

**FILED**  
Dec 23, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32228-9-III

IN THE COURT OF APPEALS  
OF WASHINGTON STATE  
DIVISION III

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STATE OF WASHINGTON, Plaintiff/Respondent

v.

DANIEL CHRISTOPHER LAZCANO, Defendant/Appellant

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BRIEF OF RESPONDENT

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## RESTATEMENT OF THE ISSUES

1. Can a first degree burglary, based upon assault, substantiate a felony murder charge in contravention of *Personal Restraint of Andress*?
2. Did the State Prove, beyond a reasonable doubt, both alternatives to the first degree murder charge?
3. Was the defendant properly required (as part of his sentence) to register as a felony firearm offender, per RCW 9.41.330?
4. Was the court within its discretion to excuse Juror 2 for cause based on extreme hardship for the juror?
5. Did the trial court abuse its discretion in rejecting a plea agreement?
6. Did the prosecutor err in introducing evidence of witness Evenson's cooperation and plea agreement on direct exam?
7. Did the prosecutor err in introducing terms of plea/immunity agreements requiring "truthful" testimony during direct exam of some other witnesses?
8. Did the prosecutor vouch for the credibility of witness Evenson in closing argument?

## BRIEF ANSWERS

1. Yes. A first degree burglary based on an assault can substantiate a first degree felony murder charge, because RCW 9A.32.030(1)(c) specifically defines burglary in the first degree as a predicate felony.
2. Yes, the State proved all elements beyond a reasonable doubt.
  - A. The state proved beyond a reasonable doubt that the Appellant, Dan Lazcano, knew that his brother Frank Lazcano was going to commit the crime of first degree burglary when he entered the Nick Bachman residence, thus proving felony murder.
  - B. The State provided sufficient evidence to prove beyond a reasonable doubt the premeditation alternative to first degree murder.
3. Yes. The statute in question vests discretion with the sentencing court in deciding whether to require registration, for anyone convicted of Murder with a firearm sentencing enhancement. There is no indication the court abused its discretion.
4. Yes. The record is clear as to the particular juror's financial hardship. The court was well within its discretion to excuse the

juror. There is no indication that defendant's right to an impartial jury was impacted by this.

5. No. The trial court did not abuse its discretion when it rejected a proposed plea agreement, as inconsistent with the interests of justice and prosecution standards, given the dead victim's mother's strong opposition, and the apparent reward it would have given to all of those, including defendant, who had lied, hidden and destroyed evidence, and covered up the most serious crime.
6. No. Since the defense had already attacked the witness' credibility, including the subject of the witness' plea agreement, in the defense's opening statement, the prosecutor was allowed to 'pull the sting' of the expected cross-examination on this issue.
7. Yes, but such error was harmless.
8. No. The prosecutor did not state a personal belief during closing argument, but rather was arguing what the evidence showed.

#### **STATEMENT OF THE CASE**

The State accepts the Statement of the Case from the Appellant, and supplements it with the following information.

Shortly after Daniel<sup>1</sup> Lazcano [Daniel] and Frank Lazcano [Frank] learned of the thefts at Ben Evenson's home, they went to visit Amber Jones. RP 419. Daniel was very upset that two of his guns were stolen as they had sentimental value, and Frank said he'd kill Marcus Schur if Frank found him. RP 419. Amber Jones believed Frank was serious; she told Marcus Schur about the conversation; and he was nervous and returned Daniel's guns. RP 419.

Even after his guns were returned, Daniel continued to be mad at Marcus Schur because many items were still missing, and Daniel believed Marcus Schur lied to him during a phone conversation. RP 390, 392-96, 407, 1590-92. Susan Consiglio (Ben Evenson's mom and friend of both Daniel and Frank) was also worried that violence would ensue and often pushed for a peaceful resolution during the entire 11 days that Daniel was searching for Marcus Schur. RP 391, 394, 405, 407.

On December 16, Daniel and Frank saw Susan Consiglio in Rosalia and Daniel told Ms. Consiglio that he and Frank were going to Spokane to find Marcus Schur; they had Frank's AK-47 in the passenger compartment of the car with them when they were talking to Ms. Consiglio and during their hunt for Marcus that day. RP 381-85, 1594.

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<sup>1</sup> The State will also use some first names to facilitate an understanding of the fact situation, as some actors share the same last names. No disrespect is intended.

When they didn't find Marcus Schur, they continued to be upset about it, and Daniel's Uncle Travis Carlon also expected violence. RP 500, 503.

On December 27, 2011, the day of the murder, Daniel, who was in Spokane at the time, learned that Marcus Schur was in Malden from Susan Consiglio, and Daniel was still upset with Marcus Schur. RP 1589-92.

Daniel then quickly called his good friend Kyle Evans and asked him if he wanted to go "whup Marcus Schur's ass;" Kyle Evans declined. RP 412, 1592. Dan had Frank's AK-47 with him when he left Spokane for Malden, and had possessed the gun since they learned of the burglary at Ben's house. RP 1594.

Daniel had been taught how to safely possess and use a firearm, and had shot many firearms while hunting, hiking and camping. RP 1588-89. Daniel was an avid hunter and had been for almost ten years. RP 496-99, 1541-42, 1570-78. He specifically knew several safety measures when using a firearm, including the following: 1) Keep your finger off the trigger until you are ready to fire, 2) Don't point the gun at someone unless you want to kill them, and 3) treat all weapons as if they are loaded. *Id.* More specifically, Daniel was very familiar with Frank's AK-47, he had shot it before and knew how to load the ammunition in the clip, and how to operate the safety and that keeping the safety on was a precaution against accidental firing. RP 1580, 1588-89.

After Daniel's phone call to Kyle Evans, Daniel and his girlfriend McKyndree Rogers then headed from Spokane to his Uncle Travis Carlon's house where Daniel had to convince Frank to go with him to Malden to deal with Marcus Schur. RP 393, 473, 506-09, 511-12, 770, 779, 790, 836-37, 1553, 1589-90. Once they arrived at the Backman residence, Daniel went around the back of the house and waited with the AK-47 rifle while Frank went in the front. RP 939-940, 960. Frank assaulted David Cramer and Amber Jones in the process. RP 939-40, 979-80, 422-28, 1069-70, 1127-31. Frank was never given permission to enter the Backman residence and assault Mr. Backman's guests, Amber Jones and David Cramer. RP 1063-65, 1069-70, 1130, 1143. Daniel was angry, and when he saw Marcus Schur he yelled "Stop Marcus" and then just opened fire. RP 979-80.

Daniel later told Kyle Evans that he'd waited outside while Frank went in the front of the house. Daniel further said, when Marcus Schur came out the back of the house, "we got him down," referring to Daniel and Frank having gotten Marcus down. Daniel further said that he and Frank had put Marcus Schur in the car and left the scene. (RP 939-940, 957, 960.)

Marcus Schur was hit by two bullets and the wounds were consistent with AK-47 rounds. A main artery was severed by one of the

shots and he quickly bled to death. (RP 1360-1362, 1366-1367, 1379-1380.)

As noted in defendant's brief: Daniel and Frank scooped up the body and put it in the car and drove to their Uncle Travis Carlon's house, and Mr. Carlon gave them advice and direction and help on what to do with the body and the rest of the evidence: hide it, destroy it, and lie.

- Mr. Carlon and the brothers' step-dad Eli Lindsey took the AK-47 and threw it in the Spokane River (noted in Appellant's brief);
- Frank and his girlfriend Jamie Whitney disposed of the car by burning it in a rural location north of Spokane (noted in Appellant's brief);
- Jamie Whitney gave Frank a false alibi (RP 855);
- Daniel's girlfriend McKyndree Rogers gave Daniel a false alibi (RP 801-803);
- Daniel and Frank gave matching false stories to the police within the next day about Dan being in Spokane at the time of the murder, and explaining the disappearance of the car. (Frank's story at RP 1273-1278, Dan's story at RP 1279, 1284, 1565);

- Daniel made a false written statement to the Rosalia town marshal who was investigating the original burglary/theft case involving Marcus Schur's theft of Daniel's guns – concerning the AK-47 having (supposedly) been stolen, but wanting the investigation dropped, (RP 1306-1309, 1601-1604).
- The day the body was discovered, Jamie Whitney facilitated a meeting with her, Frank, Daniel, and Ben Evensen to talk about what to do, where Frank and Dan each said they would take the blame for the killing, in order to protect their brother (Dan to protect Frank, and Frank to protect Dan) (RP 863-864, 867-868).

Ben Evenson was a central witness for the State. It was his house that had been burglarized by Marcus Schur, wherein Daniel's guns were stolen, but Ben Evenson was in the Whitman County jail at the time of the burglary and the murder. RP 972-975. He was a very close friend of the Lazcano brothers and was told by them what happened, including specifics of the killing and hiding of the body. See RP 971, 976-986, 991-993, and throughout his testimony. Daniel told Ben Evenson that Daniel waited out behind the house and when Marcus came out Daniel shouted for him to stop, and when he wouldn't, Daniel raised up

[indicating raising a rifle] and shot him with the rifle. Id. Evenson was questioned the day the body was found, but denied knowledge. He was then questioned again March 30 and was initially reluctant and then told what he knew, without a deal offered to him. RP 1004, 1505.

He was then later given a formal offer to reduce an unrelated burglary charge to a gross misdemeanor, conditioned on his having been truthful in a statement to the sheriff's office and that any testimony would be truthful. (Appendix I in Appellant's Brief). The prosecutor elicited that on direct exam. (RP 1000-1003 and Appendix I of Appellant's Brief.)

This was followed up in cross exam by defense counsel, asking whether Evenson would lie to protect himself (RP 1005-1006), and pointing out prior [arguably] inconsistent testimony from earlier proceedings, implying that such inconsistent statements showed he wasn't being truthful in his testimony before this jury, and as required by his plea deal (RP 1018-1019).

Other witnesses were given immunity or reduced charges for their roles in the cover-up of the murder.

Uncle Travis Carlon was promised one felony of Rendering Criminal Assistance in exchange for his truthful statement to the police at the time of his interview by them, and the State's agreement to not prosecute Eli Lindsey for a felony for his role, and the State's agreement

not to prosecute Mr. Carlon's wife, Nicole Morgan for her involvement. Mr. Carlon's deal was not written, it was made during a recorded interview. The recording was not played for the jury. (RP 479, 483-488, 494-495.) Mr. Carlon recited all of the above, on direct examination, but did not say anything about his deal being conditioned on him testifying truthfully. Id.

