

No. 89585-6

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

IN RE PERSONAL RESTRAINT PETITION OF:

NOEL EVAN CALDELLIS,

PETITIONER.

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Noel Evan Caldellis (hereinafter “Caldellis”) challenges his first-degree murder conviction (Snohomish County No. 06-1-02485-5).

This is Caldellis’ first collateral attack on this judgment. He is currently incarcerated at the Reformatory in Monroe, Washington serving a 25 year sentence.

B. FACTS

1. Procedural History

On October 2, 2006, the State of Washington charged Noel Caldellis by Information with murder in the first degree while armed with a firearm. He was also charged and convicted of two counts of assault.

Caldellis appealed. The opening brief was filed on October 9, 2008. The reply was filed in April, 2009. The case was decided on July 20, 2009. On direct review, this Court reversed the two assault charges based on the trial court’s failure to give adequate self-defense instructions. Specifically, this Court found that the trial court erred by failing to give a “no duty to retreat” instruction. However, this Court affirmed Caldellis’ conviction for murder in the first degree charge while armed with a firearm. The unpublished decision was issued on July 20, 2009. Caldellis next filed a *Petition for Review* in the Washington Supreme Court that was denied. On

February 3, 2010, the mandate was issued, returning the case to the trial court for further proceedings.

Caldellis was resentenced on April 26, 2010. At that time, the State dismissed the two remanded assault charges. The trial court sentenced Caldellis to 300 months in prison. He did not appeal from the current judgment. See *Judgment and Sentence* attached as Appendix A.

This Personal Restraint Petition timely follows.

2. Facts

Direct Appeal Decision

On direct appeal, this Court described the facts as follows:

On September 2, 2006, Noel Caldellis attended a party in Lake City. Jason Kimura, who was at the same party, was in the midst of a feud with Cole Huppert, who was at a different party hosted by siblings Dustin and Amanda Black in Brier. Around midnight, Kimura and several others left Lake City to head to the Brier party, where Kimura planned to fight Huppert. They left in a caravan of three or four cars; Caldellis was a driver of one of these cars.

The group stopped at a gas station mini-mart, where some of them bought food, and then met up in a nearby grocery store parking lot to wait for directions to Huppert's location. One of the other caravan members, Hannan Khan, got into a heated argument with Caldellis' passenger, Miguel. Khan pulled a gun on Miguel, and Caldellis stepped in and took the gun away from Khan. Caldellis then tucked the gun into his pants.

About 10 minutes later, the caravan group left the parking lot and headed to the party in Brier. When they arrived, Kimura walked to the house to pursue Huppert for the fight. However, 25 to 30 people rushed from the house, some yelling profanities and racial slurs. Several of them immediately began fighting some of the people who had just arrived in Kimura's caravan.

Some members of both the Brier group and Kimura's group were watching the others fight. One in Kimura's group not engaged in the fighting saw someone run up as if to attack Caldellis, who fended him off by punching him. Next, he saw Caldellis pull out the gun and fire two shots in the air and one horizontally. Several witnesses heard gunshots and then saw Caldellis holding the gun, with his arm extended. One witness, Meghan Lever, saw a young man near the driveway fall to the ground.

Caldellis and the rest of Kimura's group got in their cars and left. Lever and the other Brier party guests ran toward the house, pushing and shoving to get inside. After they were inside, they locked the windows and doors. Lever called the police to report the gunfire. She stayed on the line until the police arrived, briefly went outside to meet the police, and then went immediately back into the house when instructed by police and dispatchers. While she was outside, she saw someone lying on the ground. She later found out this person was Jay Clements, who died from gunshot wounds.

Some brief additional facts are helpful.

Mr. Caldellis did not testify. However, his custodial statement was introduced by the State.

The Jury Instructions

The jury was instructed "to convict" the defendant they must find he engaged in conduct creating a grave risk of death to human life and that Jay Clements died as a result. The jury was not instructed that Caldellis must also know of and disregard that grave risk of death. In addition, the "to convict" instruction was unclear about whether, if Caldellis endangered only Jay Clements life, he was guilty or whether he had to endanger human lives. In argument, the prosecutor told jurors Caldellis endangered human life if he intended to kill Clements.

Defense counsel sought a self defense instruction on the two assault counts. Counsel did not seek an instruction extending the right to self defense to the murder count.

Courtroom Closures

Prior to the start of jury selection, jurors were given questionnaires which were never available to the public. No closure hearing preceded the decision to use these three confidential questionnaires. If those documents are in the court file, they are under seal and unavailable to all members of the public, including undersigned counsel.

The purpose of the questionnaire was, in part, to enable the attorneys to identify areas of inquiry where additional questions should be asked, but also, in part, as a substitute for in-court questioning. In other words, some of the questions and answers on the questionnaire were not repeated or referenced in open court.

Neither the trial counsel nor the court discussed with Caldellis the fact that a “confidential jury questionnaire” placed under seal would deprive Caldellis of a trial that was open and public. Trial counsel did not consider the legal issue; he did not discuss it with Caldellis at any time; and he does not believe that Caldellis understood that he was being deprived of his trial rights. *Declaration of Ray McFarland* attached as Appendix B. If Caldellis had been asked, he would not have waived his right to an open and public trial.

The Judge and Jurors Fell Asleep For a Short Time During Trial

Several relatives of Caldellis attended the trial. His mother and father sat directly behind Caldellis and looked in the direction of the judge and witness. Twice, they saw the judge fall asleep for brief periods of time.

Other spectators watched the jurors more closely. They saw at least two jurors fall asleep during crucial portions of the testimony.

Closing Argument

During his rebuttal argument, the prosecutor asked jurors to think of a “big” reason why a defendant might not testify during his trial. Defense counsel objected, but then withdrew the objection. Counsel did not seek a mistrial.

These record-based and extra-record facts are discussed at greater length in the sections that follows.

C. ARGUMENT

CLAIM NO. 1: THE “TO CONVICT” MURDER INSTRUCTION OMITTED ONE OF THE ELEMENTS OF THE CRIME, DENYING CALDELLIS HIS RIGHT TO DUE PROCESS AND A JURY TRIAL ON ALL OF THE ELEMENTS OF THE CRIME.

CLAIM NO. 2: APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ASSIGN ERROR TO THE DEFICIENT JURY INSTRUCTION. IF APPELLATE COUNSEL HAD RAISED THE ISSUE, THERE IS A REASONABLE LIKELIHOOD OF A DIFFERENT OUTCOME ON APPEAL, ESPECIALLY GIVEN THE DIRECT APPEAL HARM STANDARD.

CLAIM NO. 3: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A “TO CONVICT” INSTRUCTION CONTAINING ALL OF THE ELEMENTS OF THE CRIME.

The “To Convict” Instruction Failed to Include All of the Elements

The State charged Mr. Caldellis with first-degree murder under the seldom used “extreme indifference” prong.¹ Mr. Caldellis’ jury was given a “to-convict” instruction that told jurors the elements of the crime were:

1. That on or about the 3rd day of September, 2006, the defendant discharged a firearm;
2. That the conduct of the defendant created a grave risk of death to another person;
3. That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
4. That Jay Daniel Clements died as a result of defendant’s acts.

Instruction No. 4 (attached as Appendix D).

The jury was further instructed, although *not* in the “to convict” instruction, that “(c)onduct which creates a grave risk of death under circumstances manifesting an extreme indifference” is an “aggravated recklessness which creates a very high degree of risk greater than that involved in recklessness.” Instruction No. 5 (Appendix D). The court did not give a definition of “aggravated recklessness.” The trial court defined “reckless.” However, that instruction was given as part of the definition of first-degree manslaughter. Instruction No. 7 (Appendix D).

The current WPIC (26.06) (attached as Appendix E) accurately reflects the elements of murder by extreme indifference. That instruction,

¹ In fact, Mr. Caldellis is the only person prosecuted in recent history by the Snohomish County Prosecutor’s Office for this crime. See *Response to Public Disclosure Request* attached as Appendix C.

which is premised on caselaw construing the statute and pre-dating

Caldellis' trial, provides in pertinent part:

To convict the defendant 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 _____, the defendant created a grave risk of death to another person;
- (2) That the defendant *knew of and disregarded* the grave risk of death;
- (3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That _____ died as a result of defendant's acts;

(emphasis added).

There is an obvious difference between the instruction given to Caldellis' jury and the one required by law. Caldellis' instruction omits the mental element that he "knew and disregarded" the grave risk of death his actions allegedly created. The instruction given by the trial court required jurors only to find that Caldellis' conduct *created* a grave risk of death, not that Caldellis *knew* his conduct created a grave risk of death.

Mr. Caldellis is entitled to a new trial because the "to convict" instruction failed to contain all of the elements of the crime charged.

Murder by Extreme Indifference Requires Proof that a Defendant Knew of and Disregarded the Grave Risk of Death He Created

First degree murder by extreme indifference requires both a knowledge and conduct prong. The required mental element is a "knowing disregard of a *grave risk of death* to others." *State v. Barstad*, 93

Wash.App. 553, 567, 970 P.2d 324 (1999). “And, the defendant's conduct and knowing disregard of such grave risk must occur in circumstances which manifest an extreme indifference to human life.” *Id.* See also *State v. Madarash*, 116 Wash.App. 500, 511, 66 P.3d 682 (2003) (“...in order to act with extreme indifference to human life, a person must know that his or her behavior creates a grave risk of death to another.”).

Barstad distinguishes extreme indifference from intentional murder, by noting that extreme indifference does not require proof the offender “intended to commit the offense.” 93 Wn.App. at 568. Instead, “(h)e need only know of and disregard the fact his conduct presents a grave risk of death to others, as evidenced by circumstances that manifest his extreme indifference to human life.” *Id.* In other words, the facts must evidence the defendant's subjective knowledge his act is extremely dangerous, and his indifference to the consequences. *Barstad, supra*; citing with approval, *United States v. Fleming*, 739 F.2d 945 (4th Cir.1984); *Slaughter v. State*, 424 So.2d 1365 (Ala.Crim.App.1982); *Pears v. State*, 698 P.2d 1198 (Alaska 1985); *People v. Watson*, 30 Cal.3d 290, 637 P.2d 279, 179 Cal.Rptr. 43 (1981), *superseded by statute as stated in People v. Whitfield*, 15 Cal.Rptr.2d 4 (Cal.Ct.App.1992); *Powell v. United States*, 485 A.2d 596 (D.C.1984); *Anderson v. State*, 254 Ga. 470, 330 S.E.2d 592 (1985); *Hamilton v. Commonwealth*, 560 S.W.2d 539 (Ky.1977); *People v. Vasquez*, 129 Mich.App. 691, 341 N.W.2d 873 (1983); *State v. Omar-*

Muhammad, 102 N.M. 274, 694 P.2d 922 (1985); *People v. Gomez*, 65 N.Y.2d 9, 478 N.E.2d 759, 489 N.Y.S.2d 156 (1985); *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984); *Smith v. State*, 674 P.2d 569 (Okla.Crim.App.1984); *Commonwealth v. Taylor*, 461 Pa. 557, 337 A.2d 545 (1975); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975); *State v. Moss*, 727 S.W.2d 229 (Tenn.1986); *Wagner v. State*, 76 Wis.2d 30, 250 N.W.2d 331 (1977).

The *mens rea* for first degree manslaughter also differs from the *mens rea* for extreme indifference. Manslaughter requires only a knowing disregard of “a *substantial* risk that a *wrongful act* may occur.” RCW 9A.08.010(1)(c) (emphasis added). The extreme indifference form of murder requires knowledge of a *grave* risk of *death*.

The current WPIC, amended in 2008, accurately reflects the elements of murder committed by “extreme indifference.” The comments to WPIC 26.06 provide:

First, the instruction's second element now includes a requirement that the defendant knew of and disregarded the grave risk of death. This change reflects the Court of Appeals' holding in *State v. Barstad*, 93 Wn.App. 553, 568, 970 P.2d 324 (1999), where the court held that RCW 9A.32.030(1)(b)'s phrase “under circumstances manifesting an extreme indifference to human life” requires a subjective mental state: that the defendant must “know of and disregard the fact his conduct presents a grave risk of death to others.”

Caselaw makes it clear that the instruction given to Caldellis' jury did not include all of the elements of the crime—omitting the necessary *mens rea* requirement.

