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No. 61835-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

IN RE PERSONAL RESTRAINT PETITION

STATE OF WASHINGTON, Respondent,

v.

SALVADOR HERNANDEZ RIVERA, Petitioner.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
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A. AUTHORITY FOR RESTRAINT

Petitioner Salvador Rivera is restrained pursuant to judgment and sentence entered December 15, 1998 in Whatcom County Superior Court, #98-1-00289-4. Petitioner's Ex. D.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a personal restraint petition alleging that the court should have sentenced defendant to the non-firearm deadly weapon enhancement instead of the firearm enhancement is time barred, where the petition was filed over six years after the sentence was final.
2. Whether State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) applies retroactively to a personal restraint petition that was final before Blakely v. Washington¹ was decided.

C. STATEMENT OF FACTS

Appellant Rivera was charged with Murder in the First Degree, while armed with a deadly weapon, pursuant to RCW 9.94A.125 and RCW 9.94A.310(3)(a), for acts that occurred on March 20, 1998.

Petitioner's Ex. A. He was found guilty and sentenced to 333 months on the offense and 60 months on the deadly weapon enhancement. Pet. Ex.

D. Rivera appealed his conviction, which appeal was denied, and the

¹ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.3d 403 (2004).

mandate issued on May 17, 2002. App. A. (*See, State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001).)

On June 4, 2008 Rivera filed the current petition as a CrR 7.8 motion with Whatcom County Superior Court. App. B (Initial Consideration Order.) The Superior Court transferred Rivera's motion to the Court of Appeals to be considered as a personal restraint petition on June 5, 2008. *Id.*

D. ARGUMENT

Rivera asserts that the court exceeded its authority in imposing a firearm deadly weapon enhancement instead of a non-firearm deadly weapon enhancement. He claims that the sentence is not valid on its face. Rivera's petition is time-barred because it was filed over six years after his sentence was final. Rivera has failed to demonstrate that the judgment and sentence is invalid on its face. At the time the court imposed the sentence, it was well within its authority to impose the firearm enhancement pursuant to RCW 9.94A.125 and RCW 9.94A.310(3)(a). Rivera's reliance on *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008), is misplaced as *Blakely* does not apply retroactively to cases that were final before it was decided in 2004. Rivera's petition should be denied.

- 1. Rivera's personal restraint petition is procedurally barred because it was filed more than one year after his sentence was final and the judgment is not invalid on its face.**

Rivera's petition can only be considered on the merits if relief can otherwise be granted under RCW 10.73.090, RCW 10.73.100 and RCW 10.73.130; In re Personal Restraint of Well, 133 Wn.2d 433, 438, 946 P.2d 750 (1997). Under RCW 10.73.090 a petition collaterally attacking a judgment and sentence may not be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1), (2); In re Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993) (upholding constitutionality of RCW 10.73.090 which imposes one-year time limit except in six enumerated circumstances set forth in RCW 10.73.100). A judgment that is appealed is final once the mandate is issued. RCW 10.73.090(3)(b).

Rivera's mandate was issued on May 17, 2002. His current collateral attack was filed on June 4, 2008, almost 6 years after his

judgment and sentence was final.² Rivera is time-barred from raising a challenge to his sentence at this late date.

a. *Rivera has failed to show that his judgment and sentence is invalid on its face.*

Rivera asserts that the judgment and sentence is invalid on its face, claiming that the court exceeded its sentencing authority. A judgment and sentence is constitutionally invalid on its face only if the judgment “without further elaboration evidences infirmities of a constitutional magnitude.” In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000) (emphasis added). The error of law or fact must appear within the four corners of the judgment and sentence itself. State v. Ross, 152 Wn.2d 220, 231 95 P.3d 1225 (2004); *see also*, State v. O’Neal, 126 Wn. App. 395, 431, 109 P.3d 429 (2005), *aff’d on other grounds*, 159 Wn.2d 500, 150 P.2d 1121 (2007) (defendant bears threshold burden of showing existence of error of fact or law “within the four corners of the judgment and sentence”). If the judgment and sentence reflects that the sentence imposed was within the trial court’s legal authority, the judgment and sentence is valid on its face. In re Personal Restraint of Hemenway, 147

² The initial consideration order reflects that the judgment and sentence was final on June 10, 2004. It appears the date listed relates to a certificate of finality, rather than the mandate, and thus was in error. See Appendix C.

Wn.2d 529, 532, 55 P.3d 615 (2002); *see also*, In re West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005) (“sentence is invalid on its face if it exceeds the duration allowed by statute and the alleged defect is evident on the face of the document without further elaboration.”). In order to determine whether the trial court exceeded its statutory authority in imposing sentence, the court looks to the relevant portions of the Sentencing Reform Act at the time the defendant was convicted. In re West, 154 Wn.2d at 211-12.

The judgment and sentence itself reveals no facial invalidity. Under the statutes at the time, the trial court had authority to impose a five year deadly weapon enhancement where a firearm was used and a two year deadly weapon if a deadly weapon other than a firearm was used. RCW 9.94A.125 (1998); RCW 9.94A.310(3)(a); RCW 9.94A.125(4)(a) (1998); *see also*, State v. Rai, 97 Wn. App. 307, 983 P.2d 712 (1999), *abrogated by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005); State v. Olney, 97 Wn. App. 913, 987 P.2d 662 (1999), *abrogated by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005); State v. Serrano, 95 Wn. App. 700, 706-07, 977 P.2d 47 (1999); State v. Meggyesy, 90 Wn. App. 693, 706-08, 958 P.2d 319 (1998), *rev. den.*, 136 Wn.2d 1028 (1998), *abrogated by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005).

Under State v. Rai, a trial court was required to have imposed a firearm enhancement where it was uncontested that the deadly weapon was a firearm. Rai, 97 Wn. App. at 312. The trial court here did not exceed its sentencing authority in imposing a five year firearm enhancement.