Step-dad Eli Lindsey pled guilty to a gross misdemeanor in exchange for a truthful statement to the police during the investigation and truthful testimony (Copy of letter outlining the deal - Appendix F in Appellant's brief). During direct examination, the full letter was admitted as an exhibit, and the portion requiring a truthful statement to police was testified to, although the requirement of truthful testimony was not testified to. (RP 609-610.)

Jamie Whitney (Frank's girlfriend) was given immunity in exchange for her truthful statement and truthful testimony. She testified to that effect on direct exam. RP 868-869 and Appendix G of Appellant's Brief.

McKendry Rogers (Daniel's girlfriend) was given immunity in exchange for her truthful statement and truthful testimony. She testified on direct exam to the requirement that her statement to police investigators had been truthful. RP 811-812 and Appendix H of Appellant's Brief. In

cross exam, defense highlighted the requirement that she *testify* “truthfully”, which in combination with the requirement that she had already given a “truthful” statement to police, essentially required her to testify consistently with the statement given to police, whether it was really true or not. The defense was arguing that the agreement defined what the “truth” was going to be. See RP 813-814.

There were three trials in this case. The first two ended in mistrials with hung juries. The defendant testified in all three trials, fairly consistently. He testified in his first trial to the effect that he did leave his Uncle’s house with Frank, to look for Marcus Schur, with the AK-47, to harm Marcus or just to talk to him, but that once they got to the small town of Malden, where Marcus Schur reportedly was, they stopped at their Uncle Jimmy’s house (their uncle James Holdren), and that Daniel got out of the car and Uncle Jimmy got in and left with Frank. Daniel just stayed at Uncle Jimmy’s house and petted the dogs. A short time later, Frank and Uncle Jimmy came back and had a dead Marcus Schur in the trunk. Uncle Jimmy got out, Daniel got back in, and Daniel and Frank then drove to Uncle Travis Carlon’s house. Volume V - First Trial, RP 1001- 1007.

During his second trial, Defendant again testified substantially the same. He got out and petted the dogs, while Uncle Jimmy got in and left with Frank. A short time later, Uncle Jimmy came back and got out and

Daniel got back in, with a dead body in the trunk, and Daniel and Frank went to Uncle Travis Carlon's. Volume XI-B - Second Trial, RP 2610 – 2612.

No other witness testified to anything remotely similar, with numerous witnesses testifying as noted above, to Daniel talking about how he had shot Marcus and how he and Frank had gotten him down, when Marcus ran out the back of the house.

After the second mistrial, the State offered a deal to the defendant. The defendant accepted and the deal was presented to the court on July 19. The deal involved the State reducing the charge from Murder in the First Degree to Manslaughter in the Second Degree in exchange for a guilty plea to that charge. Before the court ruled on the motion to amend, a Statement On Plea of Guilty was handed to the court, signed by defendant, which noted "On or about the night of December 27, 2011, in Whitman County Washington, I shot Marcus Schur twice, in Maulden, outside Nick Backman's house, and thereby with criminal negligence caused the death of Marcus Schur." See CP 223 - 255: State's Answer Re Defense Request To Enforce Plea Agreement – including Exhibit Two thereto (all attached to this brief as Appendix 1). The victim's mother told the court that she was very opposed to the deal. The Appellant's brief lays quotes

the court's reasoning in rejecting the plea agreement. The Statement On Plea was handed back to defense counsel.

After two mistrials due to hung juries, and a change of venue to Spokane County for the third trial, jury selection began for the third (and final) trial on December 2, 2013. The court anticipated that the trial would take about three weeks, and told the jury venire the same. RP 118. (The trial ended on December 18, with a verdict of guilty of Murder 1<sup>st</sup> degree with the firearm enhancement. RP 2058.) The jury was selected and sworn on December 2<sup>nd</sup>. RP 233. They were given preliminary instructions and dismissed for the rest of the day. RP 234-246.

The next day, December 3<sup>rd</sup>, before opening statements, the juror who had been seated as juror number 2, asked to be excused because of financial hardship, and after some discussion / argument that juror was excused and replaced with an alternate juror. See RP 263 – 266 and 268-272. Juror 2 is an electrician by trade. RP 269. He told the court that missing three weeks wages at Christmas-time, would be a very big deal for him, especially since he was in the middle of moving into a new home. It was “critical” that he have those wages, and his employer would not pay if the juror wasn't working. RP 269-270. The court found it would be an “extreme hardship” on that juror and therefore excused him. RP 271.

The person who was excused, was Mr. Rounsley, originally number 29 in the venire, and was an electrician from the Spokane Valley, never been on a jury, could be fair, and liked to hunt and work on cars. RP 268, 132. His replacement on the jury, after Mr. Rounsley was excused was Mr. Kershner. Mr. Kershner was from North Spokane, retired military, never been on a jury, could be fair, and liked history and being a craftsman. RP 271, 133.

In the defense Opening Statement, given before the State's case in chief, the defense brings up the plea deal that Ben Evenson had been given in exchange for his cooperation and testimony ( RP 319-320) :

“In fact, Ben Evenson, their jailhouse snitch who made a deal to get out of jail who agreed to testify to what they told him he has to testify to in order to get his deal, made a statement. And their whole case revolves around this, because there's nobody puts Daniel at that – at that scene. There's nobody puts him there.

We'll talk about a scientific principle called the Locard Principle, where if you introduce something into a scene, it leaves evidence. There's no evidence, nothing. But they have one jailhouse snitch who puts him there. The problem is, is he also says Daniel confessed to a bunch of things that we're going to show you didn't happen. And we're going to show you all kinds of independent witnesses giving you information that absolutely contradicts that, absolutely contradicts that.

First off, we're going to prove to you beyond a scientific certainty that the murder weapon wasn't the AK-47. ... And yet the state bases their whole case on this. Why? Because that's what they got Ben Evenson to say Daniel confessed to. They have no choice.”

In closing argument, the prosecutor told the jury, in summing up a portion of Ben Evenson's testimony and credibility "every single time, he's told the truth" [referring to Evenson's multiple statements and testimonies] and also said "his testimony is entirely believable and accurate" [referring to how it made sense that Daniel would reveal who shot Marcus to Evenson, since Evenson was so close to the Lazcano brothers and how they had indisputably involved him after the fact, including telling him details of hiding the body]. RP 1980 - 1981

## ARGUMENT

### I. Assault as an element of burglary first degree is perfectly valid under RCW 9A.32.030(1)(c).

RCW 9A.32.030 states:

- (1) "A person is guilty of murder in the first degree when:"
- (c) He or she commits or attempts to commit the crime of either ... (3) burglary in the first degree, ... and in the course of or 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:"

The Appellant states that "[T]he State's theory does not withstand judicial scrutiny. The State agreed that an assault cannot be the underlying bases for first degree felony murder." Brief of Appellant (BOA), 17. The

second sentence is correct. While the Appellant cites to *Personal Restraint of Andress*, 147 Wn.2d 602 (2002) to support his theory, it is out of place. In that case, the Washington Supreme Court was considering whether or not felony assault could be a predicate offense to felony murder second degree, per RCW 9A.32.050. *Id.* at 605, 608. Felony murder second degree, at the time, stated that a person was guilty of murder in the second degree when that person committed or attempted to commit any felony not specifically enumerated in RCW 9A.32.030(1)(c). Former RCW 9A.32.050 (1976). Under that version of the statute, the *Andress* court ruled that the legislature in 1976 could not have meant to include felony assault as a predicate felony to murder second degree. *Personal Restraint of Andress*, 147 Wn.2d at 605-16. However, after that decision, the legislature in 2003 amended RCW 9A.32.050(1)(c) to include Assault as a predicate felony for felony murder second degree. RCW 9A.32.050(1)(c), *Bowman v. State*, 162 Wn.2d 325, 335 (2007).

None of the above, however, changes the fact that the Appellant was charged with murder in the first degree, facing the two alternatives of premeditated murder under RCW 9A.32.030(1)(a), or felony murder under RCW 9A.32.030(1)(c). RP 1943. Under that statute, assault is an element of the predicate felony of burglary first degree and is only considered in light of the state's need to prove that crime as a predicate felony to murder

in the first degree. *See State v. Lawson*, 185 Wn.App. 349, 357-358 (2014); *see also State v. Chiariello*, 66 Wn.App. 241, 244 (1992).

In a case very similar to the case at bar, a felony murder conviction was sustained on appeal where the facts showed that the defendant entered a home with the intent to assault the victim and then ended up killing the victim. *State v. Bolar*, 118 Wn.App. 490 (2003). In that case, Mr. Bolar was searching for his ex-girlfriend and her new boyfriend because they had stolen drugs and money from him. *Id.* at 496-97. Mr. Bolar had located the victim, Mr. Hill, at a residence, threatened the owner with burning the residence down unless he helped him get in, then assaulted and shot the victim. *Id.* Later, the defendant admitted that he had tracked down the victim with the intent to assault him and that “he just lost it” and shot the victim once. *Id.* at 499. The Court of Appeals held that the evidence was overwhelming that the defendant was a principle in the predicate felony of first-degree burglary. *Id.* at 505-06. The defendant had intimidated the home owner until he felt he had the defendant into the home, and then the owner expressly limited their presence to the kitchen. *Id.* The defendant then charged through the bedroom door, assaulted the victim, and while he was held down by a co-participant, defendant shot and killed the victim. *Id.*

In the case at bar, there are very similar facts. The Appellant and his brother went to Nick Backman's home to assault Marcus Schur because he had stolen from them on December 16, 2011. RP 373, 375, 412, 973, 1551-53, 1892. Neither Dan nor Frank was welcome to enter Nick Backman's home, and Frank assaulted David Cramer and Amber Jones while he chased after Marcus Schur. RP 1063-65, 1143. In the case at bar, just as in *Bolar*, assault was merely an element of burglary first degree, the predicate felony charged by the State for the felony murder portion of the charges.