A “To Convict” Instruction Must Contain All of the Elements of the Crime

Washington courts have long held that the failure of the “to convict” instruction to contain all of the elements of the crime mandates reversal. As a result, reversal is required.

To convict a defendant, the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358 (1970). Due process of law requires the State to prove each element of a crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 713-14, 887 P.2d 396 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 22.

Implicit in this principle is the requirement that jury instructions list all of the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element. *See State v. Linehan*, 147 Wn.2d 653-54, 56 P.3d 542 (2002).

It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every essential element of an offense beyond a reasonable doubt. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)

(instruction that purported to be a complete statement of the law yet stated the wrong crime as the underlying crime the conspirators agreed to carry out was constitutionally defective). Where a “to convict” instruction fails to state the elements of a crime completely and correctly, a conviction based upon it cannot stand. *State v. Smith*, 131 Wn.2d at 263.

Where a jury instruction, like the one given to Caldellis’ jury, purports to be a complete statement of the crime, it must contain every element of the crime charged. *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The jury is not required to supply the omitted element by searching the other instructions “to see if another element alleged in the information should have been added to those specified in [the] instruction.” *Id.* In addition, a defendant is denied a fair trial if “the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven.” *Davis*, 27 Wash.App. at 506.

A trial court's failure to include the correct mental state element in the “to convict” instruction is not rendered harmless by subsequent definitional instructions. *State v. Aumick*, 126 Wn.2d 422, 432-33, 894 P.2d 1325 (1995) (trial court's failure to include intent in the elements of attempt instruction was not rendered harmless by other instructions referring to intent).

Instead, a jury has a right to regard the “to convict” instruction as a

complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction. *State v. Oster*, 147 Wash.2d 141, 52 P.3d 26 (2002).

Reversal is Required Because Caldellis Received Ineffective Assistance of Appellate Counsel

Because the “to convict” did not include all of the elements of the crime, reversal is required. Mr. Caldellis has framed this claim of error in three alternative manners. First, he claims that the trial court was required to give an instruction which accurately stated the elements of the crime. Next, he claims that appellate counsel was ineffective for failing to raise this plain error on appeal. Finally, he argues that trial counsel was ineffective for failing to propose a correct instruction.

Petitioner respectfully suggests that this Court should first consider the claim of ineffective assistance of appellate counsel. See generally *In re PRP of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). The failure to include all of the elements of a crime in the “to convict” instruction is a plain error, which does not require an objection to preserve. *State v. Mills*, 154 Wash.2d 1, 6, 109 P.3d 415 (2005). Because the error could have been raised on direct appeal, there was no tactical reason to forego it.

The WPIC was amended before Caldellis’ case was briefed, argued, or decided. In any event, even if the WPIC had not been amended, there were several cases at the time of Caldellis’ trial and appeal that should have

indicated to counsel that the pattern instruction was flawed. See *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009) (trial counsel was ineffective for failing to propose correct self-defense instruction where caselaw made the requisite standard clear, even if WPIC was incorrect). Obviously, there can be no reasonable tactical reason for appellate counsel to raise an extremely meritorious claim on direct appeal. Caldellis easily satisfies the “deficient performance” prong.

Moving then to the prejudice prong, the test is whether there is a reasonable likelihood of a different outcome on appeal if appellate counsel had raised the claim. An omission of an essential element from the jury instructions is harmless only when it is clear that the omission did not contribute to the verdict. *State v. Brown*, 147 Wash.2d 330, 340-41, 58 P.3d 889 (2002). This is clear, for example, when the omitted element is supported by uncontroverted evidence. *Id.* at 341. On the other hand, an error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds. *See id.* at 341-43 (holding that erroneous accomplice liability instructions were not harmless for any charges against the defendants wherein the jury might have convicted on an improper understanding of the law); *see also State v. Schaler*, 169 Wash.2d 274, 236 P.3d 858 (2010) (“Thus, while the jury could have concluded that Schaler's statements were serious threats and that a reasonable speaker would so regard them, they could also have concluded

that Schaler's threats were a cry for help from a mentally troubled man, directed toward mental health professionals who could help him. For this reason we cannot conclude on the record that there was “uncontroverted evidence” that Schaler's threats were true threats. Therefore, the omission of a true threat instruction was not harmless. Reversal is required because the jury was not asked to decide whether a reasonable person in Schaler's position would foresee that his statements or acts would be interpreted as a serious expression of intent to carry out the threat, and the evidence was ambiguous on the point.”).

The evidence regarding Caldellis’ mental state was far from uncontroverted. Quite the contrary, Caldellis’ mental state was the primary disputed fact in this case, which is precisely why the trial court gave a lesser included instruction on manslaughter.

Caldellis’ actions occurred as he and other arrived at the scene of what quickly became a melee where 25 to 30 people rushed from a house, some yelling profanities and racial slurs. RP 257, 351, 447, 890, 1219, Recorded Statement of Caldellis (RS) 15 attached as Appendix G. In stark contrast, Caldellis expected only to be a witness to a fight involving his friend and a single combatant. RP 325 – 326, 505, 1233, 2793, RS 13. Caldellis almost immediately found himself in the middle of this chaos when someone ran up to attack him. RP 449 - 450, 1242. At the same time, Caldellis heard talk that the people attacking him and his friends had guns.

RP 1075, 1095, 1242, 1289, RS 19. It was during these quickly developing and dangerous events that Caldellis pulled out and fired his gun— first into the air and then horizontally. RP 453, 489, 514.

The facts certainly do not present an overwhelming case that Caldellis knew of and disregarded the fact that his actions created a grave risk of death. Instead, it was a classic close case where the jury’s evaluation of Caldellis’ state of mind was crucial to the outcome. As a result, reversal is required.

Plain Error Review Also Results in Reversal

Reversal is also required under plain error review. Because Caldellis brings this claim in a post-conviction posture, the question is whether the State can show that the error did not have a substantial and injurious effect. *O’Neal v. McAninch*, 513 U.S. 432 (1995) (where the issue is evenly balanced and the judge has doubts about whether the error had “substantial and injurious effect” on the jury’s verdict, then the judge must treat the error as if it were not harmless and must rule for the petitioner); *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Once again, the evidence in this case is too close to conclude what the jury would have done if they had been instructed on all, not just some, of the instructions.

Trial Counsel Was Ineffective for Failing to Propose a Correct Instruction

Defense counsel did not propose the “to convict” instruction that was refused by the court. See *Defendant’s Proposed Instruction No 21* attached as Appendix F. In fact, counsel proposed a definitional instruction which correctly explained that a defendant “must knowingly disregard a grave risk of death to others and engage in conduct that endangers human life generally. *Proposed Instruction No. 9* attached as Appendix F. That instruction was refused by the court. RP 3152.

Despite proposing a correct definitional instruction which cited to the leading cases construing the elements of “extreme indifference” murder including *Barstad, supra*, trial counsel’s proposed “to convict” instruction did not correctly state all of the elements of the crime.

Trial counsel candidly admits that this failure was oversight, not the product of any tactical reasoning. See *Declarations of Ray McFarland*. Of course, there could be no reasonable tactical decision to remove an element of proof from the State’s ledger, especially where that element is the critical element at issue in the trial. Defense counsel sought to prove that Caldellis’ actions were the result of fear of serious injury which equaled manslaughter, at most. Eliminating the “knew of and disregarded” requirement from the murder count only served to minimize the differences between those two crimes. Thus, it would have been very much in

Caldellis' favor for counsel to propose an instruction consistent with the law.

As noted earlier, because this was a close case trial counsel's failure certainly undermines confidence in the verdict. This Court cannot say with any confidence that the outcome of this trial would have been the same if the jury had been informed of all, not just some, of the elements of the crime.

Consequently, reversal is also required because Caldellis was denied his Sixth Amendment right to effective assistance of trial counsel.

To the extent that the State disputes the material facts of either claim of ineffectiveness, this Court should remand for an evidentiary hearing according to RAP 16.11.

CLAIM NO. 4: THE "TO CONVICT" MURDER INSTRUCTION FAILED TO SPECIFY THAT CALDELLIS ACTED WITH EXTREME INDIFFERENCE TO HUMAN LIFE IN GENERAL. INSTEAD, THE INSTRUCTION IMPLIED THAT CALDELLIS WAS GUILTY IF HE ACTED WITH EXTREME INDIFFERENCE ONLY TO THE VICTIM'S LIFE. THIS AMBIGUITY DENIED CALDELLIS HIS RIGHT TO DUE PROCESS AND A JURY TRIAL ON ALL OF THE ELEMENTS OF THE CRIME.

CLAIM NO. 5: APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO ASSIGN ERROR TO THE DEFICIENT JURY INSTRUCTION. IF APPELLATE COUNSEL HAD RAISED THE ISSUE, THERE IS A REASONABLE LIKELIHOOD OF A DIFFERENT OUTCOME ON APPEAL.

CLAIM NO. 6: TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PROPOSE A "TO CONVICT" INSTRUCTION INCLUDING ALL OF THE ELEMENTS OF THE CRIME.

CLAIM NO. 7: PROSECUTORIAL MISCONDUCT DENIED CALDELLIS A FAIR TRIAL WHEN THE PROSECUTOR TOLD JURORS THE

INSTRUCTIONS PERMITTED THEM TO CONVICT ON LESS PROOF THAN WAS CONSTITUTIONALLY REQUIRED.

Introduction

There was an additional problem with the “to convict” instruction. The instruction only required the State to prove only that Caldellis’ action created a grave risk of danger to “another person.” That person, according to the plain language of the instruction, could have been Jay Clements, who died from the gun fired by Caldellis.

In contrast, the law requires proof that Caldellis’ actions endangered persons other than Clements. A defendant's act demonstrates a depraved indifference to life *only* if it puts the lives of more than one person at risk.

The State took full advantage of the failure of the jury instruction to make it clear that the law required proof that Caldellis acted with extreme indifference to human life—not just that he acted with extreme indifference to Mr. Clements’s life. The prosecutor argued that the charge of extreme indifference was easier to prove than the lower degree of intentional murder, especially if jurors concluded Caldellis acted with the intent to kill the victim. The prosecutor stated:

You do have these witnesses describing an intentional murder. In fact, there is pretty good reason to think that’s exactly what happened in this case. But this charge, the charge before you, makes it even easier because you don’t have to make that decision whether or not he actually intended to kill. He certainly intended to fire the gun. That was no accident. His finger didn’t slip.

RP 3178. The argument continued: “Either defendant caused Jay Daniel Clements’ death or he did not. If he did, he did it by exhibiting extreme indifference to human life....I suggest if he caused the death, it meets the case, Murder I. RP 3202. See also RP 3178 (prosecutor argues that if jurors find Caldellis acted with intent to kill the victim, then their decision is “a lot easier” because “he is still exhibiting extreme indifference to human life,” and equating extreme indifference to “somebody dies as a result” of actions.).

Later in his argument, the prosecutor returned to the theme that, if Caldellis intended to kill Jay Clements, then that was conclusive proof of his extreme indifference to a human life. The prosecutor notes that Caldellis told the police he was not necessarily shooting at “this” person. RP 3187. The prosecutor then seizes Caldellis’ words as proof that Caldellis shot at Jay Clements, rather than shooting indiscriminately. The prosecutor argues: “Why is he saying ‘this’ person? Why not ‘a’ person? He says ‘this’ person because he knows Jay Clements was standing right in front of the muzzle of his gun when he pulled the trigger and killed him. He has got that in his mind when he is talking to Detective Rittgarn.” RP 3187.

In short, the prosecutor exploited the failure of the instruction to specify that human “life” cannot be singular, but must be plural. Further, he used this proof that Caldellis intended harm only to the deceased victim

as conclusive proof of extreme indifference to human life—what he described as a *lesser* mental state which proved a *greater* crime. In contrast to the prosecutor’s argument, the law requires proof in addition to what the prosecutor told the jury was required in order to convict. However, the requirements of the law were not readily apparent from the jury instructions. The prosecutor’s argument fully exploited this ambiguity—telling jurors they could legally convict on less evidence than actually required by the law.

