a first degree felony-murder charge in contravention of *Personal Restraint of Andress*, 147 Wn.2 602, 56 P.3d 981 (2002).

(c) Did the State present sufficient evidence of premeditation?

2. Did the trial court abuse its discretion under RCW 9.94A.431(1) and CrR 2.1(d) when it determined that the plea agreement with the State was not in the interests of justice?

3. (a) Did the prosecuting attorney commit misconduct by introducing plea agreements requiring witnesses to testify truthfully when their credibility had not yet been attacked (this would include witnesses granted immunity)?

(b) Did the prosecuting attorney commit misconduct in closing argument when he vouched for Ben Evensen's credibility?

(c) Was defense counsel ineffective for not objecting to the introduction of the exhibits or the testimony concerning "truthfulness?"

(d) Was defense counsel ineffective in not objecting to the prosecuting attorney vouching for Mr. Evensen in closing argument?

4. Did the trial court violate RCW 2.36.080(3) and deprive Mr. Lazcano of his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 and 22?

5. Does RCW 9.41.010(7) defining “felony firearm offender” apply under the facts and circumstances of Mr. Lazcano’s case?

6. Do the respective errors, when considered cumulatively, violate Mr. Lazcano’s due process right to a fair and impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 and 22?

STATEMENT OF CASE

“It was a dark and stormy night”¹ when Marcus Schur died in an alley in Malden, Washington. Two (2) bullets ended his life. (RP 1175, ll. 5-16; RP 1219, ll. 4-5; RP 1219, l. 22 to RP 1220, l. 9; RP 1239, ll. 10-12; ll. 22-23; RP 1242, ll. 7-9; RP 1259, ll. 1-4; RP 1266, ll. 11-21; RP 1267, ll. 1-2)

¹ Sir Edward George Earle Bulwer-Lytton, *Paul Clifford* (1830)

The Lazcano brothers, Daniel and Frank, had been looking for Marcus² since a burglary of Ben Evensen's house on December 16, 2011. Multiple items were stolen during the burglary, including two (2) rifles belonging to Daniel. (RP 373, ll. 16-21; RP 375, ll. 2-8; RP 973, ll. 8-14; RP 1551, ll. 11-22; RP 1552, ll. 5-18; RP 1552, l. 22 to RP 1553, l. 7; RP 1892, ll. 7-8)

Ben was in the Whitman County Jail when the burglary occurred. His mother, Susan Consiglio, confirmed the burglary. She kept both her son and the Lazcanos' informed of her attempts to get Marcus to return the stolen items. (RP 370, ll. 10-14; RP 372, ll. 14-23; RP 972, ll. 1-5)

Marcus returned Daniel's two (2) rifles within a day or two (2) after the burglary. Ms. Consiglio found the rifles inside a dog fence in the backyard of the Ben's residence. (RP 387, ll. 12-16; RP 388, ll. 1-4; RP 389, ll. 8-19)

Daniel was happy to have his guns returned. However, he was still mad at Marcus because some of Ben's property had not been returned. (RP 403, l. 22 to RP 404, l. 8 RP 407, ll. 16-23; RP 1590, ll. 14-24)

On December 27, 2011 Ms. Consiglio advised Daniel that Marcus was in Malden. Daniel drove from Spokane to Pine City with his girlfriend, McKyndree Rogers. They went to his Uncle Travis Carlon's home

² First names are being used in order to facilitate an understanding of the fact situation. No disrespect is meant as to any person.

where they met up with Frank and his girlfriend, Jamie Whitney. (RP 393, ll. 2-5; ll. 15-17; RP 473, ll. 20-21; RP 506, ll. 14-17; RP 507, ll. 1-17; RP 509, ll. 2-3; RP 770, ll. 20-25; RP 779, ll. 1-19; RP 790, ll. 2-4; RP 791, ll. 13-14; RP 1553, ll. 13-21; RP 1589, l. 20 to RP 1590, l. 3)

Prior to leaving Spokane Daniel called his friend Kyle Evans. He asked Kyle if he wanted to go with him to “whup” Marcus’ ass. Kyle declined. (RP 412, ll. 7-17)

When Daniel and his girlfriend arrived at the Carlon residence he urged Frank to go with him to find Marcus. (RP 511, l. 23 to RP 512, l. 3; RP 512, ll. 13-14; RP 836, l. 11 to RP 837, l. 9)

Daniel was driving a white car belonging to his stepfather, Eli Lindsey. He and Frank drove to the Nick Bachman house in Malden. (RP 511, ll. 17-22; RP 607, ll. 23-25; RP 619, ll. 7-14)

Upon arrival at the Bachman residence Frank knocked on the front door. David Cramer, Marcus’ brother, answered the door. Frank knocked him to the ground and entered the house. Amber Jones was present and Frank pushed her. Marcus ran out the back door. Nick Bachman observed what happened inside the house. (RP 422, l. 16 to RP 423, l. 9; RP 424, l. 25 to RP 425, l. 13; RP 426, ll. 6-12; RP 427, ll. 19-21; RP 428, ll. 8-10; RP 1069, ll. 12-21; RP 1070, ll. 5-10; RP 1127, ll. 23-24; RP 1129, ll. 1-3; RP 1130, ll. 14-23; RP 1131, ll. 3-6)

David followed Frank out the back door and into the alley. He saw two (2) flashes from a gun. He believed he heard five (5) additional shots. Nick Bachman also believed he heard seven (7) gunshots. Amber Jones heard two (2) shots. A neighbor, James Wendt heard two (2) shots. (RP 429, ll. 15-20; RP 1071, ll. 12-16; RP 1076, ll. 19-20; RP 1132, ll. 13-19; RP 1133, ll. 16-19; RP 1134, l. 24 to RP 1135, l. 2; RP 1203, ll. 4-10; ll. 20-23; RP 1206, ll. 8-14; RP 1219, ll. 4-5)

Ms. Jones recognized the white car that was out in the alley. She did not see Daniel. She believed he was inside it. She did not see Frank when she looked out the back door. (RP 432, ll. 8-19; RP 437, ll. 1-6)

Becky Varner, a neighbor of Mr. Bachman's, saw the white car with people running around it. It was her belief someone on a bicycle had been run over and the people were loading a person into the car. The car backed up and something longer was picked up and put in the car. (RP 1238, ll. 12-21; RP 1241, ll. 7-8; RP 1242, ll. 7-9; RP 1243, ll. 12-20; RP 1249, ll. 10-23)

The brothers returned to the Carlon residence. Frank went inside and contacted his uncle. He stated: "We got one in the car with two in the chest." Mr. Carlon went outside and saw Daniel in the passenger seat of the car. (RP 513, ll. 1-13; RP 514, l. 23 to RP 515, l. 1; RP 841, ll. 1-15; RP 1560, ll. 7-16)

Mr. Carlon told the brothers “no body, no crime.” He had the brothers meet him outside Pine City. They eventually stopped at an area in Whitman County known as Hole in the Ground. (RP 515, ll. 10-23; RP 517, ll. 9-13; RP 520, ll. 6-11)

Frank gave an AK-47 to Mr. Carlon for disposal. Frank purchased an AK-47 on September 8, 2009 from an Army surplus store in Spokane. Mr. Carlon and Mr. Lindsey drove to Spokane. The AK-47 was tossed from the TJ Meenach Bridge into the Spokane River. It was later recovered by Deputy Cook of the Spokane Sheriff's Dive Team. (RP 541, ll. 1-13; RP 561, ll. 22-24; RP 566, ll. 6-12; ll. 21-25; RP 568, ll. 11-23; RP 612, ll. 2-17; RP 666, ll. 6-7; ll. 10-12; RP 668, ll. 8-22; RP 670, ll. 8-13 RP 745, ll. 20-21; RP 752, ll. 1-3; ll. 12-18).

The brothers eventually placed Marcus' body in a creek between Bonnie Lake and Rock Lake. His arms and legs were tied. Rocks were placed on the body to weigh it down. Marcus' body was not found until March 25, 2012. (RP 343, l. 19 to RP 344, l. 4; RP 347, ll. 14-16; RP 1327, ll. 16-24; RP 1331, ll. 12-21; RP 1339, ll. 23-25; RP 1341, ll. 7-14; RP 1620, ll. 7-8)

Frank and Jamie drove the white car to Spokane County where it was set on fire. It was later impounded and the VIN number was traced to

Mr. Lindsey. (RP 850, ll. 6-14; RP 914, ll. 17-19; RP 916, ll. 21-23; RP 918, ll. 11-13; RP 930, ll. 16-21; RP 933, ll. 16-18)

After Marcus' body was found the brothers, Ben and Jamie had a discussion in her Tahoe. The brothers each indicated that they would take the blame. (RP 858, ll. 14-23; RP 862, ll. 10-13; RP 862, l. 24 to RP 863, l. 10; RP 863, ll. 15-22; RP 986, ll. 16-18; RP 987, ll. 11. 9-18)

Daniel made statements to the following people:

"Uncle, I fucked up."	Travis Carlon - (RP 524, ll. 3-5)
"I can't believe I did this. I can't believe this is happening."	Jamie Whitney - (RP 849, ll. 3-7)
"It wasn't Frank."	Jamie Whitney - (RP 888, ll. 12-16)
"We got him down."	Kyle Evans - (RP 940, ll. 2-12)
I yelled "stop, Marcus"	Ben Evensen - (RP 980, ll. 7-10)
"I fucked up"	Nicole Carlon - (RP 1868, ll. 8-13; RP 1876, ll. 6-11)
"We took care of it."	Ben Evensen - (RP 1041, ll. 16-20)
"I can't believe I threw my whole life away because my house got robbed."	Undersheriff Rockness - (RP 1891, ll. 18-20)

Fitzgerald didn't do shit, (RP 1892, ll. 1-2)
so we had to do it our-
selves.”