II. The State proved both elements of first degree murder beyond a reasonable doubt.

“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.” *State v. Fortune*, 128 Wn.2d 464, 467 (1996), *see also State v. Allen*, 159 Wn.2d 1, 7 (2006). “Under Washington law, premeditated murder and felony murder “are alternative ways of committing the single crime of first degree murder.” *Id.* at 468, *citing* several cases. “The threshold test governing whether unanimity is

required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury.” *State v. Ortega-Martinez*, 124 Wn.2d 172, 707 (1994). Sufficient evidence is evidence adequate to justify a rational trier of fact to find guilt beyond a reasonable doubt.” *Id.* at 708. “The evidence is sufficient if “after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.”” *Id.*, citing *State v. Rempel*, 114 Wash.2d 77, 82, 785 P.2d 1134 (1990). Stated another way, “[i]n testing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, drawing all reasonable inferences from the evidence in the State’s favor.” *State v. Ra*, 144 Wn.App. 688, 703 (2008), citing *State v. Gregory*, 158 Wash.2d 759, 817, (2006) (quoting *State v. Clark*, 143 Wash.2d 731, 769, 24 P.3d 1006 (2001)). In the case at bar, there was sufficient evidence for a reasonable jury to convict on either or both alternatives to murder in the first degree.

- A. The State presented sufficient evidence to prove that the Appellant had general “knowledge” that

his brother was going to commit burglary first degree.

The Appellant is not challenging the sufficiency of the evidence in general on the felony murder prong, but rather that as an accomplice, the Appellant didn't have knowledge that his brother would assault David Cramer-Cramer or Amber Jones Jones. "The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation." *State v. Carothers*, 84 Wn.2d 256, 264 (1974), emphasis added. "Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant." *Id.* "[T]he law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." *State v. Davis*, 101 Wn.2d 654, 658 (1984), *citing State v. Carothers, supra.*

Washington State has a long-standing rule that an accomplice "does not need to have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *State v. Roberts*, 142 Wn.2d 471, 512 (2000), *referring to the decision in State v. Davis*, 101 Wn.2d 654 (1984). *Roberts* and *Davis*

and their line of cases all focused on the difference between robbery second degree and robbery first degree, and whether or not it was necessary for the accomplice to know that their co-participant was armed with a firearm. There are no similar cases regarding the three types of burglary in Washington, however the theory is still sound.

In the case at bar, the Defendant certainly had general knowledge that his brother intended to commit a burglary, and even that he intended to commit a burglary first degree, even if he didn't know specifically whether or not David Cramer or Amber Jones would be present. Daniel certainly could have expected either Amber Jones or David Cramer's presence because he sought the victim at Amber Jones's house to begin with. RP 419. Daniel had been looking for Marcus Schur for 11 days because he was very upset with him, he intended to "whup his ass," brought a gun he knew very well how to use, and insisted Frank come along and then waited while Frank flushed Marcus Schur out of the house. RP 390, 392-96, 407, 412, 422-28, 473, 500, 503, 506-09, 511-12, 770, 779, 790, 836-37, 939-40, 979-80, 1067-70, 1127-31, 1553, 1580. It is ridiculous to assert that Daniel didn't have any idea that an assault might occur, not only did he have knowledge that entry into the home by Frank was uninvited and going to contain violence, Daniel intended for violence to occur. There is plenty of evidence for the jury to decide, and a

reviewing court, that Daniel had general knowledge burglary and assault would be committed, even if he may not have specifically planned for an assault on David Cramer and Amber Jones

B. The State presented sufficient evidence to prove that the Appellant premeditated the murder of Marcus Schur Schur.

“Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short.” *State v. Ra*, 144 Wn.App. 615-16, citing *State v. Allen*, 159 Wash.2d 1, 7–8 (2006). “Premeditation must involve more than a moment in time.” *Id.* “The State can prove premeditation by circumstantial evidence where the inferences argued are reasonable and the evidence supporting them is substantial.” *Id.* “Examples of circumstances supporting a finding of premeditation include motive, prior threats, multiple wounds inflicted or multiple shots ... and the planned presence of a weapon at the scene.” *Id.*

In *State v. Ra*, the defendant, Mr. Ra, had never even met the victim, yet the court found there was sufficient evidence to establish premeditation. *Id.* at 610, 616. The victim and his friends arrived in a parking lot and parked near the vehicle that Mr. Ra and his friends were in. *Id.* at 610-11. Members of Mr. Ra’s group were catcalling to the

women in the victim's group, and issuing challenges to the victim and his group. *Id.* When the victim approached Mr. Ra's vehicle, Ra shot at the victim multiple times and one of the later shots struck the victim in the chest and killed him. *Id.*

The *Ra* court found that several factors could lead a reasonable jury to conclude that *Ra* premeditated the murder, including bringing a loaded firearm, provoking a confrontation with the victim, and firing multiple shots before eventually killing the victim. That court concluded that all of those factors could lead to the inference that from the first shot *Ra* intended to kill the victim. *Id.* at 616.

In another case about premeditated murder, the Court of Appeals considered motive as one of the elements that could help a jury reach the conclusion of premeditated murder. *State v. Aguilar*, 176 Wn.App. 264, 273-274 (2013). In that case, the defendant murdered his wife after accusing her of having possible involvement with another man. *Id.* The *Aguilar* court held that this gave the defendant motive, and that motive along with stealth, a prolonged attack, and the presence of mind to leave the scene of the murder and seek help to hide from law enforcement could all lead a reasonable jury to believe the murder was premeditated. *Id.*

The case at bar shares many similarities with *Ra* and *Aguilar*.

Daniel certainly had motive, he had become very upset when he learned that two guns that had sentimental value to him were stolen. RP 419. He remained upset for the next 11 days, and immediately upon learning where the victim was, attempted to recruit Kyle Evans, then recruited Daniel's brother Frank to go help Daniel violently punish Marcus Schur. RP 412, 506-09, 511-12, 770, 779, 790, 836-37, 1553, 1589-92. Daniel was very angry and had a motive to attack Marcus Schur who had wronged him and Daniel's "brother" Ben. He stealthily stationed himself out behind the house where he believed Marcus Schur to be, while Frank went in the front. He and his brother had the presence of mind to scoop up the body and leave the scene and then recruit others to hide evidence and concoct a story to mislead the police.

Also as noted in *Ra* is the question of whether or not any threats were issued. As Amber Jones noted, Frank threatened to kill Marcus Schur while Daniel was present and Amber Jones believed the threat. RP 419-20. Marcus Schur was also nervous about how upset Daniel and Frank were and immediately returned the guns, though this did not alleviate Daniel's anger. Finally, while the rest of the statements were not issued as a threat directly to the victim or his associates, Susan, Uncle Travis, Kyle Evans and Ben all knew that violence was intended upon

Marcus Schur during the 11 days Daniel searched for him. This combined with Daniel's knowledge of the AK-47 discussed below also gave the jury very credible evidence to rely on that the murder was premeditated.

Another factor discussed in *Ra* is the planned presence of a weapon. Daniel had carried the AK-47 with him at all times after learning of the thefts by Marcus Schur. He knew quite well how to use the AK-47 and knew of all the safety rules that should go with operating a firearm. Not only did he bring the weapon, but he did the opposite of everything a person needs to do to prevent an accidental death. He brought the AK-47, and the jury could certainly infer that he intended to use it that night.

Finally, just as in *Ra*, multiple shots were fired. In the case at bar, there were reports that the gun was fired at least twice, possibly more (and of course the victim was hit with two shots fired by Daniel). RP 429, 1071, 1076, 1132-35, 1203, 1206, 1219. Just as in *Ra*, and in combination with the factors noted in the previous paragraph, once again a reasonable juror could consider this as a factor in determining premeditation. There was very strong evidence within all four of these factors for a reasonable juror to find that the murder of Marcus Schur Schur was premeditated.

III. The defendant was properly required in his sentence to register as a felony firearm offender, per RCW 9.41.330.

According to RCW 9.41.330:

(1) On or after July 28, 2013, whenever a defendant in this state is convicted of a felony firearm offense ..., the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

(2) In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to:

(a) The person's criminal history;

(b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and

(c) Evidence of the person's propensity for violence that would likely endanger persons.

In this case, defendant's crime met the definition of a 'felony firearm offense' (see RCW 9.41.010 (8)(e)) namely having committed a felony while armed with a firearm. Therefore, the sentencing court had discretion to impose the requirement that defendant register under the terms of RCW 9.41.333. The State believes there was no error in this regard.

IV. The court was within its discretion to excuse Juror 2 for cause based on extreme hardship for the juror.

The statute that governs excusal of jurors is RCW 2.36.100(1):

“ ... no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, ... or any reason deemed sufficient by the court for a period of time the court deems necessary.” This statute has been interpreted as vesting “wide discretion” in the trial court as to whether to excuse jurors / potential jurors from service. *See State v. Ingels* 4 Wn.2d 676 (1940). A defendant who suggests grounds for a reversal for violation of the statute would have to demonstrate that the court abused its discretion, and therefore violated the statute, and that such a violation caused some prejudice. *See State v. Rice*, 120 Wn.2d 549 (1993). In the case at bar, defendant has not shown an abuse of discretion, nor any prejudice from excusing this juror.

As defendant notes in his brief, Art. 1, Section 22 entitles him to an “impartial jury”. But there is no reason to suspect that provision of the state constitution was violated by the excusing of this juror. It is well settled that a defendant does not have a right to be tried by a particular juror or by a particular party, and it is up to the legislature to define juror qualifications. *See City of Tukwila v. Garrett*, 165 Wn.2d 152, 161, 164-165 (2008). There has been no showing that the statute, and court action

in accordance therewith, is unconstitutional. The defendant would have to show prejudice here, to succeed in such a challenge. *Id.* at 161.

“In establishing actual prejudice, the most important questions are whether ‘there was any exclusion of any class of citizen or weighting of the jury list or that the jury list was not a representative cross section of the community’ or whether the ... jury itself was so composed that there might have been any inherent bias or prejudice against the challenger... .” *Id.* When reviewing the transcript from the case at bar, one can see a wide cross section of the community. See RP 129 – 140. Juror number 2 was replaced by the first alternate, with no indication that he wasn’t fit for the job. There simply is no indication at all that there was any sort of prejudice to the defendant in the court excusing Juror 2 on the grounds of extreme financial hardship.

V. The trial court did not abuse its discretion in rejecting a plea agreement.

The State agrees that Appellant notes the relevant case law on this issue. The State just comes to the opposite conclusion in applying that law. As noted by the trial judge (and quoted in Appellant’s brief at page 42): “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.”