If this Court were to look beyond the judgment and sentence itself to the charging document, it is clear that the deadly weapon charged was a firearm and that Rivera specifically was charged with the five year firearm sentence enhancement. The information alleged:

Murder in the First Degree, Count I: That the defendants, SALVADOR HERNANDEZ RIVERA AND JOSE MANUEL RIVERA-HERNANDEZ and each of them, then and there being in said county and state, on or about the 20th day of March, 199, with premeditated intent to cause the death of another person, did shoot Matthew Garza, thereby causing the death of Mr. Garza, a human being, in violation of RCW 9A.32.030(1)(a), which violation is a Class "A" Felony, and during the course or commission of said crime, the defendants or one of them was armed with a deadly weapon, to-wit: a .22 caliber handgun, for the purposes of the deadly weapon enhancement of RCW 9.94A.125 and 9.94A.310(3)(a);

Petitioner's Ex. A. The jury instructions and special verdict also show that the jury found he was armed with a firearm. The to-convict instruction on Murder in the First Degree required that the jury find that Rivera shot the victim. App. D, Instr. No. 14. The special verdict instruction only defined the deadly weapon in the context of a firearm. App. D, Instr. No. 37. The special verdict in conjunction with the related jury instructions, in accord

with RCW 9.94A.125 and RCW 9.94A.310(3)(a), clearly provided the basis for the court's imposition of the firearm enhancement. Rivera's judgment and sentence is not invalid on its face.

2. Recuenco does not provide a basis for vacating Rivera's sentence because Blakely is not retroactive to cases like Rivera's that were final when it was decided.

Rivera's petition is dependent upon the application of State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (hereinafter "Recuenco II") to his case. In State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) (hereinafter "Recuenco I"), the court found that imposition of a firearm enhancement when the jury had only found facts supporting a deadly weapon enhancement violated that defendant's Sixth Amendment rights *as defined by Blakely*. Id at 162-63 (emphasis added). In doing so, the court abrogated prior caselaw that permitted judges to impose firearm enhancements where juries only returned special verdicts finding deadly weapons, including State v. Meggysey, *supra*, State v. Rai, *supra*, and State v. Olney, *supra*. Id. at 163 n. 2. The court also decided that Sixth Amendment violations under Blakely can never be harmless.

The U.S. Supreme Court, on certiorari, then overruled the holding in Recuenco I that harmless error analysis cannot be

applied to Blakely violations under federal law. Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

On remand, in Recuenco II the court found that the error in that case still was not harmless. In distinguishing federal harmless error analysis the court stated:

In contrast, Recuenco was charged with second degree assault with a deadly weapon, a special verdict form was submitted regarding a deadly weapon finding, and the jury found guilty as to the properly submitted sentencing enhancement of 'deadly weapon.' We recognize here that the harmless error doctrine simply does not apply because no error occurred in the jury's determination of guilt. The charge brought by the State, the jury instructions, and the jury's explicit findings left no fundamental 'gap' for the trial court to fill.

The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

Recuenco, 163 Wn.2d at 441-42. The court concluded that harmless error did not apply to the circumstances of that case: "it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury." Id. at 442.

However, the harmless error analysis applied in Recuenco II is only pertinent to Rivera's case if that case can be applied retroactively to his case. "The law favors finality of judgments, and courts will not routinely

apply 'new' decisions of law to cases that are already final." State v. Evans, 154 Wn.2d 438, 443, 114 P.3d 627 (2005). The harmless error analysis in Recuenco is predicated on Blakely. Blakely does not apply retroactively to cases that were final when it was issued and does not fall within the state law exception for retroactive application under RCW 10.73.100(6). State v. Evans, 154 Wn.2d 438, 114 P.3d 627 (2005). Rivera's case was final as of May 17, 2002. Blakely, decided in 2004, does not apply retroactively to his case and Recuenco II decided this year does not either.

Moreover, Recuenco II is distinguishable from the facts of Rivera's case. Rivera was specifically placed on notice that he was being charged with the firearm enhancement while the State in Recuenco had failed to provide the defendant there with notice that the State was seeking the firearm, as opposed to the other deadly weapon, enhancement. Here, Rivera was charged with the firearm enhancement, the jury found that Rivera shot the victim and found that he was armed with a deadly weapon, defined as a firearm for purposes of the deadly weapon allegation. The court properly imposed the firearm deadly weapon enhancement in Rivera's case.

E. CONCLUSION

Rivera has failed to show that the judgment is facially invalid. His petition is procedurally barred from consideration. For the reasons set forth above, the State respectfully requests that this Court dismiss the petition.

Respectfully submitted this 16th day of October, 2008.

Hilary A Thomas

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, and petitioner Salvador Rivera, addressed as follows:

Salvador Rivera
DOC #790179
Stafford Creek Corr Ctr
191 Constantine Way
Aberdeen WA 98520

Sydney A. Koss
Legal Assistant

10/16/2008
Date

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STATE OF WASHINGTON
2008 OCT 17 AM 10:45

APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

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WHATCOM COUNTY
WASHINGTON
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STATE OF WASHINGTON,
Respondent,

No. 43839-5-1

v.

MANDATE

SALVADOR HERNANDEZ
RIVERA,

Whatcom County

Appellant.

Superior Court No. 98-1-00289-4

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Whatcom County.

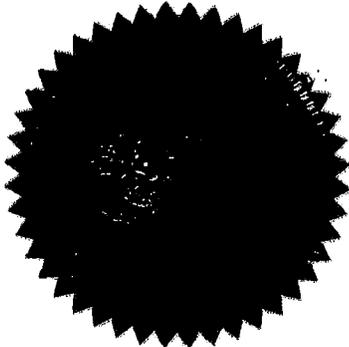
This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on October 8, 2001, became the decision terminating review of this court in the above entitled case on May 17, 2002. An order denying a petition for review was entered in the Supreme Court on May 1, 2002. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Washington Appellate Project
Whatcom County Prosecuting Attorney
Tracey Meek
Hon. Michael Moynihan
Indeterminate Sentencing Review Board

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 17th of May, 2002.



RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.