Fitzgerald fucked up me, (RP 1892, ll. 4-5)
Ben's and Frank's lives.”

Neither Amber Jones, David Cramer, Nick Bachman nor James
Wendt heard anyone yell; “Stop Marcus.” (RP 1222, ll. 15-19)

An Information was filed on April 2, 2012 charging Daniel with
first degree murder (including the alternatives of premeditation and felo-
ny-murder) and unlawful disposal of human remains. (CP 1)

On April 5, 2012 an Amended Information was filed adding a fire-
arm enhancement to Count 1. (CP 4)

A Second Amended Information was filed on January 11, 2013. It
added a count of first degree kidnapping with a firearm enhancement. (CP
7)

Daniel's first trial ended in a mistrial. The jury found him guilty of
unlawful disposal of human remains. (02/21/13 RP 1207, l. 19 to RP
1210, l. 11)

Daniel's second trial also ended in a mistrial. Daniel was then
PR'd pending a determination of whether or not the State would retry him.
(06/10/13 RP 2888, l. 21 to RP 2889, l. 4)

The State and defense counsel then reached a plea agreement. The State prepared a Motion to Amend the Information. On July 19, 2013 the trial court refused to amend the Information. The Court declined to accept a guilty plea to manslaughter second degree. Marcus' mother opposed the plea agreement. (07/19/13 RP 7, l. 11 to RP 10, l. 7; RP 13, l. 12 to RP 18, l. 11; CP 203)

When Judge Frazier granted a change of venue to Spokane County for the third trial he recused himself. Defense counsel then filed a motion to enforce the plea agreement after the case was transferred to Spokane County. The motion was denied. (RP 79, l. 6 to RP 86, l. 20; CP 195)

On December 9, 2013 a Third Amended Information was filed. It deleted Count 3 (kidnapping). (RP 20, ll. 20-25; CP 270)

During jury selection defense counsel objected to the trial court excusing Juror No. 2 for financial hardship on the basis that it constituted bias against the working class. Defense counsel requested that the Court set a reasonable daily wage for this juror and direct the County to pay the same. The trial court overruled the objection. (RP 264, l. 17 to RP 266, l. 7; RP 268, ll. 16-18; RP 270, l. 24 to RP 271, l. 4; RP 271, ll. 18-21)

The trial court's jury instructions defined premeditated first degree murder, as well as first degree felony-murder based upon first degree burglary. Accomplice liability was included in the instructions. There was

no requirement for unanimity on the alternatives contained in the first degree murder instruction. (Instructions 9, 13, 14, 19, 21; CP 311; CP 316; CP 317; CP 322; CP 324; Appendices “A”; “B”; “C”; “D”; “E”)

Eli Lindsey, Jamie Whitney, McKyndree Rogers, Ben Evensen, and Travis Carlon were either granted immunity or given reduced charges in exchange for their testimony. The State imposed a requirement of “truthfulness” as to each of these witnesses. During direct examination, and without objection from defense counsel, the State introduced the plea agreements and/or questioned the witnesses concerning the “truthfulness” of their testimony. (Exhibit 73; Exhibit 74; Exhibit 75; Exhibit 76; RP 479, ll. 3-13; RP 479, l. 18 to RP 480, l. 2; RP 525, l. 21 to RP 526, l. 5RP 609, l. 16 to RP 610, l. 13; RP 811, l. 17 to RP 812, l. 3; RP 812, ll. 9-16; RP 868, l. 7 to RP 869, l. 22; RP 1001, l. 23 to RP 1002, l. 19; Appendices “F”; “G”; “H”; “I”)

The prosecuting attorney questioned each of these witnesses as to whether or not they had told the truth and if their testimony at trial was the truth. (RP 576, ll. 8-15; RP 578, ll. 9-14; RP 828, l. 21 to RP 829, l. 12; RP 1004, ll. 7-8; RP 1057, ll. 7-10)

The prosecuting attorney also vouched for Ben’s credibility in closing argument. (RP 1980, ll. 1-18)

The jury found Daniel guilty of first degree murder. It entered a special verdict that he was armed with a firearm at the time of the offense. (CP 340; CP 344)

Judgment and Sentence was entered on January 31, 2014. Daniel was sentenced to three hundred and twenty-four (324) months in prison, including the firearm enhancement. Thirty-six (36) months of community custody was also imposed. The trial court checked the box requiring felony firearm registration. Daniel filed his Notice of Appeal the same date. (CP 367; CP 378)

SUMMARY OF ARGUMENT

When felony-murder is based upon first degree burglary which, in turn, is based upon an assault inside a building, and there is insufficient evidence of any other basis for the burglary, then the elements cannot be established beyond a reasonable doubt.

An involuntary reaction to events cannot constitute the necessary predicate to establish premeditation beyond a reasonable doubt.

A trial court is precluded from denying an amendment of an Information when substantial rights of the defendant are not prejudiced.

CrR 2.1(d) does not reflect that substantial rights of the public are to be considered.

The trial court abused its discretion after two (2) mistrials occurred, when it refused to accept a plea agreement.

Daniel was denied his right to a fair and impartial trial when

- 1) a juror was excluded over defense counsel's objection;
- 2) the prosecutor introduced plea agreements requiring witnesses to testify truthfully;
- 3) the prosecutor vouched for a witness in closing argument; and
- 4) due to cumulative error.

ARGUMENT

The State charged Daniel with first degree murder. Count 1 of the Third Amended Information states:

That the said Daniel Christopher Lazcano on or about the 27th day of December, 2011, in the State of Washington, with a premeditated intent to cause the death of another person, to-wit: Marcus Schur, caused the death of said person, and/or the above named Defendant did commit or attempt to commit the crime of burglary in the first degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, the Defendant, or another participant, caused the death of a person other than one of the par-

ticipants, to wit: Marcus Schur ..., and/or was an accomplice to said crime

RCW 9A.32.030(1) provides, in part:

A person is guilty of murder in the first degree when:

- (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person ...; or
- (b) ...; or
- (c) He or she commits or attempts to commit the crime of ... (3) burglary in the first degree ... and in the course of or in the furtherance of such crime or in immediate flight therefrom, he or she, or another participant causes the death of the person, other than one of the participants

I. FELONY-MURDER

A. First Degree Burglary

The State expressed its theory on felony-murder during the instruction conference with the Court. The following exchange occurred:

THE COURT: Well, there's no evidence that the burglary would -- has two components, either an assault or an armed with a deadly weapon. There's no evidence that there was a shooting underlying the burglary, right? Correct?

MR. TRACY: Well, in immediate flight from the burglary there was a shooting.

THE COURT: The -- okay. Assault can't be the predicate offense underlying a felony-murder. That's number one. So your underlying offense is a burglary. The burglary is committed when Frank runs in the house. He's either got a pistol strapped on him or he's got -- or he has assaulted somebody, right? Aren't those the facts basically?

MR. TRACY: Yes.

(RP 1926, l. 25 to RP 1927, l. 13)

There was no flight from any burglary. Frank was chasing Marcus out the back door in order to assault him. Marcus was shot when he was in the alley behind the house. The shooting occurred independent of and after the burglary; but not in fleeing from it. The burglary is therefore based upon the assaults that occurred inside the house.

... [T]he words "assaults any person therein" refer to any person who is assaulted while the perpetrator is entering the building, while he is in the building, or while he is in immediate flight from the dwelling.

State v. Gilbert, 33 Wn. App. 753, 756, 657 P.2d 350 (1983); *see also*:
State v. Irby, 187 Wn. App. 183 (2015).

Frank assaulted David as he entered the Bachman residence. He assaulted Amber Jones as he ran through the residence. He did not assault anybody after leaving the residence.

Frank was not armed when he entered the residence. He was not armed while he was in the residence. He was not armed when he left the residence. Any reference to a pistol or a holster, whether by the prosecuting attorney or defense counsel, was without foundation in fact. (RP 444, ll. 8-19; RP 575, ll. 3-17; RP 543, ll. 8-24; RP 617, ll. 12-14; RP 1118, ll. 8-21; RP 1119, ll. 2-9; l. 21; RP 1568, ll. 12-20)

The language of the felony murder provision of the first degree murder statute requires that a “coparticipant” be one who actually commits or attempts to commit the underlying felony. As we observed above, it provides that a person is guilty of murder where “[h]e or she commits or attempts to commit” a predicate felony “*and* in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.” [Citation omitted.]. Thus, **in order for a person to be found guilty of felony murder, the State must prove that he or she committed or attempted to commit a predicate felony *and* that he or she, or a coparticipant, committed homicide in the course of commis-**

sion of the felony. See *State v. Dudrey*, 30 Wn. App. 447, 450-55, 635 P.2d 750 (1981).