The judge was well aware of the cover-up that so many of the witnesses had engaged in. The judge had also heard the defendant testify, twice, that he didn't even go near the house where Marcus Schur was that night, and Uncle Jimmy had gone instead; testimony not corroborated by anyone else and which Uncle Jimmy denied. And now the judge was presented with a signed Statement On Plea Form and a proposed plea agreement, wherein defendant stated the opposite of his trial testimonies. The judge simply was not going to put his 'stamp of approval' on the defendant's perjury, or the friends, family, and lovers who had conspired to avoid having the defendant held accountable. The judge was within his rights to reject the plea agreement, especially when one takes into account the strong objection by the victim's mother.

While it is a bit painful to admit, the prosecutor erred in making the offer which the court rejected. Not only was there no abuse of the trial court's discretion, the trial court was right to reject the deal. All participants have different roles in the criminal justice system, and all participants can make a mistake. In this case, the prosecutor made a

mistake, and the trial court rightfully exercised its role in correcting that mistake.

VI. The prosecutor did not err in introducing evidence of Evenson's cooperation and plea agreement on direct exam, since the defense had already raised the subject of this plea agreement in the defense's opening statement.

Defendant argues that *State v. Ish*, 170 Wn.2d 189 (2010), requires reversal here because the State should not have elicited evidence during Evenson's direct exam about his plea deal, which was given in exchange for his cooperation and "truthful testimony." But *Ish* does not compel a reversal, nor does it compel a finding of prosecutorial error. If this court does find error, such error should be found to be harmless.

*Ish* involved a contested trial court ruling allowing the State to reference a plea agreement between the State and the witness involving a condition of truthful testimony, during direct exam of the witness. The trial court allowed the evidence during direct exam. Neither party had broached the topic in front of the jury until then. *Ish* found the evidence to have been irrelevant and to *potentially* be 'vouching', and thus error to allow it in the direct exam. *Id.* at 199. But the court held the impact, if any, was slight. *Id.* at 200-201.

Significantly, both the lead opinion (four justices) and the concurring opinion (four justices) explicitly mention that under certain circumstances the State may attempt to ‘pull the sting’ out of an anticipated attack on the witness’ credibility. At footnote 10 in the lead opinion, the court notes this, but notes the trial court did not base its ruling on that situation. The court also noted that “once Ish attacked [the witness’] credibility on cross examination the State was free to raise [the witness’] promise to testify truthfully on redirect. *Id* at 199-201.

The concurring opinion reasoned similarly, that the State should be allowed to ‘pull the sting’ from anticipated cross-examination, but went further to find that the limited testimony that the witness had to testify truthfully was not improper, and did not amount to vouching. *Id.* at 202-205.

In the case at bar, defense counsel brought up the subject in their opening statement, before it was broached by the prosecutor. Evenson was the “jailhouse snitch who made a deal” and would testify to “what they told him he has to testify to in order to get his deal.” The prosecutor then introduced the terms of the deal in direct exam. The defense did not object, and why would they? Attacking a witness’ credibility because of a deal to testify is a tried and true tactic. And the defense went on the do just that. The defense argued, as they had done twice before in the earlier

trials, that the State required the witness to testify “truthfully”, which in combination with the requirement that he had already given a “truthful” statement to police, essentially required him to testify consistently with the statement given to police, whether it was really true or not. A fair tactic, and perhaps contributed to two prior hung juries; it just didn’t succeed this time.

If there was error here, it was harmless; the result would not have been different if the State had let the defense broach the topic first (as they were obviously going to). All the other witnesses pointed to the defendant’s involvement, including the defendant having made a similar confession to his friend Kyle Evans, and the close relationship that Evenson had with the Lazcano brothers (making it likely that defendant would confide in Evenson), and the fact that Evenson was included in the meeting on the day the body was discovered. The fact that the jury was told that Evenson’s deal involved a requirement of truthful testimony didn’t change things.

One important witness who did not have (or need) a deal from the State was Kyle Evans, the defendant’s friend and to whom the defendant confessed to being at the house where Marcus was found by Daniel and Frank that fateful night. As noted above, Daniel told Kyle Evans that Daniel waited out behind the house while Frank went in, and when

Marcus Schur ran out the back, Daniel and Frank ‘got him down.’ The fact that this witness did not have an immunity / reduced charges deal to obtain his testimony might not merit an entire paragraph in an appellate brief in other cases. But here, in this case almost entirely full of friends, family, and lovers of the defendants, who engaged in such a pattern of lies, deceit, and cover-up, it is worth noting that Kyle Evans’ testimony came from the guy who just wanted to do what’s right, and also corroborated the other witnesses’ testimony, including Ben Evenson.

VII. The prosecutor erred in introducing terms of plea/immunity agreements during direct exam of some other witnesses, but such error was harmless.

The prosecutor introduced a ‘truthful testimony’ requirement during direct exam of some other witnesses, without the defense having first brought up the subject. This was prosecutorial error, but was harmless.

Regarding the Lazcanos’ girlfriends McKendree Rogers and Jamie Whitney, the State brought up the requirement of truthful testimony first. There was no objection, apparently because of a tactical decision to make use of the “truthful testimony” requirement. Again the defense made a good argument that the state was telling the witnesses what to say and making them say it. Under *Ish*, the prosecutor should not have tried to ‘pull the sting’ before cross exam, [and has certainly well learned not to do so in future] but doing so here did not cause prejudice to the defense.

The court may note that there was no evidence, testimony, nor argument from the State, about Travis Carlon's obligation to give "truthful" testimony. To the extent Appellant argues otherwise, Appellant is mistaken.

Regarding Eli Lindsey's testimony, the State erred in bringing up the requirement of "truthful" testimony on direct. However, the matter wasn't dwelt on, and Appellant acknowledges at page 32 of his brief that it did not 'unduly impact Daniel's position.'

**VIII. The prosecutor did not vouch for the credibility of Evenson in closing argument.**

The sum of what the prosecutor told the jury about Evenson's credibility was that he had: 1) 'told the truth' in his many interviews and testimonies - arguing that he was remarkably consistent in all of those, and that consistency itself added to his credibility; and 2) that his testimony was 'believable and accurate,' -arguing that given the circumstances surrounding why he would know the things he testified to and why they were consistent with what other witnesses said. This was arguing from the evidence, not giving a personal belief in the credibility of the witness.

"It is improper for a prosecutor personally to vouch for the credibility of a witness." *State v. Brett*, 126 Wn.2d 136, 175 (1995), citing *State v. Sargent*, 40 Wn.App. 340, 344 (1985). "The Defendant bears the burden of "establishing both the impropriety of the prosecutor's conduct

and its prejudicial effect.” *Id.*, citing *State v. Furman*, 122 Wn.2d 440, 445 (1993). Prosecutors can argue an inference from the evidence, “and prejudicial error will not be found unless it is ‘clear and unmistakable’ that counsel is expressing a personal opinion.” *Id.* Citing *Sargent*, 40 Wn.App. at 344.

The *Sargent* court found that the prosecutor committed misconduct when he made the statement “I believe Jerry Lee Brown, I believe him...” *Sargent*, 40 Wn.App. at 343. However, the Washington Supreme Court in *State v. Brett* found that the prosecutor did not commit misconduct when the prosecutor said that “one reason you might want to believe [one witness over another] is that she [was experiencing a terrible event] that she’s going to remember...”. *Brett*, 126 at 175. The court held that the comments were proper argument and did not set forth a statement of personal belief. *Id.* “Rather, the prosecutor was drawing an inference from the evidence as to why the jury would want to believe one witness over another.” *Id.* In another case, the Washington Supreme Court again found that a “badge of truth” theme and statements that the victim’s testimony bore a “ring of truth” from the prosecutor during closing did not amount to misconduct. *State v. Warren*, 165 Wn.2d 17, 30 (2008). In fact, the court noted that the prosecutor’s argument was a response to defense counsel’s attack on the credibility of the witness during both opening

statements and cross-examination. *Id.* In both *Brett* and *Warren* the Supreme Court differentiated the conduct of the prosecutor in those cases from the one in *Sargent*.

Finally, in another case from the Washington Supreme Court, once again the prosecutor used a “ring of truth” argument in referring to a paramedic’s observations regarding the defendant’s lack of grief. *State v. Stenson*, 132 Wn.2d 668, 727 (1997). However, the Court once again found that the “prosecutor was within proper bounds in drawing inferences from” facts in evidence. *Id.* at 728.

In the case at bar, the prosecutor did not once state “I believe” or “I think so and so lied” or “I know so and so told the truth.” In each instant, it was a statement or conclusion based on facts in evidence from the trial.

## CONCLUSION

For the above reasons, the State respectfully requests that this court deny Mr. Lazcano’s appeal issues and affirm the decision below.

Dated this 23 day of December 2015.



Denis P. Tracy, WSBA # 20383  
Whitman County Prosecutor  
PO Box 30  
Colfax, WA 99111-0030  
(509) 397-6250

## **APPENDIX 1**

(CP 223 to 255. Document titled: State's Answer Re Defense Request To Enforce Plea Agreement)

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**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHITMAN**

STATE OF WASHINGTON, )  
Plaintiff, )  
v. )  
DANIEL LAZCANO , )  
Defendant. )

CASE NO. 12-1-51-9  
STATE'S ANSWER  
RE DEFENSE REQUEST  
TO ENFORCE PLEA AGREEMENT

COMES NOW, the Plaintiff and Answers Defendant's "Request to Enforce Plea Agreement and Amended Information and Charges." The State asks this court to deny the defendant's motion/request.

**ISSUES PRESENTED AND SHORT ANSWERS**

1. Should this court reconsider a decision of another judge, when that judge has already decided that the plea agreement that was offered by the State was not in the interest of justice or the prosecution standards?  
No.
2. Even if this court was inclined to reconsider the issue, and inclined to reach a different result than the earlier judge, could this court require the State to make the same offer it made earlier, that was rejected by the court earlier, and which the State does not desire to make again?  
No.

277

FILED  
DEC 3 7 2013  
SHIRLEY J. FUS  
WHITMAN COUNTY CLERK

Denis P. Tracy  
WHITMAN COUNTY PROSECUTOR  
PO Box 30, Colfax WA, 99111  
(509) 397-6250, FAX (509) 397-5659

1 3. Should this court parse a previously-rejected proposed amended information from the rejected  
2 plea agreement, and consider the State to have charged the defendant with that amended  
information, over the State's objection?