Indifference to Human Life in General—Not to a Particular Person

The extreme indifference version of murder requires the State to prove that the defendant acted recklessly and with extreme indifference to human life in “general[],” as opposed to simply endangering the life of a “particular” victim or victims. *State v. Berge*, 25 Wash.App. 433, 437, 607 P.2d 1247 (1980). In those cases where the State’s proof of the defendant’s conduct shows that he jeopardized the life of his victim only, reversal of the conviction is required on sufficiency grounds. *Berge*, 25 Wash.App. at 437. *See also State v. Anderson*, 94 Wash.2d 176, 616 P.2d 612 (1980) (extreme indifference alternative not applicable where defendant killed child victim by immersing her in overly hot bath because conduct dangerous to victim only). Instead, the law requires proof that the defendant’s action endangered persons other than or in addition to the victim.

Mr. Caldellis does not raise a sufficiency challenge. Instead, he argues that there is a “reasonable likelihood” that the jury understood the instructions to permit a guilty verdict based on less proof than constitutionally required. *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); see *United States v. Diaz*, 176 F.3d 52, 101-02 (2d Cir.1999); *United States v. Doyle*, 130 F.3d 523, 535-36 (2d Cir.1997). That “reasonable likelihood” existed based on the instruction alone. However, it was increased by the prosecutor’s argument which told jurors the law permitted them to convict based on less proof than was constitutionally permissible.

There was a Reasonable Likelihood Jurors Misunderstood the Instruction. The Prosecutor’s Argument Improperly Heightened this Risk

The Due Process Clause requires a State to prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Where there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this clearly established constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991); *Boyd v. California*, 494 U.S. 370, 380 (1990) (recognizing that an instruction, “not concededly erroneous,” can be “subject to an erroneous interpretation” that renders it unconstitutional); cf. *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding states cannot permit a “significant” risk that a

jury's misunderstanding deprived a civil defendant of Due Process). The “reasonable likelihood” standard is clearly established to be a likelihood of jury confusion greater than a bare “possibility,” yet *less* than “more likely than not.” *Boyde*, 494 U.S. at 380.

It is “self-evident” that the Due Process right, under *Winship* and its progeny, to a jury that understands the elements of the charged offense is “interrelated” with the Sixth Amendment right to a jury trial. See *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Justice Story described the right to a jury that understands and follows the law as “most sacred”:

Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.

... [This] is his privilege and truest shield against oppression and wrong

United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).

In *Sandstrom*, the United States Supreme Court established that a conviction may be unconstitutional where a jury instruction is not facially erroneous, but is subject to an erroneous interpretation. 442 U.S. at 517. In such circumstances, this Court undertakes a “realistic assessment” of how a jury likely understood a set of instructions. See *Penry v. Johnson*, 532 U.S. 782, 804 (2001) (holding instructions may have misled jury about constitutional role in sentencing); *Bollenbach v. United States*, 326 U.S.

607, 612-14 (1946) (assessing likely impact on jury of erroneous supplemental instruction); *Bruton v. United States*, 391 U.S. at 135-37 (1968) (assessing jury's ability to follow instruction to disregard evidence); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 410-11 (1947) (assessing likely impact of instructional error relating to corporate defendants on rights of individual defendants). Where it is reasonably likely that a jury was confused about a principle of law important to carrying out its fact-finding role, there is a constitutional violation. See *Penry*, 532 U.S. at 804; *Yates v. Evatt*, 500 U.S. 391, 401-02, 406 & n.6 (1991); *Francis v. Franklin*, 471 U.S. 307, 318 (1985). Obviously, a prosecutor's improper argument can contribute to that unacceptable risk of error.

Mr. Caldellis was Harmed by the Instruction's Failure to Accurately State the Law

While the prosecutor's argument misstated the law, impermissibly lowering the State's burden of proof, it also revealed that the evidence that Caldellis acted with indifference to human lives was contested and uncertain. No witness could definitively say where Jay Clements was standing when he was shot. Instead, they identified where he fell. Dustin Black stated: "I can remember seeing the gun pointed directly at me, and then sweeping to the left, and then back to the right, and then fixated on the other side of the driveway from where I was." RP 169. "I couldn't be sure

in that fourth shot where it was aiming.” RP 170. “I’m not saying [shots were fired directly in the direction of where Jay’s body was found], but somewhere in that general direction.” RP 217.

Joshua Ong testified, in response to the question of whether Caldellis shot towards the crowd: “I guess there was (*sic*) people there towards where he was shooting. From my perspective, that’s what I saw.” “I don’t remember how many people.” “I would say a couple, not like a barricade of people.” RP 455. Most of the testimony was similar. See *e.g.*, Paul Tillman: “I couldn’t see where he was pointing at. I couldn’t see that. RP 668; Ian Waites: Q: But you couldn’t see if there were any people directly in the line in which the shooter was firing?” A: “Well I saw people in front of the house, so I mean if you want to take a string from the end of the gun and pull it out that way and walk about a direct line like that, no, I couldn’t say that.” RP 1726.

Taken in the light most favorable to the State the evidence made out a *prima facie* proof of indifference to human life in general. A reasonable factfinder could have concluded that Caldellis shot into a group of people, creating grave risk of death to many persons. However, the evidence also supported a conclusion that Caldellis shot at or in the general direction of Jay Clements. And, the prosecutor used the uncertain evidence together with the ambiguity in the jury instructions to argue that Caldellis was guilty

if jurors reached the latter conclusion. In fact, he told jurors their job was easier if they focused on that scenario.

In short, the prosecutor told jurors that the easiest path to conviction for Murder 1° was to focus on the elements of Murder 2°.

Ineffective Assistance of Appellate and/or Trial Counsel

Like the previous claim of error, appellate counsel could and should have raised the related issues of the deficient instruction and the prosecutor's improper argument about the meaning of that instruction. Both issues could have been raised on direct appeal despite the lack of objection. The failure of a jury instruction to state all the elements of the crime is a plain error.

Like the previous claim of error, this Court should review this first through the lens of ineffective assistance of appellate counsel. If counsel had raised the constitutional claim that the instructions and argument created a reasonable likelihood that jurors convicted based on less proof than was legally required, this Court would have reversed.

This Court can also review this claim of error as ineffective assistance of trial counsel. Not only did trial counsel not propose a jury instruction that accurately stated the law, counsel did not object, but instead permitted the prosecutor to tell the jury that the law requires less proof than is constitutionally required. It is not reasonable tactics to permit the prosecutor to tell the jury that the law permits a conviction on less proof

than is, in fact, required. Defense counsel concedes this fact in his declaration.

This Court can also review this claim as prosecutorial misconduct. Although defense counsel did not object, the error is manifest because the prosecutor's argument attempts to enjoin the jury to return a conviction on less proof than is constitutionally permissible.

The law required proof beyond a reasonable doubt that Caldellis acted with extreme indifference to human lives. The proof supported that conclusion, but also supported the conclusion that Caldellis acted with indifference to a human life. Because the prosecutor argued the latter theory was consistent with the law and because the facts were so uncertain, the presence of this constitutional error more than undermines confidence in the verdict. Reversal is required.

If the State disputes the material facts to this claim (or its sub-parts) with competent evidence of its own, then this Court should remand for an evidentiary hearing. RAP 16.11.

CLAIM NO. 8: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE SELF-DEFENSE INSTRUCTIONS ON THE MURDER COUNT

Introduction

Defense counsel defended the two assault charges with a claim of self-defense. The defense sought and the court gave self-defense instructions for those two counts. On appeal, this Court concluded that

those instructions improperly failed to include a “no duty to retreat” instruction, this Court reversed the assault counts. When those cases were returned to the trial court, the counts were dismissed.

Defense counsel did not seek a self-defense instruction for the murder count. Instead, counsel sought, but was refused an instruction which included language: “Any motive for the actor’s conduct is a factor to be considered in determining whether conduct manifests extreme indifference to human life.” *Defense Proposed Instruction No. 9*.

Obviously, the defense sought to argue that Caldellis was acting lawfully or, at least that Caldellis had a plausible claim that he was justified when he fired the shot that killed Jay Clements.

As a result, the defense had every incentive to seek a self-defense instruction on the murder count, in addition to the assault counts. Defense counsel now admits that a self-defense instruction would have supported, not detracted from his theory of the case.

Defense counsel did not seek a self defense instruction for one simple reason. He likely concluded that Caldellis’ statement eliminated the defense on the murder count. However, the legal standard is whether there is any evidence, taken in the light most favorable to Caldellis, supporting the defense. The evidence meets that standard. Even if the jury rejected the self-defense claim, that instruction could have informed their deliberations as to whether Caldellis acted with knowing and reckless

disregard of a grave risk of death and with extreme indifference to human lives.

Self Defense Applies to a Charge of Murder by Extreme Indifference

Self-defense and defense of others are defenses to murder, including the extreme indifference prong. The crime requires proof that the defendant knowingly engaged in conduct creating a grave risk of a non-justifiable death. This is the case because the subjectively held belief of danger negates the *mens rea* for the crime. In fact, if a defendant is aware that his acts creates a risk of serious harm a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, “but recklessly or negligently used more force than was necessary to repel the attack,” is entitled to an instruction on manslaughter. *State v. Schaffer*, 135 Wn.2d 355, 957 P.2d 214 (1998); *State v. Jones*, 95 Wash.2d at 623, 628 P.2d 472; *see State v. Hughes*, 106 Wn.2d at 190.

Ineffective Assistance for Failing to Request an Instruction

Defense counsel provides ineffective assistance of counsel when he unreasonably fails to request an instruction and where that failure prejudices the defendant—where it undermines confidence in the verdict. To establish ineffective assistance of counsel the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996).

Deficient performance is performance falling “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wash.2d 66, 72, 758 P.2d 982 (1988). If either element of the test is not satisfied, the inquiry ends. *Hendrickson*, 129 Wash.2d at 78, 917 P.2d 563.

There is a strong presumption that counsel's performance was reasonable. *State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999); *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Hendrickson*, 129 Wash.2d at 77-78, 917 P.2d 563; *McFarland*, 127 Wash.2d at 336, 899 P.2d 1251.

In this case, defense counsel has candidly admitted that he did not believe a self defense instruction applied because “Caldellis did not intentionally shoot Jay Clements.” See *Declaration of McFarland*, ¶ 10. As a result, the resolution of this issue depends on whether the evidence,

viewed in the light most favorable to Caldellis supports a claim of self-defense.

The Evidence Supports Self Defense

Mr. Caldellis told the detective he shot the gun into the crowd—"not trying to point out exactly at this person, but I just shot." RS 21. When asked why he shot, Caldellis attributed his "stupid" actions to the influence of alcohol. RS 21. At the end of the interview, Caldellis asked for mercy because he did not "mean to shoot anyone." RS 34.

Taken alone, this statement does not support a claim of self defense. However, Caldellis' statement was not the only evidence on the subject. As mentioned earlier, when Caldellis arrived at the scene a large group rushed out, attacking Caldellis and members of his group. RS 18 ("So a bunch of people started running out of the house. There's...I'd say there was about fifty of them...people from the house outside fighting." "It was rather dark and I couldn't even see." He continued: "Because what happened when we got to the house they were like waiting and they just ran out of the house and people had bats and shit and you know...people were even holding sticks... like they were prepared. That's when the entire house came out." RS 18. Caldellis then heard members of the other group say to get guns and thought he saw someone with a gun. RS 19. Even after he shot in the air, and members of the opposing group briefly retreated, "(t)hen they

started coming back.” RS 21. It was at this point, that Caldellis shot. RS 21-22.

Mr. Caldellis’ fear for his safety and the safety of others at the time he fired the last shots was with was corroborated by other testimony. Jason Kimura described “two waves – the first wave came out and started fighting, then we seen more kids running out of the house.” RP 348. “I was kind of scared because a lot of people were trying to hurt you.” RP 350. He added, “(w)e knew they had guns but we didn’t think they were going to shoot anybody.” RP 374. “They were just coming at us.” RP 376.