FILE
 IN CLERK'S OFFICE
 COURT OF APPEALS
 STATE OF WASHINGTON-DIVISION 1
 DATE.....**OCT 08 2001**.....
Susan P. Ajl
 CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	NO. 43839-5-1
Respondent,)	
)	DIVISION ONE
v)	
)	
SALVADOR HERNANDEZ RIVERA,)	OPINION PUBLISHED IN PART
)	OCT 08 2001
Appellant.)	FILED _____

KENNEDY, J. — Our State Supreme Court recently ruled that erroneous denial of a litigant's peremptory challenge is never harmless when the objectionable juror actually deliberates. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). Salvador Hernandez Rivera's appeal of his first degree murder conviction raises the issue of whether harmless error analysis is appropriate where the trial court fails to accord a criminal defendant the full number of alternate-juror peremptory challenges granted by CrR 6.5, and neither alternate juror actually deliberates. Because the error does not call into question the defendant's constitutional right to a fair trial by an impartial jury and Rivera has not shown prejudice, we conclude that reversal is not required. We also reject Rivera's contention that his right to a public trial was violated when the court closed the courtroom to address a juror's complaints about the hygiene of another juror. We affirm Rivera's conviction.¹

Salvador Rivera and his brother Manuel Rivera were charged by amended

¹ We treat the remainder of Rivera's contentions in the unpublished portion of this opinion.

information with murder in the first degree and with being armed with a firearm during the commission of the murder. The victim, Matt Garza, died from a gunshot wound to the head fired at close range. The brothers were tried together.

In non-capital cases, the defense is allowed six peremptory challenges to prospective jurors. CrR 6.4(e)(1). A peremptory challenge is an objection to a juror for which there is no reason given but upon which the court shall exclude him or her. Id. When multiple defendants are tried together, each defendant receives an additional peremptory challenge. Id. When the court chooses to pick alternate jurors, the defense is allowed an additional peremptory challenge for each alternate juror to be selected. CrR 6.5. And when multiple defendants are tried together each defendant is allowed an additional peremptory challenge with respect to the alternate jurors. Id.

Here, the trial court properly allowed the co-defendants a total of eight peremptory challenges under RCW 6.4(e)(1). The court determined that two alternate jurors should be selected. But instead of allowing a total of four peremptory challenges (two for each co-defendant) under CrR 6.5, the trial court allowed a total of only two.

At the conclusion of voir dire, after the parties had accepted the jury, the error with respect to peremptory challenges of the alternate jurors was discovered. The court declined to reopen voir dire, and subsequently denied a motion for mistrial based on the error. When the case was sent to the jury, the alternates were excused. They did not participate in deliberations.

During the trial, which otherwise had been open to the public, the trial court conducted a hearing in a closed courtroom, with the parties present, regarding a juror's complaint about a fellow juror's lack of personal hygiene. Rivera did not object to the

closure of the courtroom. The trial court did not conduct an on-the-record balancing of the defendants' right to a public trial against the need for the closure before holding the closed hearing.

II

Alternate Juror Challenges

Rivera argues that the error depriving him of one of his peremptory challenges with respect to the selection of the alternate jurors violated his rights under both Wash. Const. art. 1, § 22 and the Sixth Amendment to the United States Constitution.² Rivera also contends that the error deprived him of due process under the Fifth and Fourteenth Amendments to the United States Constitution. He contends that automatic reversal is required even though neither alternate juror deliberated, and even though it is undisputed that the jury that rendered the verdict was fair, impartial and unaffected in any way by the error with respect to selection of the alternate jurors.

² Rivera did not provide a Gunwall analysis but the State did. When analyzing a claim based on both the U.S. and Washington constitutions, the first step is to determine whether the State constitution provides more protection than the U.S. constitution. To do so, a court engages in a Gunwall analysis. The six Gunwall factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808, 76 A.L.R.4th 517 (1986).

In this case, all of the Gunwall factors support the conclusion that the state constitution provides the same protection as the federal constitution. Art. 1, § 22 guarantees a defendant the right to a "speedy public trial by an impartial jury". The Sixth Amendment guarantees a defendant the right to a "speedy and public trial, by an impartial jury". There is no significant difference between the texts or the structures of the provisions. (Factors 1, 2, and 5.) Art. 1, § 22 was taken from the federal constitution. (Factor 3.) Washington courts have always relied heavily on federal interpretations of the right to an impartial jury. See, e.g., State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986), State v. Williamson, 100 Wn. App. 248, 251, 996 P.2d 1097 (2000), State v. Evans, 100 Wn. App. 757, 772-74, 998 P.2d 373 (2000). The Gunwall analysis indicates that art. 1, § 22 does not provide any more protection than the Sixth Amendment. Accordingly, we analyze the issue under federal constitutional principles. This is consistent with the briefing of both parties, which relies heavily on federal case law.

The Sixth Amendment guarantees a defendant the right to a fair and impartial jury. State v. Williamson, 100 Wn. App. 248, 251, 996 P.2d 1097 (2000). However, it does not guarantee peremptory challenges. State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905, aff'd, 143 Wn.2d 923, 26 P.2d 236 (2001). Instead, peremptory challenges are governed by rule and statute. Williamson, 100 Wn. App. at 251. Where the jury selection process did not materially depart from the applicable rules, a defendant must show actual prejudice to receive a new trial. Id.

Neither is the right to a certain number of peremptory strikes, or any at all, embodied in the concept of due process. United States v. Annigoni, 96 F.3d 1132, 1150 (9th Cir. 1996) (en banc) (Kozinski, J., dissenting) (citing Georgia v. McCollum, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

Nevertheless, peremptory challenge is a part of our common law heritage, and one that was already venerable in Blackstone's time. United States v. Martinez-Salazar, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (citing Blackstone, 4 Commentaries 346-48 (1st ed. 1769)). Its purposes include reinforcing a defendant's Sixth Amendment right to trial before an impartial jury, 528 U.S. at 311 (citations omitted), allowing the parties to remove a certain number of jurors who are not challengeable for cause but in whom the parties may perceive bias or hostility—thereby eliminating extremes of partiality on both sides—and to assure the parties that the jury will decide on the basis of the evidence at trial and not otherwise. Annigoni, 96 F.3d at 1137.