3 No.

4 **FACTS**

5  
6 After the second hung jury in this case, the State and Defendant negotiated a plea agreement.  
7 The plea offer, which the defendant accepted, is attached as Exhibit 1. Exhibit 1 is an email stream,  
8 and contains not only the defense attorney's acceptance of the deal on July 12 at 12:07pm, but just  
9 prior to that is the State's offer, sent on July 12 at 11:19am. Prior to those emails, this court will see  
10 some back and forth about particular provisions. For instance, in his July 11, 3:31pm email, defense  
11 counsel expresses his worry about the State charging the defendant with perjury, since the defendant  
12 would be admitting specifically that he shot the victim, contrary to defendant's prior testimony. In the  
13 same stream, this court will also see the prosecutor's email (from Denis Tracy) to defense counsel on  
14 July 11 at 11:05 am. The prosecutor noted that he was unwilling to delay the matter, noting  
15 specifically that "the 'quick' resolution (if we can call over a year 'quick') is a significant part of the  
16 reason for the State's offer.  
17  
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19  
20 On July 19, 2013, the parties appeared before Judge Frazier in court. The defendant has  
21 supplied the transcript of that hearing. This court will note that at the start of the hearing, defense  
22 counsel handed forward a Statement of Defendant On Plea Of Guilty. Attached hereto, and labeled  
23 Exhibit 2, is a declaration from this prosecutor, along with a draft of the Statement On Plea that  
24 defense counsel supplied the prosecutor before the hearing. As the court will note, Defendant signed  
25 the Statement on Plea, as did his attorney, before handing it up to Judge Frazier. The Statement On  
26 Plea that was handed forward is substantially the same as the draft that is attached to Exhibit 2, except  
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1 that the Statement that was handed forward included the statement of the defendant that the gun he  
2 shot the victim with was his brother Frank's AK-47. As that Statement on Plea was handed up to the  
3 judge, the prosecutor handed up a proposed Third Amended Information, which would have had the  
4 effect of amending the murder charge to Manslaughter 2<sup>nd</sup> degree and dismissing the Kidnapping  
5 charge.  
6

7 The trial judge had heard the defendant testify twice before to the effect that not only had he  
8 not shot the victim, but that he hadn't been there, and it must have been his mentally-ill uncle who had  
9 done it. The judge amply lays out his reasoning for finding the plea agreement to be contrary to the  
10 interests of justice and the prosecution standards. The two points that this court may not see clearly  
11 however, are mentioned by Judge Frazier at page 12 of the transcript.  
12

13 The judge notes that he heard suppression hearings. In fact, the judge had suppressed  
14 defendant's incriminating statements to police after his arrest at a CrR 3.5 hearing.  
15

16 The judge also notes that he heard a proceeding where, for ethical reasons, the defendant's  
17 court-appointed attorney had to withdraw. The State is not privy to the details of that proceeding. The  
18 record of that hearing was sealed. But if this court were to reconsider Judge Frazier's ruling, this court  
19 would want to review the sealed record.  
20

21 After the judge rejected the plea agreement, near the close of the hearing, the prosecutor  
22 clarified that the court was rejecting the proposed Third Amended Information. See Transcript at page  
23 14. The court responded "yes". Id.  
24

25 A couple of weeks later, the prosecutor sent the defense another email. That is attached as  
26 Exhibit 3. It shows that the prosecutor had at that point "re-evaluated the case," and was making a  
27 different offer.  
28

1  
2 **ARGUMENT**

3 **Issue #1:** This court should not reconsider a decision of another judge, when that judge has already  
4 decided that the plea agreement that was offered by the State was not in the interest of justice or the  
5 prosecution standards.

6 Defense apparently suggests this court should act as an appellate court, in deciding whether  
7 Judge Frazier was correct or not in his ruling. He notes that “the application of a court rule to a  
8 particular set of facts in a case is a question of law that is reviewed de novo.” That is correct, when  
9 one is speaking of the Court of Appeals. But defense has not cited any authority for the proposition  
10 that this court should reconsider and overturn a decision of another judge of this court.  
11

12 The State urges this court to not reconsider Judge Frazier’s ruling. Judge Frazier listened to all  
13 the testimony in both prior trials, as well as the suppression hearing regarding defendant’s statements  
14 after his arrest. He heard the reasons related to one court-appointed attorney’s withdrawal. To quote  
15 Judge Frazier: “To go along with this plea agreement that the reason that there may be evidential  
16 problems in this case is a result of dishonesty and manipulation on the part of the defendant and family  
17 members and friends. That’s the bottom line here. And to go along with this plea agreement in my  
18 mind would be my giving my stamp of approval on perjured testimony and manipulation.” That judge  
19 was in a unique position to make that ruling. Respectfully, the State urges this court to not substitute  
20 its judgment now.  
21

22 **Issue #2:** Even if this court was inclined to reconsider the issue, and inclined to reach a different  
23 result than the earlier judge, this court should not require the State to make the same offer it made  
24 earlier, that was rejected by the court earlier, and which the State does not desire to make again?  
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1 The defendant asks this court to compel the State to comply with the earlier plea agreement.  
2 But that ship has sailed. The case has raised its anchor, hoisted its sail, and moved on with the tide of  
3 events. The State cannot be in the same position again. One of the important aspects of the plea from  
4 the State's perspective was the timing. Since the plea was rejected in mid-July, four and a half months  
5 have elapsed; a significant amount of prosecutor's time has been spent in preparing for tomorrow's  
6 trial. Defendant has not cited any authority that would suggest this court now has the authority to  
7 compel the State to re-offer the earlier plea deal.  
8

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11 **Issue #3:** This court should not parse the Proposed Third Amended Information from the plea deal of  
12 which it was a part.

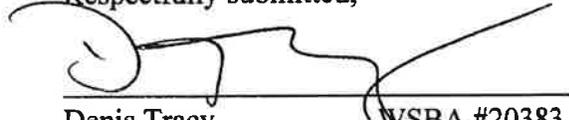
13 The Proposed Third Amended Information cannot be set adrift from the plea agreement. As a  
14 ship cannot be cut in two and be expected to float, this agreement was a package-deal. The State did  
15 not intend, and did not, go forward with an Amended Information that was separate from the plea  
16 agreement. Once the plea agreement was found to be against the interest of justice and the prosecution  
17 standards, the court also made quite clear that the portion of the deal involving the Proposed Third  
18 Amended Information was rejected. Since the proposed amended information was not accepted by the  
19 court, and since the State is not willing any longer to seek to amend the information further, there is no  
20 Third Amended Information for the defendant to be tried on here.  
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**CONCLUSION**

For the above reasons, the State respectfully requests this court deny the defense request to enforce the plea agreement from July.

DATED this 1<sup>st</sup> day of December, 2013.

Respectfully submitted,



Denis Tracy WSBA #20383  
Prosecuting Attorney

**ATTORNEY'S CERTIFICATE OF SERVICE**

I hereby certify that this day I caused a copy of this document to be emailed to the defendant's attorney, E Christianson + Lawson.

Dated: 12-1-13

Name:   
Denis Tracy WSBA #20383

# Exhibit 1

**Denis Tracy**

---

**From:** Eric Christianson [eric.m.christianson@gmail.com]  
**Sent:** Friday, July 12, 2013 12:07 PM  
**To:** Denis Tracy  
**Subject:** Re: Lazcano--offer

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

OK, I am back to the office where I can type without having to type on the darn cell phone.

So, let me make sure that I have been clear. WE HAVE A DEAL. We will be there next Friday to do the deal, plea and sentencing. This weekend client will stop by and sign a waiver of speedy through January, and I will get it faxed to you when my secretary arrives on Monday (I don't know how to use the fax). Somewhere around mid week I will email you a copy of my statement on plea to make sure that we agree on the details/ranges ...

It has been a pleasure working with you, hopefully we can get another case soon.

Eric

On Fri, Jul 12, 2013 at 11:19 AM, Denis Tracy <[DenisT@co.whitman.wa.us](mailto:DenisT@co.whitman.wa.us)> wrote:

Dear Eric:

June 12, 2013 at 11:20am

All prior offers are now revoked.

In recognition of the uncertainties and delays in the trial and appellate processes, the offer is now:

1. I will amend the charge of Murder in the First Degree to Manslaughter in the Second Degree.
2. I will move to dismiss the charge of Kidnapping.
3. Your client will plead guilty to Manslaughter in the Second Degree, and will admit that he shot Marcus Schur twice with the AK-47 belonging to Frank Lazcano, in Malden that night, outside Nick Backman's house, and thereby with criminal negligence caused the death of Marcus Schur. There will be no Alford plea or something similar to In Re Barr.
4. The Whitman County Prosecutor's Office will not charge the defendant with other crimes of which it is aware, which arise from this case, including the perjury that defendant committed during his two trials.
5. Your client will stipulate to restitution to the Washington State Department of Labor and Industries in the amount of \$5474.37, for burial expenses.

6. I will recommend a sentence within the standard range on the Manslaughter, although I will defer to the court as to the actual number of months to be served on that charge. I will recommend a sentence of 90 days on the Unlawful Disposal of Remains, to be served consecutively to the sentence on the Manslaughter.

7. Your client will enter his guilty plea and proceed to sentencing by July 19<sup>th</sup> at 11:00am, and you will notify me in writing, by hand-delivery or fax or email, by July 12<sup>th</sup> (today) at 3pm of his formal acceptance of each and every provision of this offer, with no equivocation or additional condition. The formal acceptance must include the statement: "I have reviewed the offer with my client and he accepts each and every provision of the offer."

8. Your client will waive his speedy trial time on the case, and sign and file a speedy trial waiver with the court by July 15<sup>th</sup> (Monday) at 3pm, signed by you and your client, which sets a new commencement date of August 1, 2013.

9. Upon your and your client's compliance with condition 7 above, I will then be obligated to not withdraw the offer, so long as defendant complies with every aspect.

Please let me know if you have any questions or concerns.

Sincerely,

Denis Tracy

---

**From:** Eric Christianson [mailto:[eric.m.christianson@gmail.com](mailto:eric.m.christianson@gmail.com)]

**Sent:** Friday, July 12, 2013 11:04 AM

**To:** Denis Tracy

**Subject:** Re: Lazcano--offer

That all looks correct except th waiver being entered today,

On Jul 12, 2013 10:06 AM, "Denis Tracy" <[DenisT@co.whitman.wa.us](mailto:DenisT@co.whitman.wa.us)> wrote:

Dear Eric,

For clarity's sake, all prior offers are revoked.