State v. Carter, 154 Wn.2d 71, 80, 109 P.3d 823 (2005). (Emphasis supplied.)

Daniel asserts that he was not involved in any burglary. He did not commit a burglary. He did not attempt to commit a burglary. Rather, the intent was to locate Marcus and “whup his ass.”

Deputy Cox of the Whitman County Sheriff’s Office interviewed Frank on December 28. Frank told the deputy that he was looking for Marcus to get his property back and to “beat the crap out of him.” (RP 1260, ll. 22-25; RP 1275, ll. 1-16)

Daniel had no knowledge that Frank assaulted David. He had no knowledge that he pushed Amber Jones. No evidence was presented that there had been any type of discussion between Daniel and Frank that David or Ms. Jones were to be assaulted.

The State’s theory does not withstand judicial scrutiny. The State agreed that an assault cannot be the underlying basis for first degree felony murder. See: *Personal Restraint of Andress, supra*, 605-16; see also: *Personal Restraint of Coats*, 173 Wn.2d 123, 139, 267 P.3d 324 (2011).

Yet, the prosecuting attorney’s closing argument emphasized assault as the basis for the burglary:

I want to step back a second. For burglary, you not only have to enter or remain and assault somebody, right? in there, but you also have to intend to commit a crime. Frank Lazcano intended to, so did Dan, kick Marcus's ass. That's that phrase once again. That was their intent in going to Malden. That's a crime. And, of course, once Frank got in there, he assaulted Amber.

(RP 1993, ll. 10-16)

One of the alternatives defining first degree burglary (Instructions 13 and 14) is assault. If assault cannot be the basis for felony-murder, then that particular alternative fails for first degree burglary.

The State established that an assault occurred at the entryway to and inside the Bachman residence. The State did not establish that Frank was armed with a gun at that time.

Daniel was in the alley. He did not intend to commit any burglary.

Frank's actions were independent of Daniel's. Daniel's actions were independent of Frank's.

B. Accomplice Liability

Daniel acknowledges that the Third Amended Information includes accomplice liability.

RCW 9A.08.020 provides, in part:

- (1) A person is guilty of a **crime** if it is committed by the conduct of another person for which he or she is legally accountable;
- (2) A person is legally accountable for the conduct of another person when:
 - (a) ...;
 - (b) ...;
 - (c) He or she is an accomplice of such other person in the commission of a **crime**.
- (3) A person is an accomplice of another person in the commission of a **crime** if:
 - (a) With knowledge that it will promote or facilitate the commission of **the crime**, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it; or
 - (b) His or her conduct is expressly declared by law to establish his or her complicity.

(Emphasis supplied.)

Daniel asserts that he was not an accomplice to the burglary as argued by the prosecuting attorney:

We have a definition of “accomplice,” and we’ll talk about that. Frank Lazcano committed burglary in the first degree. Burglary in the first degree is entering the house and assaulting somebody therein. In this case, Frank Lazcano entered the house without permission, you heard that, and assaulted Amber. He also, of course, assaulted David Schur right at the threshold. But after he came in he assaulted Amber, he gave her the shove. He entered without permission and he assaulted Amber therein. That’s burglary in the first degree. **The accomplice committed burglary in the first degree.**

(RP 1992, l. 17 to RP 1993, l. 1) (Emphasis supplied.)

RCW 9A.08.020 (3)(b) is inapplicable under the facts and circumstances of the case.

The prosecuting attorney’s closing argument on felony-murder conflates Daniel’s and Frank’s actions. As argued the accomplice would be Frank; not Daniel.

MR. TRACY: Felony murder. I did some color-coding here because, again, this is -- I think you might -- you might see it as odd. So this is one of the elements -- or one of the alternative(s) for first-degree murder is felony murder. We talked about that. Burglary in the first degree. So if -- before you can be convinced beyond a reasonable doubt that the defendant's guilty of felony murder based on burglary in the first degree, you've got to examine the law on burglary first degree. That's what this instruction give(s) you (indicating). And so what the prosecutor has to prove in order to prove felony murder based on burglary first degree is the date -- again, no question -- that the defendant or an accomplice entered or remained unlawfully in a building. Again, here the accomplice is Frank Lazcano; they're acting as accomplices to each other. The accomplice entered or remained: He entered un-

lawfully and without permission, and as he ran through the house, he was in there without permission. He remained. Then he left, but while he was in the house he's remaining in the house.

"That the entering or remaining was with the intent to commit a crime against a person." The intent is to commit a crime against Marcus Schur, to beat his ass or to "kick his ass." That was the phrase over and over by everybody.

"That in so entering or while in the building ..." Here I have color-coding, because I have -- the yellow highlight is Frank's acts and the red underline is the defendant's acts, because they both apply here. There -- there are two ways it was committed. They're both true. "That in so entering or while in the building," now we're talking about Frank. I'll just do the highlighted part -- "while in the building," and I won't talk

about this (indicating) -- “while in the building, an accomplice in the crime assaulted a person.” Again, Frank Lazcano assaulted Amber Jones, shoved her out. Beyond a reasonable doubt I’d suggest to you that that happened.

What about the defendant’s conduct? That also is implicated here in this element (indicating): “that in so entering or while in the building” -- this is the defendant’s prong -- “or in immediate flight from the building” -- this is the defendant waiting out back -- “the defendant in this case was armed with a deadly weapon.” That’s the rifle.

(RP 1995, l. 12 to RP 1996, l. 25)

There was no evidence introduced to indicate that Daniel had any knowledge that his actions would promote or facilitate the commission of first degree burglary. The only evidence indicates that there was an agreement between Daniel and Frank to find Marcus and “whup his ass.”

... [U]nder Washington’s accomplice liability statute, **the State [is] required to prove that [an accomplice] actually knew**

that he was promoting or facilitating [another person] in the commission of [the crime]. RCW 9A.08.020(3); *see also: State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980) (Accomplice must have actual knowledge that principal was engaging in the crime eventually charged.”

State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). (Emphasis supplied.)

Daniel contends that when viewing the *Carter* and *Allen* cases in conjunction it shows that the State failed to prove the felony-murder alternative beyond a reasonable doubt.

C. Premeditation

The legislature has declared that the premeditation necessary to support conviction for murder in the first degree must “involve more than a moment in point of time.” RCW 9A.32.020(1). This court has defined premeditation as

Deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.

State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). Premeditation may be proved by circumstantial evidence where inferences supporting premeditation are reasonable and the evidence is substantial. *Clark* [*State v. Clark*, 143 Wn.2d 731, 24

P.3d 1006, *cert. denied*, 534 U.S. 1000
(2001)] at 769.

State v. Gregory, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006). *See also:*
State v. Monaghan, 166 Wn. App. 521, 535, 270 P.3d 616 (2012).

Dr. Jeffrey Reynolds was the forensic pathologist who autopsied Marcus' body. He found two (2) bullet wounds. (RP 1347, ll. 2-3; RP 1357, ll. 21-25; RP 1358, ll. 1-4; RP 1359, ll. 13-19)

It was Dr. Reynolds' opinion that the first bullet shattered the left portion of Marcus' pelvis. This caused him to fall forward. The second bullet then went into the shoulder fracturing the collar bone. It continued downward lacerating the subclavian artery, causing the left lung to collapse and breaking a number of ribs. The second wound was the fatal wound causing rapid bleed out. (RP 1359, ll. 6-11; RP 1360, ll. 15-21; RP 1360, l. 24 to RP 1361, l. 15; RP 1362, ll. 1-15; RP 1363, ll. 14-23)

Dr. Reynolds opined that the wounds, which were nine (9) millimeters in diameter, were caused by a 7.62 x 39 bullet which is used by an AK-47. (RP 1363, l. 24 to RP 1364, l. 1; RP 1367, ll. 3-17; RP 1375, ll. 17-21)

Thus, the evidence indicates that Marcus was hit with two (2) bullets fired from an AK-47. The evidence further reflects that the first bullet hit him in the area of his pelvis causing him to fall forward. The second

bullet then entered his shoulder and was the fatal shot. It ruptured the subclavian artery, left lung and seven (7) ribs.

According to Ben, Daniel told him that he didn't go to the house to kill Marcus. Daniel expressed remorse over Marcus' death. (RP 980, ll. 22-23; RP 981, l. 17 to RP 982, l. 4; RP 984, l. 24 to RP 985, l. 2)

Daniel was emotionally upset after the shooting. He appeared scared and was crying at various times. There had been no discussion of an intent to kill Marcus. It appears that the reaction to Marcus' surprise appearance in the alley was involuntary. Even the prosecuting attorney recognized this. "It wasn't planned and you guys panicked." (RP 615, ll. 9-22; RP 846, ll. 10-20; RP 847, ll. 1-21; RP 852, ll. 5-19; RP 1889, ll. 3-8; RP 1983, ll. 15-16)

Furthermore, since the first bullet appears to have caused the forward fall, the second bullet was not intended to kill.