The United States Supreme Court has stated, in cases dating back more than a hundred years, that the denial or impairment of the right of peremptory challenge is

reversible error. E.g., Lewis v. United States, 146 U.S. 370, 376, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Harrison v. United States, 163 U.S. 140, 142, 16 S. Ct. 961, 41 L. Ed. 104 (1896), Swain v. Alabama, 380 U.S. 202, 212, 35 S. Ct. 824, 13 L. Ed. 2d 759 (1965), overruled on other grounds by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In Martinez-Salazar, however, the Supreme Court reversed a Ninth Circuit ruling that reversal is a remedy for "loss" of a peremptory used by the defense to rectify the trial court's erroneous refusal to dismiss a juror for cause. The court reasoned that the defendant lost nothing to which he was entitled under federal rule or due process, in that use of a peremptory to excuse a juror who should have been excused for cause is in line with a principle reason for peremptory challenges—the selection of an impartial jury. 528 U.S. at 316-17. Commenting on the automatic reversal rule pronounced in Swain and its predecessors, the high court seemingly sounded a warning that reversal may not be the appropriate remedy for every conceivable impairment of the right of peremptory challenge no matter how slight. 528 U.S. at 317 n.4.³

Our Supreme Court recently ruled that "erroneous denial of a litigant's

³ The footnote states:

"Relying on language in Swain, 380 U.S. 202, as did the Court of Appeals below, Martinez-Salazar urges the Court adopt a remedy of automatic reversal whenever a defendant's right to a certain number of peremptory challenges is substantially impaired. Respondent's Brief at 29 (quoting Swain, 380 U.S. at 219 (a "denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice.")). "Because we find no impairment, we do not decide in this case what the appropriate remedy for a substantial impairment would be. We note, however, that the oft-quoted language in Swain was not only unnecessary to the decision in that case—because Swain did not address any claim that a defendant had been denied a peremptory challenge—but was founded on a series of our early cases decided long before the adoption of harmless-error review." Martinez-Salazar, 528 U.S. at 317 n.4.

peremptory challenge cannot be harmless when the objectionable juror actually deliberates[.]” Vreen, 143 Wn.2d at 932. See also Annigoni, 96 F.3d 1132. In both Vreen and Annigoni, the trial court erroneously denied the defendant a peremptory challenge on Batson grounds, and the objectionable juror remained on the jury that convicted the defendants. The Ninth Circuit has also ruled that a trial court’s erroneous denial of a peremptory challenge to an alternate juror who ultimately replaced a member of the jury and rendered a verdict required reversal. Medrano v. City of Los Angeles, 973 F.2d 1499, 1503 (9th Cir. 1992).

In United States v. Patterson, 215 F.3d 776 (7th Cir. 2000), judgment vacated on other grounds, 531 U.S. 1033, 121 S. Ct. 621, 148 L. Ed. 2d 531 (2000)⁴ the trial court erroneously granted only two extra challenges of alternate jurors, rather than three as required by Fed. R. Crim. P. 24 (c)(2), in a multi-defendant trial utilizing a struck-jury pool. The error did not call into question the impartiality of the jury eventually selected. 215 F.3d at 779. Fed. R. Crim. P. 52(a) provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” 215 F.3d at 781. The Patterson court held the error to be harmless, noting that “when the jury that actually sits is impartial, as this one was, the defendant has enjoyed the substantial right”. Id. at 782.

We conclude that like the defendants in Patterson, Rivera’s substantial rights with respect to selection of alternate jurors were not impaired by the error here. Our

⁴ The judgment in Patterson was vacated and the case was remanded to the Seventh Circuit for further consideration of a sentencing issue in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

own CrR 7.6(a)(5) provides that the court may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected by an irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial. The error here did not prevent Rivera from having a fair trial before a fair and impartial jury. Accordingly, the trial court did not err by denying Rivera's motion for mistrial.

Right to a Public Trial

On one occasion during trial, the court barred the public from the courtroom in order to deal confidentially with a juror's complaint regarding a fellow juror's lack of personal hygiene. Rivera did not object to the closed hearing. The court did not balance competing interests before holding the closed hearing. Rivera contends that the court thereby violated his right to a public trial.

Both the United States and Washington Constitutions protect a criminal defendant's right to a public trial. U.S. Const. Amend. 6; Wash. Const. art. I, § 22. Specifically, the Washington Constitution protects a criminal defendant's right "to have a speedy public trial[.]" Wash. Const. art. I, § 22. The right is "one created for the benefit of the defendant." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting Gannett v. DePasquale, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)). Further, the defendant need show no prejudice resulting from a violation of this right; prejudice is presumed. State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). Failure to object does not act as a waiver. Id.

In order to close the courtroom to the public, the trial court must generally

conduct an on-the-record balancing of the defendant's right to a public trial against the need for the closure. Waller, 467 U.S. at 48; Bone Club, 128 Wn.2d at 260-61. A failure to conduct the balancing violates a defendant's right to a public trial under art I, § 22. Id. at 261. The remedy for a violation under art. I, § 22 is remand for a new trial. Id.

The central aim of the public trial guarantee is to ensure that a defendant is treated fairly by allowing the public to observe the defendant's treatment first-hand. Waller, 467 U.S. at 46. The public trial right applies to the evidentiary phases of the trial, and to other "adversary proceedings." Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir. 1997). Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire. Id.; Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

However, the hearing at issue concerned a juror's complaint regarding another juror's hygiene and a discussion about seating one juror away from another juror. This was a ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial. The hearing was akin to a chambers hearing or bench conference, and not part of a trial. Opening such conferences to the public would not further the aims of the public trial guarantee. Accordingly, when construing the right of a defendant to be present at trial, courts have concluded that the defendant does not have a right to be present during a chambers hearing or bench conference. State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000). Because the defendant has no constitutional right to be present during a chamber conference, there can be no constitutional right to have the public present.