In recognition of the uncertainties and delays in the trial and appellate processes, the offer is now:

1. I will amend the charge of Murder in the First Degree to Manslaughter in the Second Degree.
2. I will move to dismiss the charge of Kidnapping.

3. Your client will plead guilty to Manslaughter in the Second Degree, and will admit that he shot Marcus Schur twice with the AK-47 belonging to Frank Lazcano, in Malden that night, outside Nick Backman's house, and thereby with criminal negligence caused the death of Marcus Schur. There will be no Alford plea or something similar to In Re Barr.
4. The Whitman County Prosecutor's Office will not charge the defendant with other crimes of which it is aware, which arise from this case, including the perjury that defendant committed during his two trials.
5. Your client will stipulate to restitution to the Washington State Department of Labor and Industries in the amount of \$5474.37, for burial expenses.
6. I will recommend a sentence within the standard range on the Manslaughter, although I will defer to the court as to the actual number of months to be served on that charge. I will recommend a sentence of 90 days on the Unlawful Disposal of Remains, to be served consecutively to the sentence on the Manslaughter.
7. Your client will enter his guilty plea and proceed to sentencing by July 19<sup>th</sup> at 11:00am, and you will notify me in writing, by hand-delivery or fax or email, by July 12<sup>th</sup> (today) at 3pm of his formal acceptance of each and every provision of this offer, with no equivocation or additional condition.
8. Your client will waive his speedy trial time on the case, and sign and file a speedy trial waiver with the court by July 12<sup>th</sup> (today) at 1:30pm, signed by you and your client, which sets a new commencement date of August 1, 2013.
9. Upon your and your client's compliance with condition 7 above, I will then be obligated to not withdraw the offer, so long as defendant complies with every aspect.

Please let me know if you have any questions or concerns.

Sincerely,

Denis Tracy

---

**From:** Eric Christianson [mailto:[eric.m.christianson@gmail.com](mailto:eric.m.christianson@gmail.com)]  
**Sent:** Thursday, July 11, 2013 3:31 PM  
**To:** Denis Tracy  
**Subject:** Re: Lazcano

Well, a couple things:

- As to #4, I will need an explanation as to the \$5k in restitution to L&I, what is that for?
- As to waiver of speedy trial, that is no problem, client will agree to waive until January/February if you like.
- Client will agree to plead to one count of Manslaughter in the second degree, we agree to the standard range sentences. All other remaining charges shall be dismissed (other than the one already convicted of): **No further charges will arise out of the incident, including perjury.**

- client will make a mea culpa, admitting as in #3 in your offer. (3. Your client will plead guilty to Manslaughter in the Second Degree, and will admit that he shot Marcus Schur twice, in Malden that night, outside Nick Backman's house, and thereby with criminal negligence caused the death of Marcus Schur. )
- Plea and sentencing to take place on July 19 at 11am
- As to #7, once an agreement is reached, the state may not withdraw the offer. As his attorney, I will not discuss any other version of events until a solid deal has been reached, as doing so could conflict me out of representing Daniel Lazcano should the matter proceed to a third trial.

Deal?

Eric

On Thu, Jul 11, 2013 at 2:19 PM, Denis Tracy <[DenisT@co.whitman.wa.us](mailto:DenisT@co.whitman.wa.us)> wrote:

Dear Eric:

If you and your client waive an additional week of speedy trial, and exclude from any speedy trial calculation the 7 day period from July 12 to July 19, I will agree to move the scheduling / status hearing from tomorrow to July 19 at 11:00am. I have checked with Sonya and that time is available. If you would like, I can present an agreed order again, similar to the one I presented to move the June 28<sup>th</sup> date. Please let me know.

I am willing to modify the offer I made on July 1<sup>st</sup>, to the extent in this email. In recognition of the uncertainties and delays in the trial and appellate processes, the offer is now:

1. I will amend the charge of Murder in the First Degree to Manslaughter in the Second Degree.
2. I will move to dismiss the charge of Kidnapping.
3. Your client will plead guilty to Manslaughter in the Second Degree, and will admit that he shot Marcus Schur twice, in Malden that night, outside Nick Backman's house, and thereby with criminal negligence caused the death of Marcus Schur.
4. Your client will stipulate to restitution to the Washington State Department of Labor and Industries in the amount of \$5474.37.
5. I will recommend a sentence within the standard range, although I will defer to the court as to the actual number of months to be served.
6. Your client will enter his guilty plea and proceed to sentencing on July 19<sup>th</sup> at 11:00am, and you will notify me in writing/email by July 12<sup>th</sup> of his intent to do so.
7. I will be free to revoke this offer at any time, and for any reason, up until your client enters his guilty plea.

Feel free to contact me with any questions.

Sincerely,

Denis Tracy

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**From:** Eric Christianson [mailto:[eric.m.christianson@gmail.com](mailto:eric.m.christianson@gmail.com)]  
**Sent:** Thursday, July 11, 2013 12:11 PM  
**To:** Denis Tracy  
**Subject:** Re: Lazcano

LaBeau was correct, Daniel is trying to postpone until September after the harvest. Regardless, I can go put on the record tomorrow that Daniel is going to put in a plea, but the concept of me having the paperwork ready by tomorrow does not seem workable, especially with the requirement that Daniel enter a "mea culpa," which I want him to do in writing so that I know ahead of time what he will say.

I am wide open on Friday the 19th to do a plea, but whether you and Daniel make your agreement or not, ERIC will not be ready to enter it tomorrow.

Let me know what you want to do.

Eric

On Thu, Jul 11, 2013 at 12:02 PM, Denis Tracy <[DenisT@co.whitman.wa.us](mailto:DenisT@co.whitman.wa.us)> wrote:

Dear Eric,

Dan LeBeau explained that you phoned him with a request that the State's offer be modified to allow Mr. Lazcano to enter his plea in September. I'm not willing to do that. I want Mr. Lazcano to be employed and a productive member of society, but from my perspective that unfortunately has to come second to finishing this case. I will try to accommodate your schedule of course, and can do the hearing any time tomorrow afternoon. If you need an extra hour or two, just contact the judge's court administrator, Sonya Goldsby, and hopefully she can squeeze us in during the later afternoon. I only ask that you set it up today and let me know the time today, so that I can let Grace Schur know when to be there. Let me know if you need Sonya's contact information.

Sincerely,

Denis Tracy

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**From:** Eric Christianson [mailto:[eric.m.christianson@gmail.com](mailto:eric.m.christianson@gmail.com)]  
**Sent:** Thursday, July 11, 2013 11:34 AM  
**To:** Denis Tracy  
**Cc:** Dan LeBeau; Steve Martonick  
**Subject:** Re: Lazcano

Ya, there is no way dan is going to plea to the murder, but he is willing to take the deal we have been talking about on the manslaughter2. To be clear, Dan is not having to "think about it", he is merely trying to remain out until September to fulfill his commitments and make some money for his family. Either way, I don't know if I will be able to come up with the paperwork in time for an actual plea tomorrow, and would probably ask that we continue it for a plea hearing either way.

Eric

On Thu, Jul 11, 2013 at 11:05 AM, Denis Tracy <[DenisT@co.whitman.wa.us](mailto:DenisT@co.whitman.wa.us)> wrote:

Dear Eric:

I am back in the office this morning. Thank you for your thinking outside the box, sort to speak. I've spoken about something somewhat similar to Steve Martonick. I understand you have spoken to Steve recently and discussed what he and I spoke about.

Namely, that I would seriously consider an offer from the defense involving Dan Lazcano pleading to Murder 2<sup>nd</sup> degree, along with setting aside the judgment and sentence for Frank Lazcano and Frank's guilty plea to Manslaughter 2<sup>nd</sup> degree. I would recommend against exceptional sentences below any standard range, and I would not recommend minimum sentences for anyone. Other details could be subject to negotiation. This obviously does not involve 5 years for each defendant. But perhaps it is within the realm of what your and Steve's clients will agree to. But can you work this out by the deadline?

The earlier offer involving Dan Lazcano's plea to Manslaughter 2<sup>nd</sup> degree is still open, but again, the deadline for acceptance is today, and the plea would be tomorrow. I do not believe I would be willing to extend the deadline for your client to think it over any longer. If the case is to settle, I think all parties have had enough time to decide things,

and it ought to settle now. The "quick" resolution (if we can call over a year 'quick') is a significant part of the reason for the State's offer.

I'm in all day and available by phone and email.

Sincerely,

Denis Tracy

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**From:** Dan LeBeau  
**Sent:** Monday, July 08, 2013 11:41 AM  
**To:** Eric Christianson  
**Cc:** Denis Tracy  
**Subject:** RE: Lazcano

Hey Eric, first things first, the hearing on Friday is at 1:30. (I think you requested 1, but court doesn't start until 1:30). Second, Denis returns on Wednesday morning, so we will wait the 48 hours to respond to your counter offer.

Dan

**Daniel F. Le Beau**

Senior Deputy Prosecutor

Whitman County Prosecuting Attorney's Office

PO Box 30

Colfax, WA 99111

509-397-6250

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**From:** Eric Christianson [<mailto:eric.m.christianson@gmail.com>]  
**Sent:** Monday, July 08, 2013 9:17 AM  
**To:** Dan LeBeau; Denis Tracy  
**Cc:** steve martonick  
**Subject:** Lazcano

Dan and Denis, if you would have asked me a week ago I would have told you that our case is probably not going to settle. But after my last conversation with Daniel, I believe that a settlement may actually be reached in the very near future.

I would like to also explore another option of settlement. Let me be up front with you about the fact that I have not discussed nor obtained approval from my client yet to make any offers in this regard, but I believe he will be open to it and that in the big picture it is the more fair way of settling this case. I would like to propose an option where Daniel and Frank each do approximately 5 years in prison. We can come up with the charges to justify that later if we can agree on the concept. Let me know if the state has any interest in trying to come up with some arrangement like this and I will pursue it further, otherwise I will keep working with the offers at hand and see if we can get a meeting of the minds soon.

When we continued the case for two weeks to this Friday, I never received notice as to what time of day it will be on Friday. Can you tell me what time our hearing is this week?