Additional evidence supporting lack of premeditation includes:

- 1) Frank's having to get Daniel into the car after the shooting.
(RP 982, ll. 13-21);
- 2) Frank had to get the gun and put it into the car. (RP 983, ll. 1-4);

- 3) Travis Carlon's observations of Daniel in the passenger seat of the car and during their time together. (RP 514, l. 23 to RP 515, l. 1; RP 526, ll. 19-21; RP 527, ll. 3-13);
- 4) Observations made by Kyle Evans and Stephanie VanDyke later that night. (RP 952, ll. 5-19; RP 1774, l. 25 to RP 1775, l. 12).

Daniel contends that, as argued, all of these facts and circumstances are indicative of lack of premeditation. Moreover, applying common sense to what was presented to the jury leads to the conclusion that there was no time to reflect on an intent to kill Marcus.

D. Jury Unanimity

A jury must reach a unanimous verdict in a criminal case. All twelve (12) jurors must agree in order to convict a defendant of a crime with which he or she is charged. RCW 9A.04.100(1).

In this state, if sufficient evidence supports each alternative means of a charged crime, jurors can give a general verdict on that crime without giving express unanimity on which alternative means was employed by the defendant. "If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction" *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). *See also:*

State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); *State v. Franco*, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); *State v. Arndt*, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). Under Washington law, premeditated murder and felony murder “are alternative ways of committing the single crime of first degree murder.” *State v. Bowerman*, 115 Wn.2d 794, 800, 802 P.2d 116 (1990); *State v. Talbott*, 199 Wash 431, 437-38, 91 P.2d 1020 (1939).

State v. Fortune, 128 Wn.2d 464, 467-68, 909 P.2d 930 (1996).

Daniel does not argue that first degree murder is not an alternative means crime. He does have an argument that if, indeed, the evidence as to either alternative is insufficient, then there is no way to determine if the jury reached a unanimous verdict.

The jury was told in Instruction No. 9 that

To return a verdict of guilty to murder in the first degree, the jury need not be unanimous as to which of the alternatives, Alternative A -- Premeditated Murder or Alternative B -- Felony Murder, has been proved beyond a reasonable doubt, as long as each juror finds that at least one of these alternatives has been proved beyond a reasonable doubt.

When considering the sufficiency of the evidence, the test is set out in *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980):

“... [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential ele-

ments of the crime *beyond a reasonable doubt.*” *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed.2d 560, 99 S. Ct. 2781 (1979).

As previously argued, there is no evidence in the record to establish that Daniel had actual knowledge that Frank was going to commit the crime of first degree burglary. No reasonable juror could make a determination, beyond a reasonable doubt, that the knowledge element of accomplice liability was met.

II. *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010)

The prosecuting attorney introduced certain exhibits constituting either plea offers or plea agreements. There was also testimony concerning the offers/agreements, as well as immunity from prosecution.

Exhibit 73 involves Eli Lindsey. It contains the following language: “Mr. Lindsey agrees to cooperate and does cooperate in the prosecution of any case related to the death of Marcus Schur ... as well as **testifying truthfully** if subpoenaed to do so at any hearing or trial.” (Emphasis supplied.)

Exhibit 74 relates to Jamie Whitney. It includes the following language:

I am hereby granting Ms. Whitney immunity from prosecution for any crime related to the murder, disposal of the body, and destruction or disposal of evidence, provided that, and conditioned upon, the following:

...

4. Ms. Whitney appear in response to any subpoenas and **testify truthfully** in any and all trials related to the murder of Mr. Schur and the aftermath of the murder

(Emphasis supplied.)

The prosecuting attorney also granted immunity to McKyndree Rogers. Exhibit 75 contains the following language: "4. Ms. Rogers appear in response to any subpoenas and **testify truthfully** in any and all trials related to the murder of Mr. Schur and the aftermath of the murder"

(Emphasis supplied.)

The plea agreement involving Ben Evensen was entered as Exhibit 76. It states, in part: "He must respond to any subpoenas and appear and **testify truthfully** in any case involving the murder of Marcus Schur."

(Emphasis supplied.)

Finally, the prosecuting attorney, during direct examination of Travis Carlon, on two (2) different occasions, confirmed that Mr. Carlon's testimony was truthful. (RP 525, l. 21 to RP 526, l. 5; RP 576, ll. 8-15; RP 578, ll. 9-14)

The issue involved relates to prosecutorial vouching. The *Ish* Court ruled at 196:

Improper vouching generally occurs (1) if the prosecutor expresses his or her personal

belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not supported at trial supports the witness's testimony. [Citations omitted.] ... Whether a witness has testified truthfully is entirely for the jury to determine. [Citations omitted.]

The *Ish* Court went on to discuss plea agreements and provisions relating to "truthfulness." It stated at 197-98:

... [C]ourts have found that a witness's testimony that they were speaking the truth and living up to the terms of their plea agreement may amount to a mild form of vouching. ...

... Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. ... "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: '... are prosecutorial overkill.'" *Roberts* [*United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980)] at 536 (Second alteration in original) (quoting *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) *Friendly J.*, concurring)) ... **[E]vidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief.**

(Emphasis supplied.)

The prosecuting attorney introduced the plea agreements and testimony during the State's case-in-chief. Since there were two (2) prior

mistrials, the State obviously was anticipating potential impeachment questions on cross-examination of the witnesses. Defense counsel did not object at the time the exhibits were introduced or the questions asked. ““In order to prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury’s verdict.”” *State v. Ish, supra*, 200, quoting *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006) (citing *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998)).

Testimony from Travis Carlon and Eli Lindsey does not appear to unduly impact Daniel’s position. However, testimony from Jamie Whitney, McKyndree Rogers and Ben Evensen does.

Ms. Rogers testified that Daniel disposed of a certain item which may or may not have been related to the case (parachute cord). (RP 804, ll. 5-21; RP1345, ll. 4-14)

Jamie Whitney’s testimony was more damning. She directly implicated Daniel in the shooting. He supposedly told her: “I can’t believe I did this. I can’t believe this is happening.” (RP 849, ll. 3-7)

Ms. Whitney also testified to a discussion where the brothers were each going to take the blame in order to spare the other. (RP 862, l. 24 to RP 863, l. 10; RP 863, ll. 15-22)

Finally, she said that Daniel told her “it wasn’t Frank.” (RP 888, ll. 12-16)

Ben testified concerning several discussions that he had either individually or with both brothers present. His testimony includes the following:

1. Daniel told him in detail about the shooting. (RP 977, ll. 15-19);
2. Daniel told him he shot Marcus with a rifle and pantomimed what he did. (RP 978, ll. 9-17);
3. Daniel described how Frank went into the house, confronted David and forced Marcus to run out. (RP 979, ll. 14-20);
4. Daniel said he shot Marcus when he wouldn’t stop. (RP 980, ll. 5-20; RP 1052, ll. 1-10);
5. Daniel told him that parachute cord was used to tie up Marcus. (RP 990, l. 7 to RP 991, l. 19) (*See: McKyndree Rogers, infra.*).

When the testimony from these witnesses is considered in light of the fact that there were two (2) prior mistrials it is evident that the combination of the testimony, plea agreements and prosecutorial vouching adversely affected Daniel’s right to a fair trial under the Sixth and Fourteenth

Amendments to the United States Constitution and Const. art. I, §§ 3 and 22.

Moreover, Daniel cannot see a valid reason for lack of defense counsel's objection to the introduction of either the plea agreements or the testimony.

In order to overcome the “strong presumption” of effective representation, [a defendant] bears the burden of establishing that no legitimate strategic or tactical reasons support counsel's choices. *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995) (quoting *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). Where a claim of deficiency rests on counsel's failure to make an objection, a defendant must show that the objection would likely have been sustained to establish prejudice. *McFarland*, 127 Wn.2d at 337 n. 4 (“Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice.”).

State v. Brown, 159 Wn. App. 1, 17, 248 P.3d 518 (2010).

Based upon the *Ish* case, if defense counsel had objected to the introduction of the testimony and plea agreements, the trial court would have had to grant the objection and exclude both the testimony and plea agreements.

The testimony and plea agreements could only then have come in afterwards, during the State's redirect, if defense counsel had challenged the credibility of the respective witnesses during cross-examination.

III. DENIAL OF AMENDMENT AND PLEA AGREEMENT

RCW 9.94A.431(1) provides, in part:

If a plea agreement has been reached by the prosecutor and the defendant pursuant to RCW 9.94A.421 ... [t]he court, at the time of the plea, shall determine if the agreement is consistent with the interests of justice and with the prosecuting standards. ...

The State and Daniel entered into a plea agreement for second degree manslaughter. The trial court refused to accept the plea. The trial court also refused to amend the Information.

CrR 2.1(d) provides:

The court may permit any information or bill of particulars to be amended at any time before verdict or finding **if substantial rights of the defendant are not prejudiced.**

(Emphasis supplied.)

It is apparent when RCW 9.94A.431(1) and CrR 2.1(d) are read together that the trial court must make two (2) determinations: (1) "if the agreement is consistent with the interests of justice and with the prosecut-

ing standards” and (2) whether “substantial rights of the defendant are ... prejudiced” by the proposed amendment.

Daniel asserts that in addition a trial court must consider the provisions of CrR 4.2(a) and (e).

CrR 4.2(a) provides: “A defendant may plead not guilty, not guilty by reason of insanity, or guilty.”