Whether a chambers hearing is held in chambers or in a closed courtroom is

immaterial. The defendant's right to a public trial is not implicated in either situation. Accordingly, the trial court was not required to engage in balancing the merits of closing the courtroom on the record.

We find no violation of Rivera's right to a fair and impartial jury or to a public trial. Accordingly, we affirm his conviction.

The remainder of this opinion lacks precedential value and will not be printed in the Washington Appellate Reports, but will be filed of public record as provided in RCW 2.06.040.

III

Exclusion of Testimony

Rivera pleaded self-defense in the killing of Garza. He argues that the court abused its discretion when it refused to allow his brother Felipe to testify concerning Garza's prior acts of violence of which Mr. Rivera was aware. The State concedes the error and we agree that Felipe's proffered testimony was admissible to show that Rivera reasonably feared Garza. Where self-defense is at issue, evidence of a victim's prior acts is admissible to show that the defendant reasonably feared the victim would harm him. State v. Fondren, 41 Wn. App. 17, 25, 701 P.2d 810 (1985); State v. Safford, 24 Wn. App. 783, 604 P.2d 980 (1979); State v. Adamo, 120 Wash. 268, 207 P. 7 (1922). The question is, therefore, whether the error was harmless beyond a reasonable doubt.⁵ An error is harmless beyond a reasonable doubt if there is no probability that

⁵ We asked the parties for supplemental briefing with respect to harmless error. We did not ask them to address whether the error rose to constitutional proportions. We asked them to assume error and to address whether the error was harmless beyond a reasonable doubt. We will apply that same standard of review here, without determining whether constitutional error was committed.

the verdict would have been different without the error. Chapman v. California, 386 U.S. 19, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A.L.R.3d 1065 (1967).

The evidence at trial that Garza's death was an act of premeditated murder rather than self-defense was overwhelming. Witnesses testified that Rivera was angry with Garza over a drug deal and repeatedly told others that he wanted to kill him. Rivera arranged to meet with Garza and armed himself with a loaded gun. Garza was shot in the forehead at very close range. When found, Garza was clutching a beer can in both hands, and the only knife in the vicinity was a small folding pocketknife in his back pocket.

Immediately after the shooting, Rivera told his brother Manny and Gabriel Morales Soto that he had shot Garza over a drug deal. He made no mention of any need for self-defense. When police told Rivera that Garza was not yet dead, Rivera said, "Damn it" and expressed his desire to "finish the job".

Following his arrest, Rivera gave police a series of conflicting statements, claiming that he shot Garza because Garza threatened to knife him, admitting that he never saw a knife because it was too dark but at the same time claiming it was not too dark for Garza to see that Rivera was carrying a firearm. Rivera also told police, "To tell you the truth maybe I was so furious I just pulled [the gun] out and shot him". At another time, Rivera admitted to police that he was tired of getting ripped off and that he blew up and shot Garza. We also note that Rivera's claim that Garza charged at him with a knife is inconsistent with the fact that Garza was found shot in the forehead, holding a beer can with both his hands, carrying only a small folding knife in a back pocket.

Rivera told police that he feared Garza because Garza had stabbed and robbed him once before. A prior bad act directed at Rivera is more compelling evidence of reasonable fear than Filipe's proffered testimony that Rivera was present when Garza was recounting some of his prior bad acts directed at others. Thus the error was ameliorated.

We conclude that the trial court's error in excluding Filipe's testimony was harmless beyond a reasonable doubt. No rational juror could have changed his or her vote based on Filipe's testimony, in light of the evidence (1) that Rivera told others several times in the days before the shooting that he was going to kill Garza out of revenge, (2) that Rivera arranged the meeting with Garza, (3) that Rivera armed himself with a loaded firearm before meeting with Garza, (4) that after the shooting, Rivera told his brother and a friend that he had shot Garza over a drug deal, (5) that Rivera made numerous inconsistent statements to police including tacit admissions that he killed Garza out of anger, not self-defense, (6) that when Rivera learned Garza was not yet dead he was angry and wanted to finish the job, (7) and finally that the physical evidence at the scene of the shooting totally contradicted Rivera's claim that Garza had charged toward him brandishing a knife.

Pro Se Issues

In his Pro Se Supplemental Brief, Rivera presents the following issues.

I. Ineffective Assistance of Counsel

Rivera argues that he did not receive effective assistance of counsel because his attorney failed to timely report a conflict of interest to the trial court, because he failed to

43839-5-1/12

move for a change of venue, and because he failed to object when the prosecuting attorney distorted the evidence during closing argument. Rivera also challenges the sufficiency of the evidence to support a finding of premeditation. And finally, he claims that his statement to police was illegally videotaped and therefore inadmissible under Washington's wiretapping statute.

To prevail on a claim of ineffective assistance, a defendant must show (1) that his counsel's actions fell below an objective standard of competence, and (2) that, but for counsel's errors, the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel is strongly presumed competent, and an appellant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Id. at 336. Where a defendant claims ineffective assistance from counsel's failure to object, the defendant must show that the objection would have been sustained. Id. at 337.

Rivera claims that his attorney had a conflict of interest because, having previously represented Garza, the attorney had knowledge of one of Garza's prior bad acts and could have been called as a witness to testify about Garza's prior criminal conduct if he had timely revealed the fact that he had previously represented Garza.

Rivera could not have called his attorney as a witness on this basis. In a self-defense case, the victim's specific bad acts are admissible to show that the defendant's fear of harm was reasonable—so long as the evidence also shows that the defendant had knowledge of the bad acts. Thus, the issue was whether Rivera knew of any

specific bad acts at the time of the shooting, not whether his attorney knew of them. His claim of ineffective assistance fails on this ground.

Rivera does not contend that his attorney's prior representation of Garza, in and of itself, created an actual conflict of interest. Accordingly, we do not address that potential issue.

Rivera also argues that his counsel was ineffective for failing to move for a change of venue. A defendant has a right to a change of venue only where he or she can show an apparent probability of prejudice, usually from excessive and inflammatory pre-trial publicity. State v. Wall, 52 Wn. App. 665, 670, 763 P.2d 462 (1988). The mere existence of pretrial publicity does not justify a change of venue. Id. at 670.