As I said, at this point I am somewhat optimistic that this case will resolve and will therefore quit working the case for the rest of the week.

Thank you.

Sincerely

Eric

--

Eric M. Christianson

509.389.0925

*~To Defend is Divine ~*

*Honor first, honor last, honor always!*

--

Eric M. Christianson

509.389.0925

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*~To Defend is Divine ~*

*Honor first, honor last, honor always!*

Exhibit

1 end

# Exhibit 2

Exhibit 2 start

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**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHITMAN**

STATE OF WASHINGTON, )  
Plaintiff, )  
v. )  
DANIEL LAZCANO , )  
Defendant. )

CASE NO. 12-1-51-9  
DECLARATION IN SUPPORT OF  
STATE'S ANSWER  
RE  
PLEA AGREEMENT

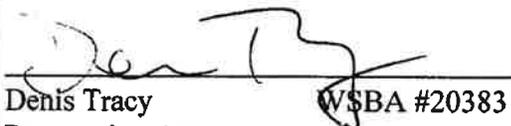
COMES NOW, Denis Tracy, the prosecutor in this case, and states the following:

1. Prior to the hearing on July 19, the defendant's attorney emailed me a draft of the Defendant's Statement On Plea of Guilty. A copy is attached hereto.
2. On July 19, just before the plea hearing, I reviewed a copy of the Statement on Plea, which was in the same form as the draft. I pointed out that it did not contain a statement that the gun with which the defendant had shot and killed the victim, was the AK-47 that belonged to the defendant's brother, Frank Lazcano. The defense then hand-wrote that addition. The Statement was signed by the defendant, the defendant's attorney, Eric Christianson, and me, before it was handed up to the court.

1 3. After the plea agreement was rejected, I reviewed the case again. I  
2 decided that I would not re-offer a reduction to Manslaughter, and instead  
3 made an offer on July 31 to reduce the charge to Murder 2<sup>nd</sup> degree if the  
4 defendant pled to that charge.

5  
6 I declare under penalty of perjury according to the laws of the State of Washington that the above is  
7 true.

8 Signed at Colfax, WA, this 1<sup>st</sup> day of December, 2013.

9  
10   
11 Denis Tracy WSBA #20383  
12 Prosecuting Attorney

**Superior Court of Washington  
For WHITMAN COUNTY**

State of Washington

Plaintiff

vs.

DANIEL LAZCANO

Defendant

No. 12-1-00051-9

**Statement of Defendant on Plea of  
Guilty to Non-Sex Offense  
(Felony)  
(STTDFG)**

1. My true name is: DANIEL LAZCANO.
2. My age is: \_\_\_\_\_.
3. The last level of education I completed was High School plus 3 years of college.
4. **I Have Been Informed and Fully Understand That:**
  - (a) I have the right to representation by a lawyer and if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
  - (b) I am charged with: Manslaughter in the second degree.  
The elements are: With criminal negligence, causes the death of another person.
5. **I Understand I Have the Following Important Rights, and I Give Them Up by Pleading Guilty:**
  - (a) The right to a speedy and public trial by an impartial jury in the county where the crime was allegedly committed;
  - (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
  - (c) The right at trial to hear and question the witnesses who testify against me;
  - (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;

- (e) The right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial.

6. **In Considering the Consequences of My Guilty Plea, I Understand That:**

- (a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	0	21 – 27 months	N/A	18 months	10 years and \$20,000
2					
3					

\* Each sentencing enhancement will run consecutively to all other parts of my entire sentence, including other enhancements and other counts. The enhancement codes are: (F) Firearm, (D) Other deadly weapon, (V) VUCSA in protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude, (P16) Passenger(s) under age 16.

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.
- (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.
- (e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment and any mandatory fines or penalties that apply to my case. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.

(f) ~~For crimes committed prior to July 1, 2000: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the total period of confinement is more than 12 months, and if this crime is a drug offense, assault in the second degree, assault of a child in the second degree, or any crime against a person in which a specific finding was made that I or an accomplice was armed with a deadly weapon, the judge will order me to serve at least one year of community custody. If this crime is a vehicular homicide, vehicular assault, or a serious violent offense, the judge will order me to serve at least two years of community custody. The actual period of community custody may be longer than my earned early release period. During the period of community custody, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.~~

[ ] ~~For offenses committed after July 1, 2000 but prior to July 26, 2009, the court may impose a community custody range as follows: for serious violent offenses, 24 to 36 months; for crimes against persons, 9 to 12 months; for offenses under 69.50 and 69.52, 9 to 12 months.~~

For crimes committed on or after July 1, 2000: In addition to sentencing me to confinement, under certain circumstances the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months, but only if the crime I have been convicted of falls into one of the offense types listed in the following chart. For the offense of failure to register as a sex offender, regardless of the length of confinement, the judge will sentence me for up to 12 months of community custody. If the total period of confinement ordered is more than 12 months, and if the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the term established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.728 is longer, that will be the term of my community custody. If the crime I have been convicted of falls into more than one category of offense types listed in the following chart, then the community custody term will be based on the offense type that dictates the longest term of community custody.

OFFENSE TYPE	COMMUNITY CUSTODY TERM
Serious Violent Offenses	36 months
Violent Offenses	18 months
Crimes Against Persons as defined by RCW 9.94A.411(2)	12 months
Offenses under Chapter 69.50 or 69.52 RCW (not sentenced under RCW 9.94A.660)	12 months
Offenses involving the unlawful possession of a firearm where the offender is a criminal street gang member or associate	12 months

Certain sentencing alternatives may also include community custody.

During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me, including additional conditions of community custody that may be imposed by the Department of

Corrections. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions.

If I violate the conditions of my community custody, the Department of Corrections may sanction me up to 60 days confinement per violation and/or revoke my earned early release, or the Department of Corrections may impose additional conditions or other stipulated penalties. The court also has the authority to impose sanctions for any violation.

- (g) The prosecuting attorney will make the following recommendation to the judge:  
**A JOINT recommendation of a standard range sentence of 21 – 27 months in prison; 18 months community custody, and Defendant agrees to the amount of \$5474.37 in restitution to the Department of Labor and Industries. The State will request that the sentence be consecutively to the sentence on the Unlawful Disposal of Human Remains, Defendant will ask that it be served concurrently. Standard fines/fees/and costs. The state will dismiss the kidnapping charge, and will charge no other allegations out of this incident, nor will the state pursue any perjury charges.**

The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference.

- (h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:
- (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
  - (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
  - (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
  - (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

If the court imposes a standard range sentence, then no one may appeal the sentence. If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence.

- (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

- (j) I may not possess, own, or have under my control any firearm, and under federal law any firearm or ammunition, unless my right to do so is restored by the court in which I am convicted or the superior court in Washington State where I live, and by a federal court if required. I must immediately surrender any concealed pistol license.
- (k) I will be ineligible to vote until that right is restored in a manner provided by law. If I am registered to vote, my voter registration will be cancelled. Wash. Const. art. VI, § 3, RCW 29A.04.079, 29A.08.520.
- (l) Government assistance may be suspended during any period of confinement.
- (m) I will be required to have a biological sample collected for purposes of DNA identification analysis. I will be required to pay a \$100.00 DNA collection fee.

**Notification Relating to Specific Crimes: *If any of the following paragraphs DO NOT APPLY, counsel and the defendant shall strike them out. The defendant and the judge shall initial all paragraphs that DO APPLY.***

- \_\_\_\_\_ (n) This offense is a most serious offense or “strike” as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.
- \_\_\_\_\_ (o) ~~The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days' confinement and up to one year of community custody plus all of the conditions described in paragraph (c). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.~~
- \_\_\_\_\_ (p) ~~The judge may sentence me under the Parenting Sentencing Alternative if I qualify under RCW 9.94A.655. If I am eligible, the judge may order DOC to complete either a risk assessment report or a chemical dependency screening report, or both. If the judge decides to impose the Parenting Sentencing Alternative, the sentence will consist of 12 months of community custody and I will be required to comply with the conditions imposed by the court and by DOC. At any time during community custody, the court may schedule a hearing to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. The court may modify the conditions of community custody or impose sanctions. If the court finds I violated the conditions or requirements of the sentence or I failed to make satisfactory progress in treatment, the court may order me to serve a term of total confinement within the standard range for my offense.~~
- \_\_\_\_\_ (q) ~~If this crime involves kidnapping involving a minor, including unlawful imprisonment involving a minor who is not my child, I will be required to register where I reside, study or work. The specific registration requirements are set forth in the “Offender Registration” Attachment.~~
- \_\_\_\_\_ (r) ~~If this is a crime of domestic violence, I may be ordered to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under~~

~~RCW 26.50.150.~~

- ~~\_\_\_\_\_ (s) If this crime involves prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.~~
- ~~\_\_\_\_\_ (t) The judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.04A.660. If I qualify and the judge is considering a residential chemical dependency treatment based alternative, the judge may order that I be examined by DOC before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison based alternative or a residential chemical dependency treatment based alternative.~~
- ~~If the judge imposes the prison based alternative, the sentence will consist of a period of total confinement in a state facility for one half of the midpoint of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of one half of the midpoint of the standard range.~~
- ~~\_\_\_\_\_ If the judge imposes the residential chemical dependency treatment based alternative, the sentence will consist of a term of community custody equal to one half of the midpoint of the standard sentence range or two years, whichever is greater, and I will have to enter and remain in a certified residential chemical dependency treatment program for a period of three to six months, as set by the court.~~
- ~~\_\_\_\_\_ As part of this sentencing alternative, the court is required to schedule a progress hearing during the period of residential chemical dependency treatment and a treatment termination hearing scheduled three months before the expiration of the term of community custody. At either hearing, based upon reports by my treatment provider and the department of corrections on my compliance with treatment and monitoring requirements and recommendations regarding termination from treatment, the judge may modify the conditions of my community custody or order me to serve a term of total confinement equal to one half of the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.04A.701.~~
- ~~\_\_\_\_\_ During the term of community custody for either sentencing alternative, the judge could prohibit me from using alcohol or controlled substances, require me to submit to urinalysis or other testing to monitor that status, require me to devote time to a specific employment or training, stay out of certain areas, pay \$30.00 per month to effect the cost of monitoring and require other conditions, such as affirmative conditions, and the conditions described in paragraph 6(e). The judge, on his or her own initiative, may order me to appear in court at any time during the period of community custody to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. If the court finds that I have violated the conditions of the sentence or that I have failed to make satisfactory progress in treatment, the court may modify the terms of my community custody or order me to serve a term of total confinement within the standard range.~~
- ~~\_\_\_\_\_ (u) If I am subject to community custody and the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.~~
- ~~\_\_\_\_\_ (v) If this crime involves the manufacture, delivery, or possession with the intent to deliver methamphetamine, including its salts, isomers, and salts of isomers, or amphetamine,~~