The rule does not restrict a defendant from entering one or the other plea at the time of the arraignment. Rather, the rule is open-ended. A defendant may enter a plea at any time whether to an original Information or an Amended Information.

As recognized in *State v. Brett*, 126 Wn.2d 136, 156, 892 P.2d 29 (1995):

... [The] right to plead guilty must be harmonized with the State’s right to amend the information. See *State v. Wernick*, 40 Wn. App. 266, 270, 698 P.2d 573 (1985) (quoting and citing *Seattle v. Crockett*, 87 Wn.2d 253, 256, 551 P.2d 740 (1976) and *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981)). Such harmonization is provided by CrR 2.1(d) which allows informations to be amended if substantial rights of defendants are not prejudiced thereby.

It is obvious under CrR 2.1(d) that Daniel would not be prejudiced by the proposed amendment. It was favorable to him. He would not be denied any substantial rights.

Daniel recognizes that the courts have limited the right to plead guilty to the time of arraignment. However, this limitation runs counter to the multiplicity of guilty pleas after plea negotiations have been conducted or Informations amended.

State v. James, 108 Wn.2d 483, 488, 739 P.2d 699 (1987) states:

Because *James* had the unfettered opportunity to enter a plea at arraignment, at which he entered a legally sufficient plea of not guilty, his right to plead guilty was no longer unconditional.

Daniel interprets the *James* ruling as being dependent upon achievement of a plea agreement and/or the filing of an Amended Information. The State reached a plea agreement with him. An Amended Information had been prepared. The trial court refused to accept the Amended Information.

Since no substantial rights of Mr. Lazcano would be prejudiced by the amendment, the question becomes whether or not the trial court abused its discretion when it refused to accept it.

As the Court recognized in *State v. Haner*, 95 Wn.2d 858, 863, 631 P.2d 381 (1981):

The amendment of an information is *not* an initial decision to prosecute ... [citations omitted]. By the time the State has determined to move to amend the information, the plain terms of CrR 2.1(d) have implicated the court in any possible alterations [citations omitted.]

Daniel agrees that the trial court bears the ultimate decision-making power with regard to the amendment of an Information. Nevertheless, that discretion is subject to the language of the rule. The language of the rule is indicative that the trial court abused its discretion since there was no prejudice to Daniel's substantial rights.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion 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 reasons given by the trial court in refusing to amend the Information follow:

... I have presided over three trials and numerous other hearings regarding the death of Marcus Schur. And to be blunt and to be honest, I'm tired. I'm tired of this case. We've had two hung juries in Daniel

Lazcano's cases. We had Frank Lazcano, at the trial -- found guilty, not to first degree intentional murder but a felony-murder.

(07/19/13 RP 13, ll. 13-19)

This has been a long process, as I've said. I think there were 20 to 30 witnesses in each of the three trials including the two trials of Daniel Lazcano that have sacrificed and been inconvenienced. We've had hundreds of people called in for jury duty in these three cases that have undergone hardship and inconvenience. It's very clear that if we have a retrial of this case it's going to be another long, drawn out expensive proceeding that will involve, I'm sure, going to another jurisdiction and a change of venue, to have a trial. And I appreciate that there is a great need here for finality, there is need for closure, there is need for people to get on and move on with their lives.

And I recognize all of these factors. And that's only one side of the equation. To accept a plea agreement, it isn't a matter of, "gosh, we're all tired of this case," including the judge, and attorneys and witnesses, and family members, but I have to be convinced before I accept this plea that the plea agreement here is consistent with the prosecutor's standards -- which take into account the severity of the charge, and whether a weapon is involved, and whether or not -- it's a crime against a person. And I also have to take into account whether the proposed plea agreement is in the best interests of justice.

(07/19/13 RP 14, l. 10 to RP 15, l. 8)

The trial court correctly analyzed its role in connection with the plea agreement. The prosecuting standards identified by the trial court are the correct standards to be used in making the decision.

The Legislature has not seen fit to define the phrase "interests of justice." Thus, each judge may interpret that phrase as he/she sees fit.

The helter skelter interpretation of the phrase “interests of justice” must not be condoned. What does it mean?

The word “justice” as defined in BLACK’S LAW DICTIONARY (9th ed.) means “the fair and proper administration of laws.”

The trial court went on to state the following:

I’m also aware that from the outset this was a case where there was a lot of necessary deal-making that had to be made by the prosecuting attorney, much of which resulted from just outright deceit, lying, interference with the administration of justice. We have the notorious uncle, Travis Carlon, that testified, and in this court’s view gave part of the story. We had the former stepfather of Mr. Lazcano, same thing, participated in disposal of the body, of cover-up with the crime -- I think gave half-truths on the witness stand, withheld information.

We have spouses and fiancées that were given immunity agreements because they initially weren’t truthful to the court. And

then we have the -- what I would term to be the -- Well, either the theatrics of Mr. Daniel Lazcano -- which I highly suspect -- or, we have an extremely unstable emotionally individual -- can't -- It's odd. I watched him very carefully. He just cannot hold his emotions. He cries like a baby, when there's some issue that affects and impacts his life, but I saw Mr. Lazcano look at the picture of Marcus Schur floating in the river, where he undisputedly disposed the body -- not a tear. I heard the tape recording of the lie that he gave to the police officers I think a day or so after this occurred. Not a quiver in his voice, no crying, no Bible being clutched.

To go along with this plea agreement -- the reason that there may be evidentiary problems in this case, is a result of dishonesty and manipulation on the part of the defendant and family members and friends. That's the bottom line, here. And to go

along with this plea agreement, in my mind,
would be my giving my stamp of approval
on perjured testimony and manipulation.

(07/19/13 RP 16, l. 2 to RP 17, l. 8)

The trial court's extensive knowledge of the prior trials and pre-trial proceedings jaundiced its perception. The trial court's personal beliefs and opinions should not have impacted the decision concerning whether or not to allow the Information to be amended and the plea agreement accepted.

Finally, the concluding reasoning by the trial court supports Daniel's position that an abuse of discretion occurred:

And I think back from the early stages of these cases -- I've never seen a case in 30 years of judicial experience, where we have a group of supporters for the people accused of a crime that are cheering, and they've vocally supportive, in absolute, total disrespect for the victim's mother -- And I don't remember a case with the extent of deceit in a cover-up, as in this case.

It isn't that I'm finding here today that a plea agreement couldn't be structured that would be in the interests of justice, and that would be consistent with the prosecutor's standards. But what I'm finding today is, just essentially, this proposal is -- insulting to the system, and to the integrity of the system. And to -- flat-out truth and honesty.

So, no, I'm not about to accept this plea agreement. I'm rejecting it.

(07/19/13 RP 17, ll. 9-24)

Mr. Lazcano recognizes that the trial court's extensive knowledge legitimately played a part in the decision. Nevertheless, the animus reflected in the Court's decision is indicative of an abuse of discretion.

Again, reading CrR 2.1(d) in conjunction with RCW 9.94A.431(1) reflects that the amendment should have been granted.

As the *Haner* Court noted at 864:

... [T]o have any meaning beyond its ordinary sentencing powers, the court's authority to approve or deny a plea bargain must include the right to refuse or allow the dismissal or amendment of the charges.

It follows, then, that the only remaining question is whether the trial judge abused his discretion in refusing to grant the State's motion to amend the information.

It appears that that is exactly what occurred in this case.

IV. CREDIBILITY

The prosecuting attorney told the jury that Ben Evensen told the truth repeatedly. This constitutes vouching and misrepresents Ben's own testimony. (RP 1980, ll. 1-18)

Ben's testimony is replete with inconsistencies:

Q. Okay. Let's go to a different subject.

First off, what is an SKS?

A. It's a assault rifle, similar to an AK-47.

Q. Okay. And you own an SKS; is that correct?

A. Did own, yes.

Q. What do you mean, did?

A. It's -- I have no idea where it is. It got stolen, so it's not in my possession anymore.

Q. But you owned one. And it was taken during this what you call "robbery" but I'm going to call "burglary" at your house?

A. Yes --

(RP 1007, ll. 13-23)

... Do you remember testifying on 2/20 --
where are we? -- 2/27/13 in a matter involv-
ing Frank Lazcano?

A. Yes.

Q. Do you remember being questioned by
Mr. Martonick and denying that you owned
an SKS?

A. No, I don't.

(RP 1011, ll. 2-8)

Q. So that day that we're talking about with
this transcript, let's get clear, you are testify-
ing in front of a jury?

A. Yes.

Q. And you told them that the SKS is not
yours, correct?

A. Yes.

Q. And you told them that because you
have a felony and therefore can't own them?

A. Yes.

Q. And you denied that the SKS was ever yours?

A. Yes. But I have a -- I can tell you about that if you want.

Q. Go ahead.

A. Okay. We had talked about prior, that SKS. And when my house was getting the search warrant or whatever for it, we had talked about giving the SKS to Daniel so it would look like his. So that's why I said it wasn't mine, because it wasn't in my name, it wasn't registered in my name. So yes, I did say it wasn't mine. But now that I know I'm not -- I can't get in trouble for it because there's nothing there, then I can say it was mine, but it wasn't technically mine.