Joshua Ong stated he watched “this guy run up who looked like he was trying to attack Noel.” RP 449. “Then Noel pulled out his gun and fired.” RP 452. Roody Ayers described “a guy came out in all black, he had like a 40 ounce bottle in his hand.” RP 559. “We were running away and he came out with a bottle down on his side in his hand.” RP 628. Ayers was frightened. “I felt we were outnumbered and people just kept coming out of the house, everybody was fighting and it just gets fuller, fuller and fuller. There were a lot at the beginning and they kept coming out.” RP 630. “I felt scared when I saw how outnumbered we were because there were a lot of people and I didn’t want to get beat up.” RP 633. Then, Ayers saw the person dressed in black (the victim) run at Caldellis with a large bottle in his hand. “Noel is 10 feet from me and Noel pointed the gun in the direction of the person.” RP 650. “Noel shot

towards this emergency area because I could see the whole street, there wasn't any house or anything around – it was just black. I don't know for sure what he is firing at. I don't know if the person in black was hit by those shots.” RP 652.

Nicanor Rapport testified: “It was crazy, chaos everywhere. My state of mind was panic. I thought I was going to get seriously hurt, that's why I backed up. I thought that because 20 – 25 people are yelling like crazy. Everywhere, left right, I see fighting. A guy came running toward us and slipped and fell and I looked back and saw Noel behind me.” RP 2790.

This testimony provides support for a self defense instruction. Caldellis reasonably feared death or bodily injury when he fired the shots. Although Caldellis told the detective that his actions were stupid and attributed them to alcohol, even a person who is indisputably acting in self defense who kills may regret his actions. Further, the defense is not eliminated because Caldellis did not claim that he was shooting at a particular person. Instead, the fact that Caldellis did not shoot to kill shows only that Caldellis was not intentionally using lethal force. More importantly, it was the exact same evidence that supported the self defense claim on the assault counts.

If sought, Caldellis would have been entitled to a self defense instruction.

Counsel's Failure to Seek a Self Defense Instruction was Deficient. Caldellis was Prejudiced.

There was no tactical reason for defense counsel to fail to seek a self defense instruction as to the murder count, rather than just the assault counts. Counsel candidly admits this fact in his declaration. As a result, counsel's performance was deficient.

The second prong of an ineffectiveness claim is prejudice. If counsel had obtained a self defense instruction there is a reasonable probability of a different outcome. On direct appeal, this Court held that the trial court's failure to give a "no duty to retreat" instruction—an element self defense—mandated a new trial. In other words, this Court found that the error was harmful.

The harm was even greater on the murder count because the self defense instruction was not only a justification for the murder, it would have given the jury a legal basis to evaluate extreme indifference. Defense counsel recognized this fact when he unsuccessfully sought an instruction that told jurors they could consider "(a)ny motive" for Caldellis' actions in determining whether he acted with extreme indifference. Self defense, even imperfect self defense would have strongly undermined the State's proof on extreme indifference.

Caldellis was prejudiced by counsel's failure to seek a self defense instruction. Once again, at a minimum Caldellis is entitled to an evidentiary hearing on this claim. RAP 16.11.

CLAIM NO. 9: THE TRIAL COURT CONDUCTED A PORTION OF JURY SELECTION PRIVATELY WHEN IT USED A CONFIDENTIAL QUESTIONNAIRE WITHOUT CONDUCTING A HEARING TO DETERMINE WHETHER CLOSURE WAS PROPER.

CLAIM NO. 10: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO EXPLAIN TO MR. CALDELLIS THAT HE HAD THE CONSTITUTIONAL RIGHT TO AN OPEN TRIAL, A RIGHT THAT INCLUDED ALL PORTIONS OF JURY SELECTION. IF CALDELLIS HAD BEEN INFORMED OF HIS CONSTITUTIONAL RIGHT TO AN OPEN AND PUBLIC TRIAL, HE WOULD NOT HAVE WAIVED THAT RIGHT.

Introduction

Mr. Caldellis' constitutional right to an open and public trial was violated during jury selection when the Court used a confidential questionnaire without first holding a *Bone-Club* hearing.

That questionnaire was never available to the public. It was apparently destroyed during or after the trial. Although the lawyers asked follow up questions in open court based on some of the answers on the questionnaire, the other purpose of the questionnaire was to eliminate the need to ask certain questions during voir dire. In other words, the questionnaires contained a great deal of information that was never open to the public—even by observing the portion of jury selection conducted in

open court. See *Declaration of McFarland; Blank Questionnaire* attached as Appendix H.

Trial counsel did not explain to Mr. Caldellis that his right to an open and public trial included all of jury selection. If he had been told of this right, Mr. Caldellis would not have agreed to secret questionnaires, but instead would have insisted that all of his trial be open to the public. See *Declaration of Caldellis* attached as Appendix I.

The Constitutional Rights to an Open and Public Trial

The right to a public trial is protected by both the federal and the Washington state constitutions. See U.S. CONST. AMEND. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); WASH. CONST., ART. 1, § 22 (“In criminal prosecutions the accused shall have the right. . . to have a speedy public trial.”); WASH. CONST., ART. 1, § 10 (“Justice in all cases shall be administered openly.”). This right includes the right to open jury selection. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2005), citing *Press-Enter Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Washington Courts have scrupulously protected the accused’s and the public’s right to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full

hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances*.” *Orange*, 152 Wn.2d at 805, *citing State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (emphasis in original).

For that reason, this Court has developed a test which must be applied in every case where a closure is contemplated. The *Bone-Club* requirements are:

1. The proponent of closure. . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;

4. The court must weigh the competing interests of the proponent of the closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose;

Easterling, at 175, n.5; *Bone-Club*, at 258-259. As the test itself demonstrates, it must be conducted *before* closing the courtroom. The constitutional presumption of openness may be overcome only by “an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Orange*, 152 Wn.2d at 806 (emphasis added) (quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). These requirements are necessary to protect both the accused’s right to a public trial *and* the public’s right to opening proceedings. *Easterling*, at 175.

The Right to an Open Trial Includes Jury Selection

The process of jury selection is included, not excepted, from this rule. *Brightman, supra; Orange, supra*. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), “(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

In this case, the trial court permitted jurors to answer a large number of questions secretly—in writing.

This Court has held that the sealing of juror questionnaires is not reversible error where: (1) there was no showing that the questionnaires were sealed and unavailable to the public during the course of trial; and (2) where there was no showing that the questionnaires contained information not expressed by individual jurors during the oral portion of jury selection. See e.g., *State v. Tarhan*, __ Wn.App. __, 246 P.3d 580 (2011); *State v. Coleman*, 151 Wn.App. 614, 214 P.3d 258 (2009).

Those concerns or exceptions to the constitutional prohibition against courtroom closures not preceded by a hearing have each been answered in this PRP. As the declaration of trial counsel provides the questionnaires were never available to the public. In addition, answers to many of the questions on the “confidential questionnaire” were never discussed in open court. See *Declaration of McFarland*. That is one of the reasons for the written questionnaires—to avoid having to ask certain questions in the courtroom.

As a result, there is no meaningful constitutional distinction between questions asked in writing or orally. Further, post-trial examination of the questionnaires, which is impossible in this case, is no more a sufficient remedy than releasing a transcript of a closed trial after-the-fact. The

simple facts remains: a constitutionally significant portion of the trial was conducted in violation of the guarantee to an open and public trial.

While juror privacy may be one appropriate consideration in weighing a decision to close, it is not a factor that justifies the failure to conduct a *Bone-Club* hearing. *State v. Duckett*, 141 Wash. App. 797, 808, 173 P.2d 948 (2007) (“In this case only a limited portion of voir dire was held outside the courtroom, but this does not excuse the failure to engage in a *Bone-Club* analysis.”). As the Court recognized in *Orange* and confirmed in *Easterling*, the guaranty of a public trial under our constitution has never been subject to a *de minimis* exception. *Orange*, 152 Wn.2d at 812-14; *Easterling*, 157 Wn.2d at 180-81. The closure here was deliberate, and the questioning of the prospective jurors concerned their ability to serve; this cannot be characterized as ministerial in nature or trivial in result. *See Easterling*, 157 Wn.2d at 181.

The Constitutional Violation was Not Invited or Waived.

The State may argue that defense counsel’s failure to object and his proposal of a similar questionnaire means that this issue has been waived. The Washington Supreme Court has answered this question in the negative, holding that is “the request to close itself, and not the party who made the request, that triggered the trial court’s duty to apply the five-part *Bone-Club* requirements. The trial court’s failure to apply that test constitutes reversible error.” *Easterling*, 157 Wn.2d at 180.

Specifically, the *Easterling* Court held that this outcome was compelled by “our prior decisions relating to article 1, section 22 of our state constitution, which require trial courts to strictly adhere to the well-established guidelines for closing a courtroom, and . . . [by] public policy as made manifest by the federal and state constitutions which favors keeping criminal judicial proceedings open to the public unless there is a compelling interest warranting closure.” *Easterling*, 157 Wn.2d at 177.

Because the trial court must act to protect the rights of both a defendant and the public to open proceedings, “the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right.” *Brightman*, 155 Wn.2d at 517.

Counsel was Ineffective for Excluding Caldellis from the Decision Whether or Not to Waive a Constitutional Right Personal to Caldellis

If this Court concludes that counsel waived the right to an open and public trial, counsel did so without informing Caldellis. *Declaration of McFarland*. If Caldellis had been informed that his right to a public trial included the written questionnaires, he would have asserted this right—a right that he personally holds. *Declaration of Caldellis* attached as Appendix I. As a result, counsel’s failure to inform Caldellis constituted deficient performance. Caldellis was prejudiced because he would have asserted the constitutional right, if he had been properly informed. In other words, the harm here, like the waiver of other fundamental constitutional

rights (e.g., the right to appeal) is measured by whether Caldellis would have waived the right, if he had been properly informed.

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wn.2d at 181. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.* The remedy is reversal and a new trial. *Id.* at 174.

This Court should reverse or remand for an evidentiary hearing.

CLAIM 11: THE JUDGE SLEPT THROUGH PORTIONS OF THE TRIAL— A STRUCTURAL ERROR. THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING. IF THE REFERENCE HEARING JUDGE DETERMINES THE TRIAL JUDGE SLEPT THROUGH ANY PORTION OF TRIAL, REVERSAL IS REQUIRED.

CLAIM 12: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO NOTICE THE JUDGE SLEEPING AND TO MOVE FOR A MISTRIAL.

CLAIM 13: A JUROR ALSO SLEPT THROUGH A MATERIAL PORTION OF TRIAL. THIS COURT SHOULD REMAND THIS CLAIM FOR AN EVIDENTIARY HEARING. IF THE REFERENCE HEARING JUDGE DETERMINES THAT A JUROR SLEPT THROUGH MATERIAL PORTIONS OF TRIAL, REVERSAL IS REQUIRED.

CLAIM 14: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO NOTICE THE SLEEPING JURORS AND TO MOVE FOR A MISTRIAL.

Facts

On two observed occasions, the trial judge dozed off for short periods of time during the conduct of the trial. See *Declarations of Sherri and Evangelos Caldellis* attached as Appendix J and K. Sherri Caldellis studiously attended her son’s trial. She sat behind her son and his

attorneys, with a direct view of the judge and the witnesses. Twice, she observed Judge Wynne's head drop, his eyes close, and watched him remain still for a short period of time, until his head jerked up and his eyes opened. *Id.* Judge Wynne fell asleep on both occasions in the afternoon after the lunch hour.

Evan Caldellis saw the judge briefly fall asleep once. *Id.* Like Sherri, Evan was seated behind counsel table, with a direct view of the judge. Like Sherri, he saw the judge close his eyes and briefly doze off. Both witnesses describe sleeping, rather than reflective contemplation by the judge. *Id.*

Both Sherri and Evan discussed the judge's brief courtroom slumber with each other during the trial. However, they did not mention or discuss it with Noel's attorney. *Id.*

Jennifer Meranto, Sherri Caldellis' sister, also attended the trial. However, her attention was focused on the jurors, rather than the judge. Ms. Meranto noticed that two jurors who sat next to each other in the front row, V.M. and D.R., both briefly fell asleep. Ms. Meranto noted that both jurors slept in the afternoon, when the courtroom would usually be quite warm. The two jurors fell asleep during the testimony of the witnesses who were present at the scene of the shooting, while the events that preceded the shooting were discussed. See *Declarations of Jennifer Meranto* attached as Appendix L.

Mr. Caldellis' trial lawyers did not notice the judge or jurors sleeping. As a result, they did not seek a mistrial for either irregularity.