Rivera has offered no evidence regarding the nature of the pre-trial publicity and cannot show on the record that he would have won a motion for change of venue. His claim of ineffective assistance also fails on this ground.

Finally, Rivera argues that his counsel was ineffective for failing to object during the State's closing argument. The gravamen of the complaint is that counsel should have objected when the prosecutor argued to the jury that Rivera had lured Garza to the scene in order to kill him when there was ample evidence that Garza arranged the meeting of his own volition. Whether or not to object is a tactical decision and does not constitute deficient performance. Moreover, the prosecution and defense argued competing inferences from the evidence. That the jury adopted the State's inference does not show that Rivera was prejudiced.

II. Sufficiency of the Evidence

Rivera argues that the State did not provide sufficient evidence to support a

finding of premeditation. We have already determined that the evidence of premeditation was overwhelming, supra. Any further discussion would be redundant.

III. Admissibility of Videotaped Statement

Rivera also argues that one of his statements to police was illegally videotaped and therefore inadmissible under the Washington wiretapping statutes. The wiretapping statute only forbids the use of tapes made without a defendant's knowledge. RCW 9.73.050. Here, the video camera was out in the open and Rivera knew his previous statement had been taped. From the totality of the circumstances, the trial court found that Rivera knew he was being taped. The record fully supports this finding. There was no abuse of discretion.

Rivera's claim of cumulative error fails. The trial court's erroneous exclusion of Filipe's testimony regarding Garza's prior bad acts was harmless beyond a reasonable doubt. The remaining assignments of error lack merit. Accordingly, there was insufficient error to cumulate.

Affirmed.

WE CONCUR:

Agid, CJ

Kennedy, J.

Grose, J.

APPENDIX B

SCANNED 2

FILED
COUNTY CLERK

2008 JUN -5 AM 8:13

WHATCOM COUNTY
WASHINGTON

BY [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
SALVADOR HERNANDEZ RIVERA,)
#790179)
Defendant.)

No. 98-1-00289-4

INITIAL CONSIDERATION ORDER
CrR 7.8(c)

CLERK'S ACTION REQUIRED
Copies to Defendant and Prosecuting
Attorney

THIS MATTER having come before the Court for initial consideration on the motion and affidavit of Defendant herein, pursuant to Criminal Rule 7.8, and the Court being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

- Defendant filed the motion more than one year after the judgment and sentence was final:
- The judgment and sentence was final on, 6/10/2004 after review by the Court of Appeals and the Supreme Court for each of the above listed cases (date judgment and sentence was filed, or date mandate disposing of the appeal was issued, or date petition for certiorari to the U.S. Supreme Court was denied, whichever is latest), and
 - The motion was filed on June 4, 2008

Other: _____

CONCLUSIONS OF LAW

Defendant's motion is untimely under RCW 10.73.090, and he/she has not shown that any of the exemptions under RCW 10.73.100 apply:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was

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unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

- Defendant's affidavit does not allege sufficient facts to support the motion.
- Defendant's motion does not present adequate grounds to entertain a CrR 7.8 motion to withdraw guilty plea.
- Other: _____

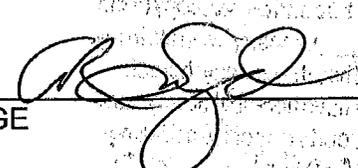
ORDER

- That the motion is DENIED.

If the defendant desires appellate review of this order denying relief, a notice of appeal must be filed with the Clerk of the Superior Court within thirty (30) days of entry of this order. The Defendant, if indigent, may be entitled to the appointment of counsel for the purposes of an appeal from this order. If the Defendant desires the appointment of counsel, the Defendant should submit evidence of indigency and a request for appointment of counsel along with the notice of appeal.

- That the motion is transferred to the Court of Appeals for consideration as a personal restraint petition.
- That the State shall file a written response to the motion within 20 days of this Order. The Court then shall consider the motion on the written submissions of the parties. If the Court determines that an evidentiary hearing is required, the matter shall be set for a hearing in accord with WCCR 77.2(7).

DATED this 5 day of June, 2008.



JUDGE

APPENDIX C

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

04 JUN 10 PM 1:07

FILED DIVISION
One Union Square
600 University Street
(206) 464-7750
2004 JUN 10 2004 JUN 10 1:07 PM

October 6, 2003

Office Of Whatcom Co Pub Def
Attorney at Law
Whatcom County Courthouse
311 Grand Ave, 6th Floor
Bellingham, WA, 98225

WHATCOM COUNTY
Salvador RIVERA
Stafford Creek Correctional Center
D.o.c. #790179
191 Constantine Way
Aberdeen, WA, 98520

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

Kimberly Anne Thulin
Whatcom Cty Pros Atty's Office
311 Grand Ave Ste 201
Bellingham, WA, 98225-4038

David Stuart Mc Eachran
Whatcom Co Courthouse
311 Grand Ave
Bellingham, WA, 98225-4048

98-1-289-4

CASE #: 53052-6-1
Personal Restraint Petition of Salvador Hernandez Rivera

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5(a), (b) and (c)."

This court's file in the above matter has been closed

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

bte

enclosure

edey

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

IN THE MATTER OF THE)
PERSONAL RESTRAINT)
OF:)

SALVADOR HERNANDEZ RIVERA,)

Petitioner.)

No. 53052-6-1

ORDER DISMISSING
PERSONAL RESTRAINT
PETITION

Salvador Rivera has filed this personal restraint petition challenging his first degree murder conviction. Rivera argues the trial court committed reversible error when it refused to allow his brother Felipe to testify regarding the murder victim's prior acts of violence. But it appears this court previously rejected virtually the same argument in Rivera's direct appeal.¹ "Simply 'revisiting' a previously rejected legal argument, however, neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Accordingly, this petition should be dismissed.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed.

Done this 10th day of October, 2003.

COX, A. J.

Acting Chief Judge

¹ Cause No. 43839-5-1.