Q. Well, hold on a minute. You testified that it was not your SKS back on 2/27/13?

A. Yes.

Q. And today you've already testified that it was your SKS?

A. Yes.

(RP 1013, l. 8 to RP 1014, l. 7)

Q. ... [O]n 3/28/13 in a phone call with Taylor Dickens, did you indicate to her that the state was trying to bribe you for testimony?

A. Yes.

Q. And how did that happen?

A. They came to my house and basically --

Q. Who's "they"?

A. Couple sheriffs. I don't recall who.

Q. Okay.

A. And they basically said that -- were asking me if I knew anything about the -- Marcus and if I knew anything about that. And I said no. And then they were basically saying, "Well, if you tell us something, we might be able to forget about this liquor store thing," you know. And then I didn't tell them anything.

(RP 1026, ll. 4-18)

Q. ... [N]obody directly told you that Dan killed Marcus, correct?

A. Mm, no, that's not correct.

Q. Would you like -- would you like me to rephrase that?

A. Yes.

Q. Nobody -- nobody, including Daniel, ever told you directly that Daniel shot Marcus?

A. No, that's not true.

Q. Not true? Let's go to 2/12/13. 2/12/13, page 21, lines 12 through 22.

(RP 1037, ll. 5-14)

Q. Is your answer, "It was never directly said who had done it, but it was referred to as Daniel had done it"?

A. Yes.

Q. It was never directly said that Daniel had done it?

A. I guess no, it wasn't. But he -- like I said, he had referred saying (indicating) "I raised up and" -- but he didn't come out and

say, "I shot Marcus." He said, "I," you know, "raised up and shot off shots."

Q. And you don't take "I raised up, shot off shots" as him directly saying that?

A. Well, yes, I -- I -- I do take it as him saying it. But there was so many different coverup stories that --

Q. But here you said it was never directly said who did it. And this is back in what? February 12 of '13?

A. (No response.)

Q. Correct?

A. Yes.

Q. So which is right?

A. Well, I guess I can't say that he told me he -- I don't -- I'm not sure. I'm kind of confused on this thing.

(RP 1038, ll. 3-22)

Q. Okay. Did you ever admit to killing Marcus yourself?

A. Yes, I did.

Q. And to who did you do that to?

A. Just friends partying. Not really admitted. I just kind of said like, "We took care of it."

Q. Are you saying that you did not admit to people that you killed Marcus Schur?

A. I did admit but -- to an extent, yes.

Q. What extent?

A. By just saying, "We took care of it." Like I never said, "I killed Marcus."

Q. Okay. But you confessed to the killing of Marcus Schur, correct?

A. Yes.

Q. And you confessed that to most -- to many of your friends?

A. No, not many.

Q. How many?

A. Maybe one or two.

Q. A couple?

A. Yeah.

Q. And some of those got recorded?

A. Yes.

Q. Okay. Did you kill Marcus?

A. No.

Q. So you lied about that?

A. Yes.

(RP 1041, l. 16 to RP 1042, l. 16)

Q. Okay. Did you indicate that Daniel wasn't involved with the killing of Marcus Schur, Daniel wasn't even there?

A. I indicated that, yes.

Q. To who?

A. To Taylor, I believe.

(RP 1043, ll. 1-5)

The State may not vouch for a government witness's credibility. *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011). The trier of fact has sole authority to assess witness credibility. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72 (2011), *review denied*, 173 Wn.2d 1007 (2012).

State v. Embry, 171 Wn. App. 714, 752, 287 P.3d 648 (2012).

The prosecuting attorney's vouching for Ben during closing argument invaded the province of the jury and foreclosed them from a proper evaluation of Ben's testimony

V. JUROR DISCRIMINATION

Defense counsel objected to excusing Juror No. 2 for financial hardship. The basis of the objection was that lower paid working individuals were being excluded from jury service due to lack of sufficient compensation.

Defense counsel's objection was denied based upon lack of authority being presented to the trial court.

RCW 2.36.080(3) states: "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, **or economic status.**" (Emphasis supplied.)

Excluding jurors for financial hardship constitutes exclusion for economic status in violation of RCW 2.36.080.

Moreover, when considering the law against discrimination, RCW 49.60.030(1), it becomes apparent that the particular juror's civil rights are being violated.

RCW 49.60.030(1) states:

The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right.

Mr. Lazcano contends that actual discrimination arises from the failure of the Legislature to recognize the financial impact of jury service on wage earners. In this respect “the law is an ass.”³

RCW 2.36.150 provides, in part:

Jurors shall receive for each day’s attendance, besides mileage at the rate determined under RCW 43.03.060, the following expense payments:

(1) ... up to twenty-five dollars but no less than ten dollars

...

PROVIDED, ... That the expense payments paid to jurors shall be determined by the county legislative authority and shall be uniformly applied within the county.

The Legislature has placed the burden of compensating jurors on the respective counties of the State. Many counties have an insufficient

³ George Chapman, *Revenge for Honor* (1654)

tax base to provide for payment otherwise than the ten to twenty-five dollar range.

When a trial, such as Mr. Lazcano's, is anticipated to last several weeks, the compensation provided by statute is woefully inadequate.

Const. art. I, § 22 provides, in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an **impartial jury of the county in which the offense is charged to have been committed**
....

(Emphasis supplied.)

Exclusion of wage earners from a jury is a denial of a defendant's constitutional rights.

By virtue of the sixth and fourteenth amendments to the United States Constitution, a criminal defendant has a right to be tried by a jury that is representative of the community. *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed.2d 690, 95 S. Ct. 692 (1975); *Smith v. Texas*, 311 U.S. 128, 85 L. Ed. 84, 61 S. Ct. 164 (1940). For an excellent analysis of the decisional law on the subject matter, see the appendix in *Foster v. Sparks*, 506 F.2d 805, 823 (5th Cir. 1975) (Honora-

ble Walter P. Gewin, *An Analysis of Jury Selection Decisions*).

State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977). (See: Appendix "J" - excerpt from referenced report)

By excluding a working person, who earns a minimum wage or who is the sole wage earner for a family, a defendant is deprived of the opportunity to have an individual, who understands the day-to-day stresses that are associated with citizens living on marginal incomes and struggling to make ends meet, on his/her jury.

The exclusion of such individuals essentially guts a jury venire of the common man or woman. Exclusion based on economic status alone should not be condoned. This juror was one who could have been attuned to Daniel's situation on December 27, 2011.

"When a defendant is denied his or her constitutional right to a fair and impartial jury, the remedy is reversal." *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

VI. FELONY FIREARM OFFENDER

RCW 9.41.010(7) defines "felony firearm offender" as meaning: "A person who has previously been convicted or found not guilty by reason of insanity in this state of any felony firearm offense."

Mr. Lazcano has a 0 (zero) offender score due to the fact that he has never been convicted of a felony. Therefore, RCW 9.41.010(7) is inapplicable under the facts and circumstances of his case.

The trial court's determination that he is required to register as a "felony firearm offender" is in error and should be removed from the judgment and sentence.

VII. CUMULATIVE ERROR

Daniel contends that when all of the foregoing errors are considered, their cumulative impact upon his trial deprived him of due process and a fair and impartial trial.

... [R]eversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. [Citations omitted.] Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. [Citations omitted.] Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. [Citations omitted.] Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. [Citations omitted.]

State v. Lopez, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

Daniel's argument concerning cumulative error has constitutional implications. If the *Ish* violation had not occurred, and if the prosecuting attorney had not vouched for Ben's credibility in closing argument, and if there had not been instructional error (lack of unanimity when evidence was insufficient on an alternative means), and if there had been sufficient evidence to establish felony murder and/or premeditation, the adverse impact would have been negligible.

CONCLUSION

The State's reliance on first degree burglary, based upon an underlying assault, precludes its being used as the predicate felony for first degree felony-murder.

There was no evidence that Daniel knew Frank was going to assault either David or Amber inside the Bachman residence.

Since there was insufficient evidence to support this alternative means of committing first degree murder, Instruction 9, telling the jury that they did not need to be unanimous on the means of committing first degree murder, is erroneous.

There is no way to determine if the jury was unanimous on either felony-murder or premeditation.

Daniel is entitled to have his conviction reversed and the case remanded for a new trial on this issue alone.

The State failed to prove, beyond a reasonable doubt, the element of premeditation. The evidence points to an involuntary reaction on Daniel's part. Other than the shooting itself, there is no evidence of intent. The intent was to "whup Marcus' ass."

In the absence of sufficient evidence of premeditation, Daniel's conviction on this alternative must also be reversed. The State is not precluded from pursuing a retrial on any lesser included offense. *See: State v. Brown*, 127 Wn. 2d 749, 756-57, 903 P. 2d 459 (1995).

Prosecutorial misconduct deprived Daniel of a fair and impartial trial under the Sixth and Fourteenth Amendments and Const. art. I, §§ 3 and 22. The prosecuting attorney's introduction of plea/immunity agreements requiring truthful testimony, as well as vouching for a witness in closing argument, violated the precepts of *State v. Ish, supra* and the constitutional mandates.

The trial court's dismissal of juror No. 2 for economic reasons also violated Daniel's right to a fair and impartial trial.

The cumulative error, as outlined in this conclusion, requires a reversal of Daniel's conviction and remand for a new trial.