Argument

The Sixth Amendment grants criminal defendants the right to a trial by an impartial jury from the state and district in which the defendant allegedly committed the crime. U.S. Const. Amend. VI. Criminal defendants' right to a jury trial is defined by the right to a fair and impartial jury "capable and willing to decide the case solely on the evidence before it" under the watch of a trial judge "to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)

A trial consists of a contest between litigants before a judge. When the judge is absent at a "critical stage" the forum is destroyed. *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). There is no trial. The structure has been removed. There is no way of repairing it. The framework "within which the trial proceeds" has been eliminated. See *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The verdict is a nullity. *Gomez*, 490 U.S. at 876.

A slightly different test applies to a sleeping juror. See *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000). For example, *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987), holds that the presence

of a sleeping juror during trial does not, *per se*, deprive a defendant of a fair trial. Cast another way, *Springfield* makes clear that the presence of all awake jurors throughout an entire trial is not an absolute prerequisite to a criminal trial's ability to “reliably serve its function as a vehicle for determination of guilt or innocence.” A single juror's slumber is not *per se* plain error. *See also State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986). Instead, a juror (or multiple jurors) must sleep through material portions of the trial. *Inattention of Juror From Sleepiness or Other Cause as Ground for Reversal or New Trial*, 88 A.L.R.2d 1275, 1276 (1963).

Mr. Caldellis has presented sufficient evidence to justify an evidentiary hearing on these two related claims. If the judge slept through any portion of trial, he was functionally absent—a structural error mandating reversal. Likewise, Caldellis has presented evidence that two jurors slept through portions of the testimony of eyewitnesses who described the events immediately preceding the shooting. These events were highly relevant to the issue of intent.

Caldellis has made a *prima facie* claim. If the State does not dispute his extra-record facts, then Caldellis is entitled to relief. If the State disputes Caldellis' facts with its own extra-record facts, then Caldellis should be permitted to establish either of these claims at an evidentiary hearing. If he does so, he is entitled to a new trial.

CLAIM NO. 15: THE PROSECUTOR INVITED JURORS TO INFER GUILT FROM CALDELLIS' FAILURE TO TESTIFY VIOLATING HIS FIFTH AMENDMENT GUARANTEE THAT SILENCE CANNOT BE VIEWED UNFAVORABLY.

CLAIM NO. 16: APPELLATE COUNSEL WAS INEFFECTIVE BY NOT ASSIGNING ERROR TO THIS COMMENT.

CLAIM NO. 17: TRIAL COUNSEL WAS INEFFECTIVE FOR WITHDRAWING HIS OBJECTION AND SEEKING A MISTRIAL AND, IF THIS COURT CONCLUDES THE PROSECUTOR'S ARGUMENT WAS A FAIR RESPONSE, BECAUSE HE OPENED THE DOOR TO A MAJOR CONSTITUTIONAL VIOLATION.

Introduction

During closing argument, after the defense had given jurors reasons for the constitutional rule that jurors could not use Caldellis' failure to testify against him, the prosecutor argued that defense counsel "forgot" a "big" reason "for Noel Caldellis not testifying." RP 3275-76. "I can think of one more, can you?" *Id.* Although defense counsel objected, he then inexplicably withdrew the objection. *Id.*

The "big" reason suggested by the prosecutor for Caldellis' decision to exercise his constitutional right not to testify was obvious to some, if not all of Caldellis' jurors. Caldellis was guilty. He did not testify because it would be incriminating.

Suggesting to jurors that silence was indicative of guilt violated the constitutional guarantee that silence won't be penalized. It was not invited by counsel. If it was, counsel was ineffective for allowing his client's silence to be used to infer guilt.

The Right to Silence at Trial Cannot be Penalized

The United States Supreme Court has held that the Fifth Amendment forbids prosecutorial comment on a defendant's decision not to testify.

Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). A prosecutorial statement “is impermissible if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.” *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir.1987).

In *Griffin, supra*, the defendant, who had not testified, was found guilty by a jury of first-degree murder. The prosecution had emphasized to the jury in closing argument that the defendant, who had been with the victim just prior to her demise, was the only person who could provide information as to certain details related to the murder, and yet, he had “ ‘not seen fit to take the stand and deny or explain.’ ” The Supreme Court reversed the conviction ruling that the prosecutor's comments and the jury instruction impermissibly infringed upon the defendant's Fifth Amendment right to remain silent. The Court held that a comment on the right to not testify:

....is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does

not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”

Id., at 614 (citations omitted).

The Court further stated that the Fifth Amendment “forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.” *Id.* at 615.

In *Baxter v. Palmigiano*, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976), the United States Supreme Court stated that “*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.” See also *Lakeside v. Oregon*, 435 U.S. 333, 338, 98 S.Ct. 1091, 1094, 55 L.Ed.2d 319 (1978).

Caselaw distinguishes between a comment on the defense's failure to present exculpatory evidence and a comment on the defendant's decision not to testify. *United States v. Tam*, 240 F.3d 797, 805 (9th Cir.2001) (noting that where the prosecutor refers to “defendant's arguments,” but obviously is addressing the arguments made by the defense counsel, there is no *Griffin* violation); *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir.1995) (noting that a “comment on the failure of the defense as opposed to the defendant to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment

privilege”); *United States v. Lopez-Alvarez*, 970 F.2d 583, 595-96 (9th Cir.1992) (allowing a prosecutor to comment on the defendant's failure to present exculpatory evidence, as long as it is not phrased to call attention to the defendant's decision not to testify).

The rule permits a fair response. However, a fair response cannot suggest to jurors that they are allowed to use silence as indicative of guilt. For example, a closely divided Supreme Court in *United States v. Robinson*, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed. 2d 23 (1988), held, in a federal criminal prosecution, that the prosecuting attorney in argument to the jury could comment on the defendant's decision not to testify because the comment was a “fair response” to defense counsel's “closing argument that the Government had not allowed respondent to explain his side of the story.” *Robinson*, 485 U.S. at 26. In other words, the prosecutor could point out the opportunity to testify, but could not suggest that defendant’s failure was probative of guilt. The Supreme Court held “that the comment by the prosecutor did not violate respondent's privilege to be free from compulsory self-incrimination guaranteed by the Fifth Amendment to the United States Constitution.” *Id.* Consequently, under *Robinson*, a defendant's Fifth Amendment right to be free of prosecutorial comment upon the defendant's decision not to testify can be lost because of defense counsel's closing argument.

In this case, the prosecutor invited jurors to conclude that Caldellis

did not testify because he was guilty. This went beyond any fair response.

The Prosecutor's Argument was a Flagrant Violation of the Constitutional Right to Silence

Generally, improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988), *aff'd*, 119 Wn.2d 711, 837 P.2d 599 (1992); *State v. Klok*, 99 Wash.App. 81, 84, 992 P.2d 1039 (2000). Initially, the defendant has the burden of establishing that the prosecutor's conduct was improper and prejudicial. *State v. Brett*, 126 Wash.2d 136, 175, 892 P.2d 29 (1995).

However, if the alleged misconduct is found to directly violate a constitutional right, then "it is subject to the stricter standard of constitutional harmless error." *State v. Traweck*, 43 Wash.App. 99, 108, 715 P.2d 1148 (1986); *see also State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Ineffective Assistance of Appellate and Trial Counsel

This issue could have been raised on direct appeal. If appellate counsel had done so, then the State would have been required to show harmlessness beyond a reasonable doubt. The State would not have been able to carry that burden. Like some of the earlier claims, this is the clearest path to reversal.

However, it is also important to consider Caldellis' claim of ineffective assistance by trial counsel. Caldellis exercised his personal right to remain silent. When he did so, the Constitution guaranteed that he would not be penalized for exercising that right. After exercising a right for which there can be no penalty, Caldellis' attorney failed to object to comments by the prosecutor which asked jurors to draw a negative inference from that silence. Defense counsel's failure to object, strike the comment, and move for a mistrial, resulted in counsel permitting jurors to do what Caldellis was guaranteed not to happen. If counsel's own remarks during closing invited the response, then counsel's failure was even more egregious.

The prosecutor's remarks asking jurors to consider another obvious reason why a defendant might not testify was among the last remarks heard by the jury in this case. As jurors were about to begin deliberations, the prosecutor asked jurors to consider that Caldellis' silence was indicative of guilt. Counsel's withdrawal of an objection could have only signaled that there was nothing improper about this argument.

In the end, it is critical to focus on the harm to Mr. Caldellis, whether this issue is reviewed as a violation of the Fifth Amendment right to silence or the Sixth Amendment right to effective counsel.

Once again, this Court should either reverse or remand for a hearing.

D. CONCLUSION AND PRAYER FOR RELIEF

Mr. Caldellis' conviction should be reversed for several reasons. His "to convict" instruction omitted an essential element of the crime. Jurors could have also reasonably misunderstood that instruction to require only proof that Caldellis endangered the life of the victim alone, a theory of law advanced by the prosecutor during closing. Trial counsel could and should have sought a self defense instruction for the murder count, especially since the defense applied to the assault counts which happened only mere seconds earlier. A portion of Caldellis' jury selection was secret. His judge and jurors slept at times during the trial. Finally, just before jurors began to deliberate, the prosecutor asked them to think of a "big" reason why Caldellis might not testify.

Based on the above, this Court should (1) call for an answer from the State; (2) if there are disputed material facts, remand those claims that depend on extra-record facts for an evidentiary hearing; and/or (3) pass this case to a three-judge panel and; (4) reverse and remand for a new trial.

DATED this 19th day of April, 2011.

/s/ Jeffrey E. Ellis

Jeffrey E. Ellis #17139

/s/ Renee Alsept

B. Renee Alsept # 20400

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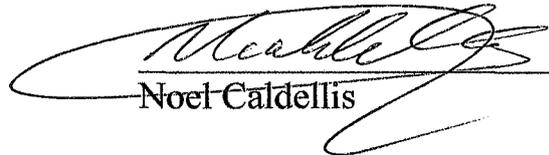
JeffreyErwinEllis@gmail.com

ReneeAlsept@gmail.com

VERIFICATION OF PETITION

I, Noel Caldellis, verify under penalty of perjury that the attached petition is true and correct and filed on my behalf.

04/15/2011
Date and Place


Noel Caldellis

Appendix A

RECEIVED

APR 27 2010

LAW OFFICE OF
RAYMOND C. MCFARLAND

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

No. 06-1-02485-6

Plaintiff,

JUDGMENT AND SENTENCE

v.

Prison

Jail One Year or Less

CALDELLIS, NOEL EVAN

First Time Offender

Special Drug Offender Sentencing Alternative

Defendant.

Clerk's action required, firearm rights
revoked, ¶ 5.5

SID: WA23130017

Clerk's action required, ¶¶ 2.1, 4.1, 4.3, 5.2, 5.3

If no SID, use DOB:

Clerk's action required, ¶ 5.6 (use of motor vehicle)

Restitution Hearing set, ¶ 4.3

I. HEARING

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

II. FINDINGS

- 2.1 CURRENT OFFENSE(S). The defendant was found guilty on December 11, 2007, by jury-verdict of:

COUNT	CRIME	RCW	CLASS	INCIDENT #	DATE OF CRIME
I	First Degree Murder (While Armed With A Firearm)	9A.32.030(1)(b), 9.94A.533(3), 9.41.010, 9.94A.602	A	BRI 0600716 <i>LYN 0608576</i>	9/3/06

as charged in the Amended Information.