FILED
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STATE OF WASHINGTON
2003 OCT -6 AM 9:11

FILED

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

2004 JUN -1 PM 4:30

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

IN THE MATTER OF THE
PERSONAL RESTRAINT OF:

SALVADOR HERNANDEZ
RIVERA,

Petitioner.

No. 53052-6-1

CERTIFICATE OF FINALITY

Whatcom County

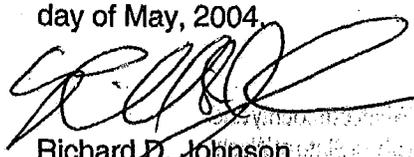
Superior Court No. 98-1-00289-4

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in
and for Whatcom County.

This is to certify that the order of the Court of Appeals of the State of Washington,
Division I, filed on October 6, 2003, became final on May 28, 2004. A ruling denying a
motion for discretionary review was entered in the Supreme Court on January 27, 2004.
An order denying a motion to modify was entered on April 6, 2004.

c: Salvador Rivera
Whatcom County Prosecuting Attorney

IN TESTIMONY WHEREOF, I
have hereunto set my hand
and affixed the seal of
said Court at Seattle, this 28th
day of May, 2004.



Richard D. Johnson
Court Administrator/Clerk of the
Court of Appeals, State of
Washington Division I.



APPENDIX D

FILED IN OPEN COURT
11-10 19 98
WHATCOM COUNTY CLERK

By: 
Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

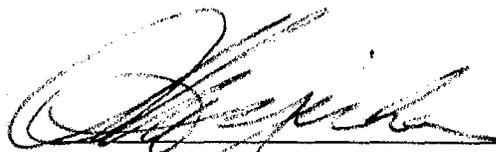
SALVADOR HERNANDEZ RIVERA,
JOSE MANUEL RIVERA HERNANDEZ,
and each of them,

Defendants.

No. 98-1-00289-4
98-1-00290-8

COURT'S INSTRUCTIONS

November 10, 1998
Bellingham, Washington


HONORABLE MICHAEL MOYNIHAN
Superior Court Judge

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendants of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your

deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections which they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the

judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

Jurors have a duty to consult with one another and to deliberate with a view to reaching a unanimous verdict, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

The defendants have entered pleas of not guilty. This plea puts in issue every element of the crime charged. The State is the Plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendants have no burden of proving that a reasonable doubt exists.

The defendants are presumed innocent. This presumption continues throughout the entire trial unless you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 7

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All of the instructions apply to each defendant.

INSTRUCTION NO. 8

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 9

Homicide is the killing of a human being by the voluntary act of another and is murder, manslaughter or justifiable homicide.

INSTRUCTION NO. 10

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person unless the killing was justifiable. The State has the burden of proving that the killing was not justifiable.

INSTRUCTION NO. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 13

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 14

To convict Salvador Hernandez Rivera of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 20, 1998, Salvador Hernandez Rivera shot Matthew Garza;
- (2) That Salvador Hernandez Rivera acted with intent to cause the death of Matthew Garza;
- (3) That the intent to cause the death was premeditated;
- (4) That Matthew Garza died as a result of Salvador Hernandez Rivera's acts; and
- (5) That the acts occurred in Whatcom County, Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

To Convict the defendant JOSE MANUEL RIVERA-HERNANDEZ of the crime of Murder in the First Degree as charged, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 20th day of March, 1998, the defendant or an accomplice caused the death of Matthew Garza;
- (2) That the defendant or an accomplice acted with intent to cause the death of Matthew Garza;
- (3) That intent to cause death was premeditated;
- (4) That Matthew Garza died a result of the acts of the defendant or his accomplice.
- (5) That the acts occurred in Whatcom County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he or she aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

INSTRUCTION NO. 11

To aid another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions. A person does not aid another person's criminal act by actions which take place after the crime has been completed.

INSTRUCTION NO. 18

It is a defense to a charge of MURDER IN THE FIRST DEGREE, MURDER IN THE SECOND DEGREE, MANSLAUGHTER IN THE FIRST DEGREE, AND MANSLAUGHTER IN THE SECOND DEGREE that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and,

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

In determining whether a homicide was justifiable, the phrase "great personal injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if were inflicted upon either the slayer or another person.

INSTRUCTION NO. 20

It is also a defense to the charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the resistance of an attempt to commit a felony upon the defendant.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of self-defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty to murder in the first or second degree.

However, if you also find beyond a reasonable doubt that the defendant recklessly or negligently used more force than necessary, ~~then~~ you may consider manslaughter in the first or second degree.

INSTRUCTION NO. 21

The defendant is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justified.

INSTRUCTION NO. 22

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 23

Robbery and assault with a deadly weapon are both felonies.

INSTRUCTION NO. 25

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and the defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

INSTRUCTION NO. 26

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of murder in the first degree, he may be found guilty of any lesser crimes, the commission of which is necessarily included in murder in the first degree, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of murder in the first degree necessarily includes the lesser crime of murder in the second degree, manslaughter in the first degree and manslaughter in the second degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he shall be convicted only of the lowest crime.

INSTRUCTION NO. 26

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person unless the killing is justifiable.

INSTRUCTION NO. 27

To convict Salvador Hernandez Rivera of the crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 20, 1998, Salvador Hernandez Rivera shot Matthew Garza;
- (2) That Salvador Hernandez Rivera acted with intent to cause the death of Matthew Garza;
- (3) That Matthew Garza died as a result of Salvador Hernandez Rivera's acts; and
- (4) That the acts occurred in Whatcom County, Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 28

To convict Jose Manuel Rivera Hernandez of the crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 20, 1998, the defendant or an accomplice shot Matthew Garza;
- (2) That the defendant or an accomplice acted with intent to cause the death of Matthew Garza;
- (3) That Matthew Garza died as a result of the defendant or an accomplice's acts;
- (4) That the acts occurred in Whatcom County, Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

A person commits the crime of manslaughter in the first degree when, with criminal recklessness, he acts in self-defense and uses more force than necessary to repel the attack and causes the death of another person.