Insofar as the issue involving the plea agreement and the trial court's refusal to amend the Information, Mr. Lazcano was unduly prejudiced as a result of the trial court's abuse of discretion. He is entitled to the benefit of his bargain with the prosecuting attorney. The language of CrR 2.1 (d) is discretionary only as to Mr. Lazcano's rights. If those rights are not impacted then the language is mandatory and the amendment must be granted and plea accepted. The case should be remanded directing the trial court to amend the Information and to take a plea.

Finally, the felony firearm registration requirement is inapplicable to Daniel's case and must be removed from any judgment and sentence.

DATED this 17th day of September, 2015.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

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Republic, WA 99166

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APPENDIX "A"

INSTRUCTION NO. 9

To convict the defendant of the crime of murder in the first degree each of the following elements of either of the two alternative means of committing the crime must be proved beyond a reasonable doubt:

Alternative A -- Premeditated Murder

- (1) That on or about the 27th day of December, 2011, the defendant acted with intent to cause the death of Marcus Schur;
- (2) That the intent to cause the death was premeditated;
- (3) That Marcus Schur died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington.

OR

Alternative B -- Felony Murder

- (1) That on or about December 27, 2011, the defendant or an accomplice committed burglary in the first degree;
- (2) That the defendant or an accomplice caused the death of Marcus Schur in the course of or in furtherance of such crime or in immediate flight from such crime;
- (3) That Marcus Schur was not a participant in the crime burglary in the first degree; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each and every element of either Alternative A -- Premeditated Murder or Alternative B -- Felony Murder has been proved beyond a reasonable doubt, or that each and every element of both Alternative A -- Premeditated Murder and Alternative B -- Felony Murder has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty to the charge of murder in the first degree. The elements in "A" and "B" are alternatives and only one complete set of elements in either "A" or "B" need be

proven beyond a reasonable doubt. To return a verdict of guilty to murder in the first degree, the jury need not be unanimous as to which of the alternatives, Alternative A -- Premeditated Murder or Alternative B -- Felony Murder, has been proved beyond a reasonable doubt, as long as each juror finds that at least one of these alternatives has been proved beyond a reasonable doubt

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any element in Alternative A -- Premeditated Murder and a reasonable doubt as to any element in Alternative B -- Felony Murder, then it will be your duty to return a verdict of not guilty.

APPENDIX "B"

INSTRUCTION NO. 13

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

APPENDIX "C"

INSTRUCTION NO. 14

To convict the defendant of felony murder in the first degree based upon the predicate crime of burglary in the first degree as set forth in Alternative B - - Felony Murder in Instruction No. 9, each of the following elements of the crime of burglary in the first degree must be proved beyond a reasonable doubt:

1. That on or about the 27th day of December, 2011, the defendant or an accomplice entered or remained unlawfully in a building;
2. That the entering or remaining was with intent to commit a crime against a person or property therein;
3. That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime was armed with a deadly weapon or assaulted a person; and
4. That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then the crime of burglary in the first degree may be considered by you in determining whether the defendant committed murder in the first degree as set forth in Alternative B - Felony Murder in Instruction No. 9.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty of murder in the first degree as set forth in Alternative B - Felony Murder in Instruction No. 9.

APPENDIX "D"

INSTRUCTION NO. 19

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

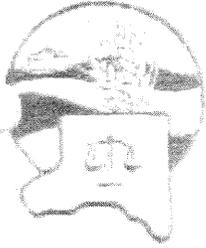
An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

APPENDIX "E"

INSTRUCTION NO. 21

A participant in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. A victim of a crime is not a participant in that crime.

APPENDIX "F"



WHITMAN COUNTY PROSECUTING ATTORNEY

400 North Main Street P.O. Box 30, Colfax WA 99111-0030
voice (509) 397-8260 fax (509) 397-8889

April 5, 2012

Rusty McJwre
Fax: 509-458-0529

Re: Bill Lindsey Cooperation Agreement

Dear Rusty:

The sheriff's office wants to question Mr. Lindsey in connection to the murder of Marcus Schur. There is reason to believe that Mr. Lindsey was involved with giving some aid to the Lazonic brothers after the murder and may have knowledge regarding the murder and its aftermath.

I am offering the following as a means of resolving Mr. Lindsey's possible criminal charges, based on your representation of what it is that Mr. Lindsey knows:

1. Mr. Lindsey gives a full, complete, and truthful statement about what he knows concerning any event that is connected to the death of Marcus Schur, including the disposal of the body, any vehicle, any weapon, or any other item of evidence, and the actions of any person associated with those events.
2. Mr. Lindsey agrees to cooperate and does cooperate in the prosecution of any case related to the death of Marcus Schur, including the disposal of the body or any other item of potential evidence. This would include keeping the sheriff's office informed about his current address and phone number, as well as truthfully answering any questions of investigators, prosecutors, and defense investigators, until all cases are finally resolved, as well as testifying truthfully if subpoenaed to do so at any hearing or trial.
3. As long as Mr. Lindsey was not involved in encouraging or planning the death of Marcus Schur, and fulfills every part of this agreement, I will not use his statements against him other than as support for a prosecution of one count of a gross misdemeanor charge of Rendering Criminal Assistance in The Second Degree 9A.76.080, or Making False Statement to A Public Servant 9A.76.175 and will recommend a sentence of 90 days in jail with the balance of any jail to be suspended. I will recommend work release and if he does not qualify due to the nature of his work, I will recommend that his jail sentence not start until after full work is completed on the farm.

Please let me know if you have any questions.

Sincerely,

Denis Tracy

Denis P. Tracy
Prosecuting Attorney

Byron Bedirian
Chief Deputy Prosecutor

Bill Truffel
Senior Deputy Prosecutor

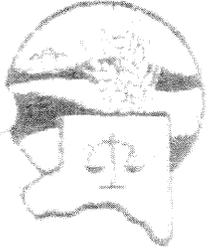
Don LeBeau
Deputy Prosecutor

Roger Feeley
Deputy Prosecutor

Kristina Cooper
Office Administrator and
Victim Assistance Coordinator

PLAINTIFF
 EXHIBIT NO. 73
 For Identification
 22-1-51-9
 Date 5-3-13
 Attorney

APPENDIX "G"



WHITMAN COUNTY PROSECUTING ATTORNEY

400 North Main Street - P O Box 30, Colfax, WA 99111-0030
voice (509) 397-6250 fax (509) 397-6669

January 29, 2013

Carl Oreskovich
Attorney At Law
By email: carl@lettermanahop.com

Re: Jamie Whitney

Dear Carl:

I understand that you are representing Ms. Whitney in matters related to the murder of Marcus Schur. Ms. Whitney gave a recorded statement to the Whitman County sheriff and the undersheriff on March 30th. I am attaching a transcript of that statement.

I want to call Ms. Whitney as a witness in the upcoming trials of Daniel and Frank Lazzaro, and any other trials that may occur which relate to the murder of Mr. Schur. On behalf of the State, I am hereby granting Ms. Whitney immunity from prosecution for any crime related to the murder, disposal of the body, and destruction or disposal of evidence, provided that, and conditioned upon, the following:

1. The statement given on March 30, 2012 was truthful.
2. Ms. Whitney make herself available for any requested interviews by prosecutor and sheriff personnel, as well as any defense attorneys and investigators, and answer all questions truthfully.
3. Ms. Whitney keep the sheriff's office (Sgt. Chapman or Sgt. Cooper) informed about her current address and phone number.
4. Ms. Whitney appear to response to any subpoenas and testify truthfully in any and all trials related to the murder of Mr. Schur and the aftermath of the murder.

Please contact me as soon as you have a chance to review this

Sincerely,


Denis Tracy

Denis P. Tracy
Prosecuting Attorney

Byron Bestrian
Chief Deputy Prosecutor

Bill Druffel
Senior Deputy Prosecutor

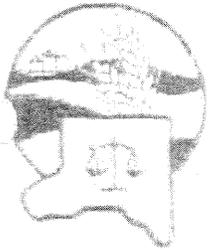
Don Lellan
Deputy Prosecutor

Roger Feeley
Deputy Prosecutor

Kristina Cooper
Office Administration and
Victim/Witness Coordinator

PLAINTIFF
EXHIBIT NO. 74
For Identification
No. 12-151-9
Date 5-31-13
Admitted [initials]

APPENDIX "H"



WHITMAN COUNTY PROSECUTING ATTORNEY

400 North Main Street - P.O. Box 30, Colfax, WA 99111-0030
voice (509) 397-6250 fax (509) 397-5659

February 7, 2013

Mark Hodgson
Attorney At Law
By email: hodgsonlawoffices@horizon1.com

Re: McKendree Rogers

Dear Mark:

I understand that you are representing Ms. Rogers in matters related to the murder of Marcus Schur. Ms. Rogers gave three recorded statements to the Whitman County sheriff on March 30th and 31. I am attaching transcripts of those statements.