The jury returned a special verdict or the court made a special finding with regard to the following:

- See ¶ 4.1 regarding findings in relation to Drug Offender Sentencing Alternative.
- The defendant used a **firearm** in the commission of the offense in Count I. RCW 9.94A.602, 9.41.010, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in the commission of the offense(s) in Count(s) _____ RCW 9.94A.602, 9.94A.533.
- The defendant committed the offense in Count(s) _____ with **sexual motivation**. RCW 9.94A.835.
- Count(s) _____ **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated

by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter; or in or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

- The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count(s) _____ RCW 9.94A.605, 69.50.401, 69.50.440.
- Count(s) _____ is (are) a criminal street gang-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count(s) _____ is (are) the crime of unlawful possession of a firearm and the defendant was a criminal street gang member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.
- The defendant committed vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count(s) _____ involve(s) attempting to elude a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count(s) _____ is (are) a felony in the commission of which the defendant used a motor vehicle. RCW 46.20.285.
- The defendant has a chemical dependency that has contributed to the offense(s) in Count(s) _____. RCW 9.94A.607.
- The crime charged in Count(s) _____ involve(s) domestic violence. RCW 10.99.020.
- The offense in Count(s) _____ was (were) committed in a county jail or state correctional facility. RCW 9.94A.533(5).
- Count(s) _____ involve(s) kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in Chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- Count(s) _____ and _____ merge. (See ¶ 3.2 for dismissal of specific count.)
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): (INPUT)

2.2 CRIMINAL HISTORY. Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

<u>CRIME</u>	<u>DATE OF SENTENCE</u>	<u>SENTENCING COURT (County & State)</u>	<u>A or J (Adult or Juvenile)</u>	<u>TYPE OF CRIME</u>
NONE				

- The defendant committed Count(s) _____ while on community custody (adds one point to score). RCW 9.94A.525.
- The court finds the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): (INPUT)

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520: (INPUT)

2.3 SENTENCING DATA.

COUNT NO.	OFFENDER SCORE	SRA LEVEL	STANDARD RANGE (not including enhancements)	*PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
1	0	XV	240-320 MONTHS	60 MONTHS (F)	300-380 MONTHS	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present, (CSG) Criminal Street Gang Involving Minor, (AE) Endangerment While Attempting to Elude.

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____ or within the standard range for Count(s) _____ but served consecutively to Count(s) _____.

The defendant and State stipulate that justice is best served by imposition of an exceptional sentence above the standard range and the court finds that exceptional sentence furthers and is consistent with the interests of justice and the purpose of the Sentencing Reform Act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory. Findings of fact and conclusions of law are attached in Appendix 2.4. The jury's interrogatory is attached. The prosecuting attorney did did not recommend a similar sentence.

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

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753(5)):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

2.6 PROSECUTOR'S RECOMMENDATION. The prosecutor's recommendation was as follows:

380 months on Count I _____ months on Count IV
_____ months on Count II _____ months on Count V
_____ months on Count III _____ months on Count VI

Terms on each count to run:

concurrently with or consecutively to each other

concurrently with or consecutively to the terms imposed in Cause No(s). _____

III. JUDGMENT

- 3.1 The defendant is GUILTY of the counts and charges listed in Paragraph 2.1.
- 3.2 The court DISMISSES Count(s) II, III, & IV
- 3.3 The defendant was found NOT GUILTY of Count(s) _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 CONFINEMENT OVER ONE YEAR. The court sentences the defendant to total confinement as follows:

CONFINEMENT. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

<u>300</u> months on Count I	_____ months on Count IV
_____ months on Count II	_____ months on Count V
_____ months on Count III	_____ months on Count VI

[XXX] The confinement time on Count(s) [] includes 60 months as enhancement for [XXX] Firearm [] Deadly Weapon [] VUCSA in a Protected Zone [] Manufacture of Methamphetamine with Juvenile Present [] other _____

Actual term of total confinement ordered is Three hundred months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at ¶ 2.3, and the following counts which shall be served consecutively:

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

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

Confinement shall commence immediately unless otherwise set forth here: _____

CREDIT FOR TIME SERVED. The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505(6). The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

Since 9/4/06

[] WORK ETHIC PROGRAM. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in ¶ 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement.

4.2 [XXX] **COMMUNITY CUSTODY.** RCW 9.94A.701. The defendant shall serve the following term of community custody (12 months for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate; 18 months for violent offenses; and 36 months for serious violent offenses):

Count I for a period of 36 months Count IV for a period of _____ months
Count II for a period of _____ months Count V for a period of _____ months
Count III for a period of _____ months Count VI for a period of _____ months

and the conditions ordered are set forth below. The combined term of community custody and confinement shall not exceed the statutory maximum.

The defendant shall report to DOC, 8625 Evergreen Way, Suite 100, Everett, Washington 98208 not later than 72 hours after release from custody.

While on community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) notify DOC of any change in the defendant's address or employment; (4) not consume or possess controlled substances except pursuant to lawfully issued prescriptions; (5) not own, use, or possess firearms or ammunition; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC; and (8) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The residence location and living arrangements are subject to the prior approval of DOC while on community custody.

- The defendant shall not consume any alcohol.
- The defendant shall have no contact with the family of Jay Daniel Clements. [xxx] See ¶ 4.5.
unless initiated by the Clements family.
- The defendant shall remain within outside of a specific geographical boundary, to wit:

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

- The defendant shall participate in the following: State certified domestic violence batterer's treatment program chemical dependency evaluation mental health evaluation anger management program, and fully comply with all recommended treatment.
- The defendant shall comply with the following crime-related prohibitions: _____

4.3 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the clerk of the court:

PVC	<input checked="" type="checkbox"/> \$500	Victim assessment	RCW 7.68.035
ORC	\$ _____ <input type="checkbox"/> waived	Court costs, including	RCW 9.94A.030, .505; 10.01.160
		Criminal filing fee \$ _____	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/SRF
		Jury demand fee \$ _____	JFR
		Other \$ _____	RCW 10.46.190
PUB	<input type="checkbox"/> \$982 <input type="checkbox"/> waived	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$ _____	Court appointed defense expert and other costs	RCW 9.94A.760
FCM	<input type="checkbox"/> \$1,000 <input type="checkbox"/> \$2,000	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/ PCD/INTF/SAD/SDI	\$ _____	Drug enforcement fund of \$ _____	RCW 9.94A.760
CLF	<input type="checkbox"/> \$100	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
EXT	\$ _____	Extradition costs	RCW 9.94A.505
RTN/RJN	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, DUI only, \$1000 maximum)	RCW 38.52.430
	<input checked="" type="checkbox"/> \$100	Biological Sample Fee	RCW 43.43.7541
		(for offenses committed after 07-01-2002)	
PDV	<input type="checkbox"/> \$100	Domestic Violence Penalty (for offenses committed after 06-04-2004 - maximum \$100)	RCW 10.99.080
	\$ _____	Other costs for: _____	
	\$ <u>600.00</u>	TOTAL	RCW 9.94A.760

RESTITUTION. The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753.

- A restitution hearing shall be set for _____.
- Defendant waives any right to be present at any restitution hearing (*sign initials*): _____.
- Defendant waives any right to a restitution hearing within 6 months. RCW 9.94A.750.

A separate Restitution Order was entered on August 7, 2008. \$ 18,356.86

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here of not less than:

\$ _____ per month commencing _____, RCW 9.94A.760.

All payments shall be made within 120 months of release of confinement; entry of judgment; other _____.

The defendant shall report to the clerk of the court or as directed by the clerk to provide financial and other information requested. RCW 9.94A.760(7)(b).

In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at \$100.00 per day (not to exceed \$100 per day) unless another rate is specified here _____, RCW 9.94A.760(2).

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

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

- 4.4 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.
- HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 206, Everett, Washington 98201 within one (1) business day of entry of this order to arrange for the test. RCW 70.24.340.

4.5 **NO CONTACT.**

The defendant shall not have contact with the family of Jay Daniel Clements (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party ~~until~~ for life (date) (not to exceed the maximum statutory sentence). ***EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.**

** Unless initiated by the Clements family.*
 A separate Domestic Violence No Contact Order, Anti-Harassment Order, or Sexual Assault Protection Order is filed contemporaneously with this Judgment and Sentence. (Entry of a separate order makes a violation of this no contact sentencing provision a criminal offense, and the order will be entered into the law enforcement database.)

4.6 **OTHER.** _____

4.7 **OFF-LIMITS ORDER.** (Known drug trafficker). RCW 10.68.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 Unless otherwise ordered, all conditions of this sentence shall remain in effect notwithstanding any appeal.

V. NOTICES AND SIGNATURES

- 5.1 COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.753(4); RCW 9.94A.760 and RCW 9.94A.505(5).
- 5.3 NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606.
- 5.4 VIOLATION OF JUDGMENT AND SENTENCE/COMMUNITY CUSTODY VIOLATION.**
(a) Any violation of a condition or requirement of sentence is punishable by up to 60 days confinement for each violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

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

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court.)

The defendant is ordered to forfeit any firearm he/she owns or possesses no later than _____ to _____ *(name of law enforcement agency)*. RCW 9.41.098

- 5.6 MOTOR VEHICLE.** If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.7 CERTIFICATE OF DISCHARGE.**
(a) If you are under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received notice from Department of Corrections and clerk's office that you have completed all requirements of the sentence and satisfied all legal financial obligations. RCW 9.94A.637.

(b) If you are not under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received verification from you that you have completed all sentence conditions other than payment of legal financial obligations and the clerk's office that you have satisfied all legal financial obligations.

5.8 RIGHT TO APPEAL. If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence. You may also have the right to appeal in other circumstances.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

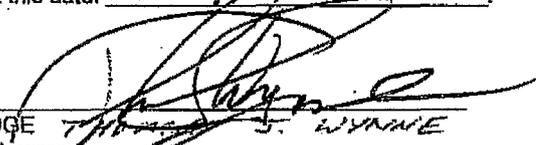
5.9 VOTING RIGHTS STATEMENT. I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

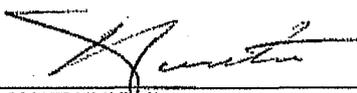
My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

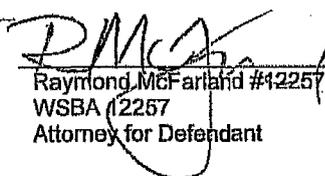
My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

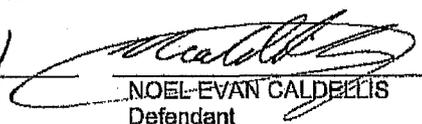
5.10 OTHER. _____

DONE in Open Court and in the presence of the defendant this date: 23 April 2018

JUDGE 
Print name: THOMAS S. WYNNE


MATT HUNTER
WSBA 24021
Deputy Prosecuting Attorney


Raymond McFarland #12257
WSBA 12257
Attorney for Defendant


NOEL-EVAN CALDELLIS
Defendant

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language. Cause No. of this case: 06-1-02485-5.

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

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

Clerk of said County and State, _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID Number: WA23130017
(If no SID, take fingerprint card for State Patrol)

Date of Birth: 11/22/1987

FBI Number: 887694KC2

Local ID Number: _____

PCN Number: _____

DOC Number: 315488

Alias name, SSN, DOB:

Race: White

Ethnicity:

Sex: M

Hispanic

Non-Hispanic

Height: 506

Weight: 170

Hair: Brown

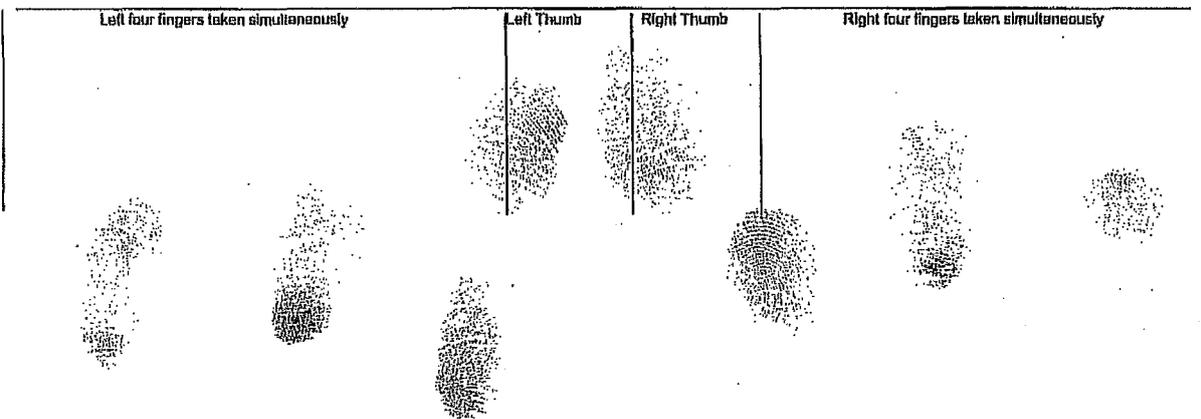
Eyes: Brown

FINGERPRINTS: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: S. Belva, Deputy Clerk.