INSTRUCTION NO. 30

To convict Salvador Hernandez Rivera of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 20th day of March 1998, Salvador Hernandez Rivera shot Matthew Garza;

(2) That Salvador Hernandez Rivera's conduct was criminally reckless;

(3) That Matthew Garza died as a result of Salvador Hernandez Rivera's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31

To convict Jose Manuel Rivera Hernandez of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 20th day of March 1998, the defendant or an accomplice shot Matthew Garza;

(2) That the defendant or an accomplice's conduct was criminally reckless;

(3) That Matthew Garza died as a result of the defendant or an accomplice's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from the conduct that a reasonable person would exercise in the same situation.

INSTRUCTION NO. 33

A person commits the crime of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person unless the killing is justifiable.

INSTRUCTION NO. 34

To convict Salvador Hernandez Rivera of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 20th day of March 1998, Salvador Hernandez Rivera shot Matthew Garza;

(2) That Salvador Hernandez Rivera's conduct was criminally negligence.

(3) That Matthew Garza died as a result of Salvador Hernandez Rivera's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

To convict Jose Manuel Rivera Hernandez of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 20th day of March 1998, the defendant or an accomplice shot Matthew Garza;

(2) That the defendant or an accomplice's conduct was criminally negligence;

(3) That Matthew Garza died as a result of the defendant or an accomplice's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

INSTRUCTION NO. 37

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

INSTRUCTION NO. 38

If you find either defendant not guilty of any of the crimes, do not use the special verdict form for that defendant. If you find either defendant guilty of any of the crimes, you will then use the special verdict form for that defendant and fill in the blank with the answer "no" or "yes" according to the decision you reach.

In order to answer either of the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the questions you must answer "no".

INSTRUCTION NO. 39

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be given with all of the exhibits admitted in evidence, these instructions, and four verdict forms, A, B, C and D, for each defendant and a special verdict form for each defendant.

When completing the verdict forms for each defendant, you will first consider the crime of murder in the first degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form A.

If you find the defendant not guilty of the crime of murder in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant not guilty of the crime of murder in the second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of manslaughter in the first degree. If you unanimously agree on a verdict, you must fill in the blank provided

in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant not guilty of the crime of manslaughter in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of manslaughter in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form D the words "not guilty" or the word "guilty," according to the decision you reach.

If you agree that the defendant is guilty of homicide but have a reasonable doubt as to which of the four degrees of homicide he is guilty, then you may only convict him of the lower degree.

If you find the defendant guilty of any crime, you will then use the special verdict form for that defendant and fill in the blanks with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any of you have reasonable doubt as to that question, you must answer "no".

Since this is a criminal case, each of you must agree for you to return any verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

SALVADOR HERNANDEZ RIVERA,

Defendant.

No. 98-1-00289-4

VERDICT FORM A

We, the jury in the above-entitled cause, find the defendant,
SALVADOR HERNANDEZ RIVERA, _____ of the
crime of murder in the first degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

SALVADOR HERNANDEZ RIVERA,

Defendant.

No. 98-1-00289-4

VERDICT FORM B

We, the jury, having found the defendant SALVADOR HERNANDEZ RIVERA not guilty of the crime of murder in the first degree, or being unable to unanimously agree as to that charge, find the defendant _____ of the lesser included crime of murder in the second degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

SALVADOR HERNANDEZ RIVERA,

Defendant.

No. 98-1-00289-4

VERDICT FORM C

We, the jury, having found the defendant SALVADOR HERNANDEZ RIVERA not guilty of the crime of murder in the second degree, or being unable to unanimously agree as to that charge, find the defendant _____ of the lesser included crime of manslaughter in the first degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

SALVADOR HERNANDEZ RIVERA,

Defendant.

No. 98-1-00289-4

VERDICT FORM D

We, the jury, having found the defendant SALVADOR HERNANDEZ RIVERA not guilty of the crime of manslaughter in the first degree, or being unable to unanimously agree as to that charge, find the defendant _____ of the lesser included crime of manslaughter in the second degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOSE MANUEL RIVERA HERNANDEZ,

Defendant.

No. 98-1-00290-8

VERDICT FORM A

We, the jury in the above-entitled cause, find the defendant,
JOSE MANUEL RIVERA HERNANDEZ, _____ of the
crime of murder in the first degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOSE MANUEL RIVERA HERNANDEZ,

Defendant.

No. 98-1-00290-8

VERDICT FORM B

We, the jury in the above-entitled cause, find the defendant,
JOSE MANUEL RIVERA HERNANDEZ, _____ of the
crime of murder in the second degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

SALVADOR HERNANDEZ RIVERA,

Defendant.

No. 98-1-00289-4

SPECIAL VERDICT FORM

We, the jury in the above-entitled cause, return a special verdict by answering as follows:

Was the defendant, SALVADOR HERNANDEZ RIVERA, armed with a deadly weapon at the time of the commission of the crime?

ANSWER: _____

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOSE MANUEL RIVERA HERNANDEZ

Defendant.

No. 98-1-00290-8

SPECIAL VERDICT FORM

We, the jury in the above-entitled cause, return a special verdict by answering as follows:

Was the defendant, JOSE MANUEL RIVERA HERNANDEZ, armed with a deadly weapon at the time of the commission of the crime?

ANSWER: _____

PRESIDING JUROR

[Faint, illegible text, likely a signature or stamp]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOSE MANUEL RIVERA HERNANDEZ,

Defendant.

No. 98-1-00290-8

VERDICT FORM D

We, the jury in the above-entitled cause, find the defendant,
JOSE MANUEL RIVERA HERNANDEZ, _____ of the
crime of manslaughter in the second degree.

PRESIDING JUROR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOSE MANUEL RIVERA HERNANDEZ,

Defendant.

No. 98-1-00290-8

VERDICT FORM C

We, the jury in the above-entitled cause, find the defendant,
JOSE MANUEL RIVERA HERNANDEZ, _____ of the
crime of manslaughter in the first degree.

PRESIDING JUROR