I want to call Ms. Rogers as a witness in the upcoming trials of Daniel and Frank Lezcano, and any other trials that may occur which relate to the murder of Mr. Schur. On behalf of the State, I am hereby granting Ms. Rogers immunity from prosecution for any crime related to the murder, disposal of the body, and destruction or disposal of evidence, provided that, and conditioned upon, the following:

1. The statement given on March 31, 2012 was truthful;
2. Ms. Rogers make herself available for any requested interviews by prosecutor and sheriff personnel, as well as any defense attorneys and investigators, and answer all questions truthfully;
3. Ms. Rogers keep the sheriff's office (Sgt. Chapman or Sgt. Cooper) informed about her current address and phone number;
4. Ms. Rogers appear in response to any subpoenas and testify truthfully in any and all trials related to the murder of Mr. Schur and the aftermath of the murder.

Please contact me as soon as you have a chance to review this.

Sincerely,


Denis Tracy
Cell: 509-432-6673

Denis P. Tracy
Prosecuting Attorney

Byron Bediman
Chief Deputy Prosecutor

Bill Druffel
Senior Deputy Prosecutor

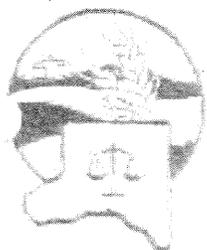
Dan LeBeau
Deputy Prosecutor

Roger Keeley
Deputy Prosecutor

Kristina Cooper
Office Administrator and
Victim Witness Coordinator

PLAINTIFF
EXHIBIT NO. 75
For Identification
No. 120-514
Date 5-31-13
Admitted

APPENDIX "I"



WHITMAN COUNTY PROSECUTING ATTORNEY

400 North Main Street - P.O. Box 80, Colfax, WA 99111-0080
voice (509) 397-5250 fax (509) 397-5650

July xx, 2017

Roxanne Bridge

By fax/email

Re: State v. Everson

12-1-52-7

Dear Roxanne:

In recognition of your client's (expected) prompt taking of responsibility for his actions, and the inherent uncertainty of the trial and appellate processes, and his cooperation in this case, and his cooperation in the case involving the murder of Marcus Schur, I am making the following offer to settle this case:

1. I will reduce the current charges from Burglary 2nd Degree and Theft 2nd degree, to one count of Trespass 1st Degree
2. Your client pleads guilty to that charge of Trespass 1st Degree, soon after the guilty pleas or trials of the Lazzano brothers
3. I will recommend 120 days in jail, with the balance of a year suspended, and a year of probation.
4. Your client stipulates to pay any restitution ordered by the court. (However, I believe he has already paid for the damaged window.)
5. It must be true that your client was truthful in his recent interview with the sheriff's officers. He must continue to cooperate and provide truthful information when questioned by either a law enforcement officer or prosecutor, or any investigator employed by one of the criminal defendants in the murder case (the Lazzano brothers). He must keep this office, the sheriff's office, and you, updated as to his current address and phone, and not change such address or phone without prior notification of you, the sheriff's office, and this office. He must respond to any subpoenas and appear and testify truthfully in any case involving the murder of Marcus Schur.
6. Provided your client has a steady job and approved place to live, I will support his request for pre-trial release, provided he maintain that steady job and place to live, and provided also that he have no contact whatsoever with any person named in any of the reports regarding the murder investigation, with the one exception of defendant's mother, provided further that defendant sign and enter a speedy trial waiver, putting the expiration of speedy trial on this case to December 31, 2012.

Please let me know if you have any questions

Sincerely,
Denis Tracy

Denis P. Tracy
Prosecuting Attorney

Byron Bedirian
Chief Deputy Prosecutor

Bill Drotici
Senior Deputy Prosecutor

Dan LeBeau
Deputy Prosecutor

Roger Feeley
Deputy Prosecutor

Kristina Cooper
Office Administrator and
Victim/Witness Coordinator

PLAINTIFF	
EXHIBIT NO.	76
For Identification	
Date	5-31-13
Admitted	<input checked="" type="checkbox"/>

APPENDIX "J"

506 F.2d 805

Catherine FOSTER et al., on behalf of themselves and all others similarly situated, plaintiffs-Appellants,

v.

James L. SPARKS et al., etc., Defendants-Appellees.

No. 73-3732.

United States Court of Appeals, Fifth Circuit.

Jan. 20, 1975.

C. B. King, Herbert E. Phipps, Albany, Ga., Jack Greenberg, Charles S. Ralston, New York City, for plaintiffs-appellants.

Jesse G. Bowles, Cuthbert, Ga., for defendants-appellees.

Appeal from the United States District

Appeal from the United States District Court for the Middle District of Georgia.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Thiel v. Southern Pacific Co., 328 U.S. 217, 224, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (daily wage earners for financial reasons); Glasser v. United States, 315 U.S. 60, 83-86, 62 S.Ct. 457, 86 L.Ed. 680 (1940) (women who were not members of League of Women Voters for domestic reasons) 61

One religious challenge coming to our attention is United States v. Suskin, 450 F.2d 596 (2d Cir. 1971).

Aside from Hernandez v. Texas, supra, we would refer the committee to United States v. De Alba Conrado, 481 F.2d 1266 (5th Cir. 1973) and Muniz v. Beto, 434 F.2d 697 (5th Cir. 1970) as representative of national origin cases. In Keyes v. Denver Independent Community School District, 413 U.S. 189, 196-197, 93 S.Ct. 2686, 2691, 37 L.Ed.2d 548, 556 (1973), the Supreme Court rejected a wooden differentiation between discrimination on the basis of race and national origin 62

See, e.g., United States v. Ross, 468 F.2d 1213 (9th Cir. 1972); United States v. Olson, 473 F.2d 686 (8th Cir.), cert. denied, 412 U.S. 905, 93 S.Ct. 2291, 36 L.Ed.2d 970 (1973); United States v. Guzman, 468 F.2d 1245, 1247 n. 21 (2d Cir. 1972); United States v. McVean, 436 F.2d 1120 (5th Cir. 1971)

63

See United States v. Kuhn, 441 F.2d 179 (5th Cir. 1971); King v. United States, 346 F.2d 123(1st Cir. 1965)

64

Compare United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972); United States v. Kuhn, supra; King v. United States, supra; United States v. Allen, 445 F.2d 849 (5th Cir. 1971) with United States v. Guzman, supra; United States v. Bryant, 291 F.Supp. 542 (D.Me.1968)

65

This explanation was adopted in United States v. Ross, supra

66

In Bryant, the comparative statistics between eligible population and composition in the pool for the 21-29 age group were 21 v. 161 for the Northern Division of Maine and 70 v. 147 for the Southern Division; the statistics for the respective division in the 30-39 age bracket were 106 v. 171 and 128 v. 188. The Court concluded that these disparities did not establish a prima facie case

67

See Thiel v. Southern Pacific Co., supra; Labat v. Bennett, 365 F.2d 698 (5th Cir., 1966) (exclusion of daily wage earners implicating racial discrimination violates equal protection and due process). Cf. United States v. Andrews, 462 F.2d 914 (1st Cir., 1972) where the court raised the possibility that exclusive reliance on registration lists might be impermissible because paupers were ineligible to vote. The resolution of this issue was preempted by the Massachusetts Judicial Committee Study which found that no paupers were excluded from jury service. See 58 F.R.D. at 504

68

See 28 U.S.C. 1871 (1970); H.R. 10689, 92nd Cong., 1st Sess. (1971). This bill was not reported out of conference. The suggestion was made to impose civil not criminal sanctions. See Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, 92nd Cong., 1st Sess. (1971) (Serial 16).

Subsequently, the Judicial Conference transmitted a bill to Congress which would impose civil sanctions.

See H.R. 10897, pending 93rd Cong., 1st Sess

69

See, e.g., United States v. James, 453 F.2d 27 (9th Cir. 1971); United States v. Tijerina, 446 F.2d 70 (10th Cir. 1971)

Letter from William B. Eldridge, Director of Research, The Federal Judicial Center, to the Honorable Walter P. Gewin, at 2 (Oct. 26, 1973). See also letter from the Honorable Irving Kaufman to the Honorable Walter P. Gewin, at 2 (Oct. 9, 1973)

71

The court in *United States v. Hunt*, 265 F.Supp. 178 (W.D.Tex.1967) articulated this reasoning

72

See *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947) where in an attack levelled against the New York procedure of empaneling blue ribbon or special juries in certain cases, defendant's tabulation of occupational breakdowns was deemed inefficacious because it did not relate jurors considered to the industries in which they were classified, 332 U.S. at 273-274, 67 S.Ct. at 1620-1621, 91 L.Ed. at 2052

73

Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 332, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970);
Glasser v. United States, 315 U.S. 60, 86, 62 S.Ct. 457, 86 L.Ed. 680 (1940); *Gibson v. Mississippi*, 162 U.S. 565, 589, 16 S.Ct. 904, 40 L.Ed. 1075 (1896)

74

28 U.S.C. 1865(b)(2)

75

WHITMAN COUNTY PROSECUTOR'S OFFICE

E-FILE

Attention: Denis Paul Tracy

PO Box 30

Colfax, Washington 99111-0030

denist@co.whitman.wa.us

DANIEL CHRISTOPHER LAZCANO #372108

U.S. MAIL

Washington State Penitentiary

1313 N 13th Avenue, Fox E-227

Walla Walla, Washington 99362

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

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Phone: (509) 775-0777

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nodb1spk@rcabletv.com