Dated: 23 APR 2010

DEFENDANT'S SIGNATURE: *Noel Caldellis*

ADDRESS: DOC - MCC



ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington:

WHEREAS, NOEL EVAN CALDELLIS has been duly convicted of the crime of First Degree Murder (While Armed With a Firearm) as charged in the Amended Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term(s) as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof; Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to conduct him to the Washington Corrections Center at Shelton, Washington, in Mason County, and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presence shall be authority for the same. HEREIN FAIL NOT.

WITNESS the HONORABLE THOMAS J. WYNNE, Judge of the said Superior Court and the seal thereof, this 23rd day of April, 2010.

Sonya Kraski
CLERK OF THE SUPERIOR COURT

By: 
Deputy Clerk

Appendix B

DECLARATION OF RAYMOND MCFARLAND

I, Raymond Charles McFarland, declare:

1. I am a lawyer practicing in Seattle. I was admitted to the Washington State Bar in 1982.
2. During my legal career, I worked as a Deputy Prosecuting Attorney in the King County Prosecutor's Office in Seattle from 1983 to 1990 and have worked as a sole practitioner in Seattle since 1992. My practice is and has been limited to criminal defense and I have handled several murder cases over the years, both as a prosecutor and defense attorney. I have tried over 100 felony jury trials.
3. I represented Noel Caldellis at his murder and assault trial in Snohomish County Superior Court and was assisted by attorney Kristina Selset as "second chair."
4. During jury selection, the court used a private and confidential questionnaire for each juror. As I recall, the completed questionnaires were seen only by the prosecution and defense teams, the judge, and Mr. Caldellis. The questionnaires were not available to the public and the completed questionnaires were sealed in the court file after jury selection.
4. I did not object to the confidential nature of the juror questionnaire.
5. I did not explain to Mr. Caldellis that the confidential nature of the questionnaire implicated his right to an open and public trial.
6. As a result, Mr. Caldellis never waived his right to an open and public trial by the use of a confidential questionnaire.
7. During oral jury selection, we asked follow up questions to most of the affirmative confidential answers on the questionnaires. We did not ask follow up questions to negative responses. There were some affirmative answers on the questionnaire that we did not follow up on. In other words, listening to the oral part of jury selection would not reveal all of the answers

on the questionnaires. Answers we did not discuss on the record during jury selection remained private.

8. As a general rule, I sought jury instructions that were an accurate statement of the law and which were helpful to Mr. Caldellis' defense.

9. Our defense at trial was two-fold: 1) The State failed to prove beyond a reasonable doubt that Mr. Caldellis' shots caused the death of Jay Clements; and 2) If Mr. Caldellis' shots caused the death of Jay Clements, it was excusable homicide because: 1) Mr. Caldellis did not intend to shoot Mr. Clements; and 2) the shots were fired in lawful defense of others.

10. I believed standard self-defense instructions did not apply because the evidence of Mr. Caldellis' custodial statement, admitted at trial, established that Mr. Caldellis did not intentionally shoot Jay Clements. I therefore believed the only available instructions that fit the evidence and the defense theory of the case were instructions related to excusable homicide.

11. I did not object to the Court's "to convict" instruction on the charge of murder 1 (Court's Instruction No. 4) as inadequate because I was not aware that the "to convict" instruction must include an element of "knowing and reckless disregard of a grave risk of death" created by the defendant's actions. If I had been aware, I would have proposed such an instruction.

12. There was no tactical reason for me not to propose an instruction making it clear that a defendant must endanger human lives, as opposed to a human life. There was no tactical reason for me not to object to the prosecutor's arguments that suggested if Caldellis intended to kill Jay Clements it was conclusive proof that he acted with extreme indifference to human life.

13. When Mr. Caldellis chose not to testify, I told him the law said that his decision could not be used against him.

14. I did not see the judge or jurors sleeping, but I am not saying it did not happen. I was focused on the witnesses at trial, not the judge or jurors. If I had seen either the judge or jurors sleeping, I might have moved for a new trial.

15. I was disappointed and discouraged by the jury verdict in this case. This was a close case. I fought very hard for my client, Mr. Caldellis, who I believed was not guilty of the extreme indifference means of committing Murder 1. However, I am also willing to admit that I may have made mistakes by failing to consider and/or propose all of the applicable law, as described above. I am willing to admit the possibility of these mistakes because Mr. Caldellis' right to a fair trial is more important than my pride.

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

19 April 2011, Seattle WA
Date and Place


Raymond McFarland

Appendix C

Law Office of
ALSEPT & ELLIS, LLC
621 SW Morrison Street., Suite 1025
Portland, OR 97205
(206) 218-7076 (ph) ✉ ReneeAlsept@gmail.com

September 15, 2010

Public Disclosure Officer
Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201-4046

RE: PUBLIC DISCLOSURE REQUEST

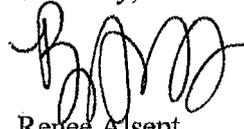
To whom it may concern:

Pursuant to the state records act, I am requesting, within five business days, an opportunity to inspect and copy your files regarding the following information:

- * Any filing and/or disposition standards regarding the crime of murder, specifically including but not limited to the filing of first-degree murder charges under the "extreme indifference to human life" prong (RCW 9.94A.030(1)(b));
- * Any filing and/or disposition standards regarding when a first-degree murder charge should be filed under the "extreme indifference" prong as opposed to a manslaughter charge;
- * A list of all cases filed charging first-degree murder under the "extreme indifference" prong over the last 5 years.

If you refuse to allow me to inspect any portion of these records, please provide me with a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld. RCW 42.17.340 (1). Feel free to respond to me by e-mail. I thank you for your attention to this matter.

Sincerely,



Renee Alsept
Attorney at Law



**Snohomish County
Prosecuting Attorney
Mark K. Roe**

Administration
Robert G. Lenz, Operations Manager
Robert J. Drewel Building, 7th Floor / M/S 504
3000 Rockefeller Avenue
Everett, WA 98201-4046
(425) 388-3772
Fax (425) 388-7172

September 21, 2010

Ms. Renee Alsept
Attorney at Law
621 SW Morrison Street, Suite 1025
Portland Or 97205

Re: Public Disclosure Request Concerning First Degree Murder involving but not limited to "Extreme Indifference to Human Life" prong.

Dear Ms. Alsept,

This will acknowledge receipt of your request received in our office on September 17, 2010, regarding the above-referenced matter. We will make every effort to provide you with the documents that can be legally provided under the Public Records Act no later than October 13, 2010. If we have not completed your request by that date you will be advised of a revised date.

Cost for the materials, *if* provided, will be \$.25 per page, plus postage. There are additional charges for reproduction of photographs, VHS or Cassette tapes and computer CD's. We accept cashiers checks, money orders, or business checks only. Personal checks and cash will not be accepted. We do not charge for 10 pages or less of documents. We will notify you by letter with the costs when we have completed review of the documents. ***We may be able to provide documents on CD's in PDF format, which may minimize the cost to you. Please advise if you prefer to receive responsive documents on CD rather than paper documents. Digital media will be provided on CD/DVD.***

If you have any questions I may be reached at 425-388-3527 or via e-mail at dwold@snoco.org.

Very truly yours,

Dave H. Wold
Public Disclosure Specialist

Administration
Robert G. Lenz, Operations Manager
Robert J. Drewel Bldg / 7th Floor
(425) 388-3772
Fax (425) 388-7172

Civil Division
Jason Cummings, Chief Deputy
Robert J. Drewel Bldg. / 7th Floor
(425) 388-6330
Fax (425) 388-6333

Family Support Division
Marie Turk, Chief Deputy
Robert J. Drewel Bldg. / 6th Floor
(425) 388-7280
Fax (425) 388-7295



renee alsept <reneealsept@gmail.com>

Public Records Request

11 messages

Wold, Dave <dwold@co.snohomish.wa.us>

Tue, Sep 21, 2010 at 3:10 PM

To: "reneealsept@gmail.com" <reneealsept@gmail.com>

I responded with our official letter yesterday, but wanted to follow up with a partial response by e-mail. I will take each of the 3 points of your request.

1. Any filing and/or disposition standards regarding the crime of murder, specifically including but not limited to the filing of first degree murder charges under the "extreme indifference to human life" prong (RCW 9.94A.030(1)(b)).

We do not have filing or disposition standards specifically for "extreme indifference to human life" prong. We may have them for Murder 1 and other levels of murder. That I will research from our directories.

2. Any filing and/or disposition standards regarding when a first degree murder charge should be filed under the "extreme indifference" prong as opposed to a manslaughter charge.

We do not have filing or disposition standards for item 2.

3. A list of all cases filed charging first degree murder under the "extreme indifference" prong over the last 5 years.

My initial inquires of this question (office wide request of all Deputy Prosecutor's) indicates we may have had one, 2 or 3 years ago. I will verify this information via a data base check and review of all Murder I cases in our office from the last 5 years.

I hope this helps you some until I can complete my research of possible responsive documents our office may have. Please let me know if I am headed in the right direction as to my search of our records.

Dave H. Wold
Legal Specialist/Public Disclosure Specialist
Snohomish County Prosecutors Office
425/388-3527
FAX: 425/388-3572
dwold@snoco.org

CONFIDENTIALITY STATEMENT

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renee alsept <reneealsept@gmail.com>

Tue, Sep 21, 2010 at 3:50 PM

To: "Wold, Dave" <dwold@co.snohomish.wa.us>



renee alsept <reneealsept@gmail.com>

Public Records Request

20 messages

Wold, Dave <dwold@co.snohomish.wa.us>
To: renee alsept <reneealsept@gmail.com>

Wed, Oct 20, 2010 at 2:44 PM

I have completed my search and the following is the results: This will be a follow-up to my e-mail dated 9/21/10.

Item 1: We have no written disposition/filing standards for Murder 1 and other levels of Murder.

Item 2: Previously Answered

Item 3: My search revealed one case where in extreme indifference prong was cited in the last 5 years. Since there is only one, rather than creating a list, I have attached the charging documents for your review.

This will complete this request.

Dave H. Wold

Legal Specialist/Public Disclosure Specialist

Snohomish County Prosecutors Office

425/388-3527

FAX: 425/388-3572

dwold@snoco.org

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<https://mail.google.com/mail/?ui=2&ik=7dbc449230&view=pt&q=caldellis%20jeff&qs=tr...> 4/17/2011

[Quoted text hidden]

Wold, Dave <dwold@co.snohomish.wa.us>
To: renee alsept <reneealsept@gmail.com>

Mon, Nov 15, 2010 at 9:21 AM

I have completed the second search back 15 years and have found nothing new to what has already been provided.

Dave H. Wold

Legal Specialist/Public Disclosure Specialist

Snohomish County Prosecutors Office

425/388-3527

FAX: 425/388-3572

dwold@snoco.org

CONFIDENTIALITY STATEMENT

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From: Wold, Dave
Sent: Wednesday, October 20, 2010 3:00 PM
To: 'renee alsept'
Subject: RE: Public Records Request

I actually searched back 8 years just to make sure. This is the only one I think is out there, probably in the last 20 years. It is simply a prong we do not use, but I can expand the search to 10 if you wish.

[Quoted text hidden]

renee alsept <reneealsept@gmail.com>
To: "Wold, Dave" <dwold@co.snohomish.wa.us>

Mon, Nov 15, 2010 at 9:28 AM

Appendix D

INSTRUCTION NO. 14

To convict the defendant of the crime of Murder in the First Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, the defendant discharged a firearm;
- (2) That the conduct of the defendant created a grave risk of death to another person;
- (3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That Jay Daniel Clements died as a result of defendant's acts; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then 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 anyone of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO

5

Conduct which creates a grave risk of death under circumstances manifesting an extreme indifference to human life means an aggravated recklessness which creates a very high degree of risk greater than that involved in recklessness.

INSTRUCTION NO. 7

To convict the defendant of the crime of manslaughter in the first degree as a lesser-included offense in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis discharged a firearm.
- (2) That the defendant's conduct was reckless.
- (3) That Jay Daniel Clements died as a result of defendant's acts;
and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then 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.