~~including its salts, isomers, and salts of isomers, and if a fine is imposed, \$3,000 of the fine may not be suspended. RCW 69.50.401(2)(b).~~

- \_\_\_\_\_ (w) ~~If this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits may be affected. 20 U.S.C. § 1091(r) and 21 U.S.C. § 862a.~~
- \_\_\_\_\_ (x) ~~I understand that RCW 46.20.285(4) requires that my driver's license be revoked if the judge finds I used a motor vehicle in the commission of this felony.~~
- \_\_\_\_\_ (y) ~~If this crime involves the offense of vehicular homicide while under the influence of intoxicating liquor, or any drug, as defined by RCW 46.61.502, committed on or after January 1, 1999, an additional two years shall be added to the presumptive sentence for vehicular homicide for each prior offense as defined in RCW 46.61.5055(14).~~
- \_\_\_\_\_ (z) ~~If I am pleading guilty to felony driving under the influence of intoxicating liquor, or any drug, or felony actual physical control of a motor vehicle while under the influence of intoxicating liquor, or any drug, in addition to the provisions of chapter 9.94A RCW, I will be required to undergo alcohol or chemical dependency treatment services during incarceration. I will be required to pay the costs of treatment unless the court finds that I am indigent. My driving privileges will be suspended, revoked or denied. Following the period of suspension, revocation or denial, I must comply with the Department of Licensing ignition interlock device requirements. In addition to any other costs of the ignition interlock device, I will be required to pay an additional fee of \$20 per month.~~
- \_\_\_\_\_ (aa) ~~For the crimes of vehicular homicide committed while under the influence of intoxicating liquor, or any drug as defined by RCW 46.61.520 or for vehicular assault committed while under the influence of intoxicating liquor, or any drug as defined by RCW 46.61.522, or for any felony driving under the influence (RCW 46.61.502(6)), or felony physical control under the influence (RCW 46.61.504(6)), the court shall add 12 months to the standard sentence range for each child passenger under the age of 16 who is an occupant in the defendant's vehicle. These enhancements shall be mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions.~~
- \_\_\_\_\_ (bb) ~~For the crimes of felony driving under the influence of intoxicating liquor, or any drug, for vehicular homicide while under the influence of intoxicating liquor, or any drug, or vehicular assault while under the influence of intoxicating liquor, or any drug, the court may order me to reimburse reasonable emergency response costs up to \$2,500 per incident.~~
- \_\_\_\_\_ (cc) ~~The crime of \_\_\_\_\_ has a mandatory minimum sentence of at least \_\_\_\_\_ years of total confinement. This law does not apply to crimes committed on or after July 24, 2005, by a juvenile who was tried as an adult after decline of juvenile court jurisdiction. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[n].~~
- \_\_\_\_\_ (dd) ~~I am being sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts \_\_\_\_\_ and \_\_\_\_\_ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.~~

- \_\_\_\_\_ (ee) ~~The offense(s) I am pleading guilty to include(s) a Violation of the Uniform Controlled Substances Act in a protected zone enhancement or manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture enhancement. I understand these enhancements are mandatory and that they must run consecutively to all other sentencing provisions.~~
- \_\_\_\_\_ (ff) ~~The offense(s) I am pleading guilty to include(s) a deadly weapon, firearm, or sexual motivation enhancement. Deadly weapon, firearm, or sexual motivation enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon, firearm, or sexual motivation enhancements.~~
- \_\_\_\_\_ (gg) ~~If I am pleading guilty to (1) unlawful possession of a firearm(s) in the first or second degree and (2) felony theft of a firearm or possession of a stolen firearm, I am required to serve the sentences for these crimes consecutively to one another. If I am pleading guilty to unlawful possession of more than one firearm, I must serve each of the sentences for unlawful possession consecutively to each other.~~
- \_\_\_\_\_ (hh) ~~If I am pleading guilty to the crime of unlawful practices in obtaining assistance as defined in RCW 74.08.231, no assistance payment shall be made for at least six months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW 74.08.200.~~
- \_\_\_\_\_ (ii) ~~The judge may authorize work ethic camp. To qualify for work ethic authorization my term of total confinement must be more than twelve months and less than thirty six months, I cannot currently be either pending prosecution or serving a sentence for violation of the uniform controlled substance act and I cannot have a current or prior conviction for a sex or violent offense.~~

7. I plead guilty to:

count **Manslaughter in the Second Degree.**

in the \_\_\_\_\_ Information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:

**On or about the night of December 27, 2011, in Whitman County Washington, I shot Marcus Schur twice, in Maulden, outside Nick Backman's house, and thereby with criminal negligence caused the death of Marcus Schur.**

[XX] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

\_\_\_\_\_  
Defendant

I have read and discussed this statement with the defendant. I believe that the defendant is competent and fully understands the statement.

\_\_\_\_\_  
Prosecuting Attorney

\_\_\_\_\_  
Defendant's Lawyer

\_\_\_\_\_  
Print Name

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

\_\_\_\_\_  
Eric M. Christianson

\_\_\_\_\_  
19598

\_\_\_\_\_  
Print Name

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

The defendant signed the foregoing statement in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- (a) The defendant had previously read the entire statement above and that the defendant understood it in full;
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is included below.

**Interpreter's Declaration:** I am a certified or registered interpreter, or have been found otherwise qualified by the court to interpret in the \_\_\_\_\_ language, which the defendant understands. I have interpreted this document for the defendant from English into that language. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) \_\_\_\_\_, (state) \_\_\_\_\_, on (date) \_\_\_\_\_.

\_\_\_\_\_  
Interpreter

\_\_\_\_\_  
Print Name

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge

# Exhibit 3

**Denis Tracy**

---

**From:** Denis Tracy  
**Sent:** Wednesday, July 31, 2013 2:20 PM  
**To:** 'Eric Christianson'  
**Cc:** steve martonick  
**Subject:** RE: Lazcano  
**Attachments:** State's offer July 31 '13 - pdf.pdf

Hi Eric and Steve,  
Thank you for sending the below-offer. I am not willing to do what you are offering/suggesting.

I have re-evaluated the case. In view of the inherent uncertainties and delays in the trial and appellate processes, I am making the attached offer. Please let me know your client's answer, Eric.

Sincerely,  
Denis Tracy

---

**From:** Eric Christianson [<mailto:eric.m.christianson@gmail.com>]  
**Sent:** Monday, July 22, 2013 7:07 AM  
**To:** Denis Tracy  
**Cc:** steve martonick  
**Subject:** Lazcano

Good morning Denis I hope you had a great weekend.

--

I met with Daniel over the weekend, and here is our offer/suggestion. Frank settles his appeal at a manslaughter 1, and Daniel pleads to a Manslaughter 1.

Eric

Eric M. Christianson  
509.389.0925

*~To Defend is Divine ~  
Honor first, honor last, honor always!*



## WHITMAN COUNTY PROSECUTING ATTORNEY

400 North Main Street - P.O. Box 30, Colfax, WA 99111-0030

voice (509) 397-6250 fax (509) 397-5659

July 31, 2013

Eric Christianson

By email: eric.m.christianson@gmail.com

Re: State v. Dan Lazcano

Dear Mr. Christianson:

In view of the inherent uncertainties and delays in the trial and appellate processes, I am making the following offer to settle this case:

1. I will amend the charge of Murder in the First Degree to Murder in the Second Degree, without a firearm sentencing enhancement.
2. I will move to dismiss the charge of Kidnapping.
3. Your client will plead guilty to Murder in the Second Degree.
4. The Whitman County Prosecutor's Office will not charge the defendant with other crimes of which it is aware, which arise from this case, including the perjury that defendant committed during his two trials.
5. Your client will stipulate to restitution to the Washington State Department of Labor and Industries in the amount of \$5474.37, for burial expenses.
6. I will recommend a sentence of 125 months for Murder. I will recommend a sentence of 90 days on the Unlawful Disposal of Remains, to be served concurrently to the sentence on the Murder.
7. Your client will enter his guilty plea and proceed to sentencing by August 30<sup>th</sup> at 1:30pm.
8. After your client is sentenced, I will move to dismiss the firearm sentencing enhancement that Frank Lazcano is serving, and thereby seek to reduce his sentence by five years. Frank Lazcano may still pursue whatever arguments he wishes in his appeal.

**Denis P. Tracy**  
Prosecuting Attorney

**Bill Druffel**  
Chief Deputy Prosecutor

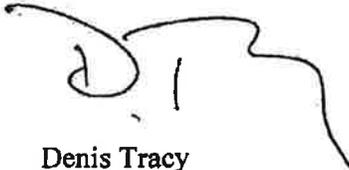
**Dan LeBeau**  
Senior Deputy Prosecutor

**Kristina Cooper**  
Office Administrator and  
Victim/Witness Coordinator

9. I may withdraw this offer at any time up until your client enters his guilty plea.

Please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to be "DT" followed by a stylized flourish.

Denis Tracy

Cc: Steve Martonick

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IN THE COURT OF APPEALS, DIVISION III  
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff,	Court of Appeals No. 322289 No. 12-1-00051-9
v.  DANIEL CHRISTOPHER LAZCANO, Defendant,	AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON )  
COUNTY OF WHITMAN )

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 23RD DAY OF DECEMBER, 2015, I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

- Emailed to Dennis Morgan at nodblspk@rcabletv.com
- Mailed to Daniel Christopher Lazcano, #372108, 1313 N. 13th Ave., Walla Walla, WA 99362

DATED this 23RD DAY OF DECEMBER, 2015. *Amanda Pelissier*  
AMANDA PELISSIER

SIGNED before me on the 23RD DAY OF DECEMBER, 2015 *Den E. Deits*



NOTARY PUBLIC in and for the State of Washington, residing at: *Colfax*  
My Appointment Expires: *Oct 1 2018*