Appendix E



Welcome to the online source for the Washington Criminal Jury Instructions

11 WAPRAC WPIC 26.06

WPIC 26.06 Murder—First Degree—Indifference to Human Life—Elements

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 26.06 (3d Ed)

Washington Practice Series TM
Current through the 2010 Pocket Parts

Washington Pattern Jury Instructions--Criminal
2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S.
Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part V. Crimes Against Life
WPIC CHAPTER 26. Murder, First Degree

WPIC 26.06 Murder—First Degree—Indifference to Human Life—Elements

To convict the defendant 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 _____, the defendant created a grave risk of death to another person;
- (2) That the defendant knew of and disregarded the grave risk of death;
- (3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (4) That _____ died as a result of defendant's acts; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then 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.

NOTE ON USE

This instruction is intended to cover only RCW 9A.32.030(1)(b). If there is an issue of causal connection, use WPIC 25.02, Homicide, Proximate Cause—Definition.

For a discussion of the phrase "any of these acts" in element (5), see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21, Elements of the Crime—Form.

COMMENT

RCW 9A.32.030(1)(b).

Several changes have been made for the 2008 edition. First, the instruction's second element now includes a requirement that the defendant knew of and disregarded the grave risk of death. This change reflects the Court of Appeals' holding in State v. Barstad, 93 Wn.App. 553, 568, 970 P.2d 324 (1999), where the court held that RCW 9A.32.030(1)(b)'s phrase "under circumstances manifesting an extreme indifference to human life" requires a subjective mental state: that the defendant must "know of and disregard the fact his conduct presents a grave risk of death to others." Also, the wording of the instruction's elements has been revised in order to remove redundant language and to clarify that the date specified in element (1) refers to the date of the events that caused the death, not necessarily the date of the death itself.

If a defense of excuse or justification is raised, then the question arises whether the defense tends to negate an element of the crime. If it does, then the concerns discussed in the Introduction to Part IV apply and the State may have the burden of proving the absence of excuse or justification. See, e.g., State v. Gregory, 158 Wn.2d 759, 803-04, 147 P.3d 1201 (2006) (the defendant may be given the burden of proving a defense that overlaps with an element of the crime, but not one that negates an element). For further discussion of defenses, see the Comment to WPIC 26.04, Murder—First Degree—Felony—Elements.

For murders committed in 1997 or earlier, the State would be required to prove that death occurred within three years and a day of the defendant's act (or, for murders committed in 1983 or earlier, within one year and a day). See the Comment to WPIC 25.01, Homicide—Definition.
[Current as of July 2008.]

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11 WAPRAC WPIC 26.06

END OF DOCUMENT

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Appendix F

INSTRUCTION NO. 21

To convict the defendant of the crime of murder in the first degree as alleged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of September, 2006, Noel Caldellis engaged in conduct that created a grave risk of death to another person;
- (2) That Noel Caldellis engaged in that conduct under circumstances manifesting an extreme indifference to human life;
- (3) That Jay Daniel Clements died as a result of defendant's acts;
- (4) That the homicide was not excusable as defined in these instructions;
and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then 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.

WPIC 26.06 (modified: specific description of defendant's conduct omitted and element of excusable homicide added)

INSTRUCTION NO. 9

Conduct which creates a grave risk of death under circumstances manifesting an extreme indifference to human life means an aggravated recklessness evincing a depraved mind and which creates a very high degree of risk greater than that involved in recklessness. The actor must knowingly disregard a grave risk of death to others and engage in conduct that endangers human life generally. Any motive for the actor's conduct is a factor to be considered in determining whether conduct manifests extreme indifference to human life.

State v. Barstad, 93 Wash. App. 533, 567-68, 970 P.2d 324 (1999)
State v. Dunbar, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991)
State v. Guzman, 98 Wash. App. 638, 646, 990 P.2d 464 (1999)
State v. Anderson, 94 Wn.2d 176, 189, 616 P.2d 612 (1980)
LaFave & Scott, *Criminal Law*, 4th Ed. (2003), Sec. 14.4

Appendix G

Det. Rittgarn: Okay. Uh, this statement concerns an investigation of the crime of... of murder, which occurred on or about September 3rd, 2006 at 0220 hours. The uh, Brier case number is uh, 06-718. The interview is being conducted at the Lynnwood uh, Police Department.

Sgt. Grabinski: Do you want the Lynnwood case number?

Det. Rittgarn: Sure. What's the Lynnwood case number?

Sgt. Grabinski: 8576.

Det. Rittgarn: The Lynnwood case number is 06-8576. Today's date is September 4th, 2006 and the time now is 7:56 p.m. Interviewing officers—or detectives are Detective Jerry Rittgarn and Sergeant Jon Grabinski. Uh, Noel... do you pronounce it Noel or Noel?

N. Caldellis: Noel.

Det. Rittgarn: Noel, okay. Noel, are you aware that this statement is being recorded?

N. Caldellis: Yes.

Det. Rittgarn: And are you willing to have it recorded?

N. Caldellis: Yes.

Det. Rittgarn: What is your true name?

N. Caldellis: Noel Caldellis.

Det. Rittgarn: What is your present address?

N. Caldellis: 12538 35th Avenue Northeast.

Det. Rittgarn: What is your age?

N. Caldellis: Seattle, Washington.

Det. Rittgarn: Seattle, Okay.

N. Caldellis: Uh...

Det. Rittgarn: What is your age and date of birth?

N. Caldellis: Eighteen and November 22nd, '87.

Det. Rittgarn: All right. Do you understand that you have the right to remain silent?

N. Caldellis: Yes.

Det. Rittgarn: Do you understand that any statement you make can be used against uh... used as evidence against you in a court of law?

N. Caldellis: Yes.

Det. Rittgarn: Do you understand that you have the right at this time to an attorney of your own choosing and to have him present before and during questioning and the making of any statement?

N. Caldellis: Yes.

Det. Rittgarn: Do you understand that if you cannot afford to hire... if you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and to have him present before and during any questioning...

N. Caldellis: Yes.

Det. Rittgarn: ...and the making of any statement? Yes?

N. Caldellis: Yeah, yeah.

Det. Rittgarn: Okay. Do you understand that you have the right to exercise any of your rights at any time before or during any questioning and the making of any statement?

N. Caldellis: Yeah.

Det. Rittgarn: Do you fully understand each of these rights?

N. Caldellis: Yes.

Det. Rittgarn: And do you have any questions about any of these rights?

N. Caldellis: No, I do not.

Det. Rittgarn: Keeping these rights in mind do you wish to talk to me now about this crime?

N. Caldellis: Yeah.

Det. Rittgarn: Yes?

N. Caldellis: Sure. Yeah.

Det. Rittgarn: Okay. Is this statement voluntary on your part?

N. Caldellis: Yes.

Det. Rittgarn: Okay. Uh, lets kind of go back to uh... uh, the party in... in uh... in Seattle. Uh...

N. Caldellis: I mean actually this... like will it help if you had a lawyer? I mean...

N. Caldellis: Well, I mean we already talked. We talked in the back of the car or on the... on the trip up here and um, we went over pretty much everything.

N. Caldellis: Yeah.

Det. Rittgarn: Uh, that's something... you know I can't give you uh, advice on... on what to do. I mean I can't give you any legal advice. Uh, that's something you need to decide for yourself. Um, you've already...

N. Caldellis: At least...

Det. Rittgarn: You've already admitted to me that... that you did... you know you did do the shooting. You had the gun and you brought it to the party and uh, you ended up shooting the guy at the... at the party. Um, so we're just kind of...

N. Caldellis: I'm just curious...

Det. Rittgarn: ...getting it... getting your words...

N. Caldellis: ...like from experience with the... like I said it was with the DUI thing...

Det. Rittgarn: Uh huh.

N. Caldellis: ...if I had had a lawyer I would have been...

Det. Rittgarn: Well, you... you...

N. Caldellis: ...like fined and whatever and...

Det. Rittgarn: Like in...

N. Caldellis: ...only like...

Det. Rittgarn: Like in an instance with a DUI I mean you...

N. Caldellis: I mean I know it's gonna be a...

Det. Rittgarn: ...you didn't...

N. Caldellis: ...complete... completely different situation.

Det. Rittgarn: Yeah.

N. Caldellis: But I'm just saying for... from experience with that like if I had had a lawyer it would have been better I just think. That's all I'm asking like if it...

Det. Rittgarn: Well, it's uh... You know like I said I... I can't give you... I can't give you advice on... on what to do. I mean you've already admitted to me that... that you did uh... you did shoot the gun and... and it... and it did hit the guy and unfortunately he's uh... he's deceased now. Um, kind of an unfortunate uh, happening. Uh, we just want to get your words down on paper uh, the... you know kind of show your... showing your side of the story.

N. Caldellis: I mean you guys... you don't... you don't seem like a person that's trying to um...

Det. Rittgarn: Uh huh.

N. Caldellis: ...like get me you know as bad as you... as I can...

Det. Rittgarn: Yeah, I'm not...

N. Caldellis: ...as you can.

Det. Rittgarn: No, I'm not trying to...

N. Caldellis: I mean it's just...

Det. Rittgarn: I'm not trying to get you. Um...

Sgt. Grabinski: Noel... Noel, just for the record have we mistreated you at all since we contacted you?

N. Caldellis: Have you mistreated me?

Sgt. Grabinski: Yeah.

N. Caldellis: No.

Sgt. Grabinski: Have we been...

N. Caldellis: You've been...

Sgt. Grabinski: ...courteous to you?

N. Caldellis: Yes.

Sgt. Grabinski: And treated you with respect?

N. Caldellis: And I appreciate that, thanks.

Sgt. Grabinski: Okay.

N. Caldellis: But um...

Det. Rittgarn: I understand that...

N. Caldellis: Yeah, it's... it's fine.

Sgt. Grabioski: And we haven't made any threats to you...

N. Caldellis: No.

Sgt. Grabinski: ...or made any promises, right?

N. Caldellis: No.

Det. Rittgarn: Well, you know I have... I understand that... you know this is uh... uh... this is a big deal. Uh, but uh, you know dictating whether... having other people dictate what happened to you um, you know you can either have them tell us the story or have yourself. Uh, I think you've... you've already kind of told me uh, what happened in your own words and uh, you seemed interested in uh... in doing that.

N. Caldellis: Um hum. Yeah.

Det. Rittgarn: Okay.

N. Caldellis: Yeah, everything...

Det. Rittgarn: All right.

N. Caldellis: ...is cool.

Det. Rittgarn: Um, kind of going back to the party at uh... it was Jordan's place?

N. Caldellis: Yeah.

Det. Rittgarn: In Seattle?

N. Caldellis: Yeah.

Det. Rittgarn: Do you know the address of that?

N. Caldellis: I think it's (inaudible), I don't know the address.

Det. Rittgarn: Okay. Uh, off... Right off of 35th there?

N. Caldellis: Yeah, by the (inaudible).

Det. Rittgarn: Yeah.

N. Caldellis: Yeah.

Det. Rittgarn: What uh... What was going on there? Uh, it was uh... Saturday night?

N. Caldellis: Friend's birthday party, yes.

Det. Rittgarn: Saturday night?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Friend's birthday party?

N. Caldellis: Yeah.

Det. Rittgarn: Can you tell me a little about... bit about who was there at the time?

N. Caldellis: Uh, just a bunch of friends from wherever... you know from around the place. And there was a little drinking but not too much.

Det. Rittgarn: Not too much?

N. Caldellis: Yeah. And then uh, actually police showed up because of the noise level or whatever was too loud.

Det. Rittgarn: Uh huh.

N. Caldellis: Told everyone to leave. Be... or people were parked on where they like you guys were looking around.

Det. Rittgarn: Yeah, yeah.

N. Caldellis: Well, before that by the fence they were parked, a bunch of people were parked there, so they told them to move the cars and everything.

Det. Rittgarn: Okay, but it was cool after that? The police left and you guys continued with the party?

N. Caldellis: Yeah. It was... Not... I mean it wasn't like a party like... like this is only like good friends.

Det. Rittgarn: Okay, just a group of friends.

N. Caldellis: We were just kind of being loud I guess.

Det. Rittgarn: Okay.

N. Caldellis: So...

Det. Rittgarn: A get together.

N. Caldellis: Yeah.

Det. Rittgarn: Okay.

N. Caldellis: So the police I think they came back like another time.

Det. Rittgarn: Okay.

N. Caldellis: Told us to keep the noise down and that's all.

Det. Rittgarn: You were talking about uh, at one point in the night you were talking with uh... uh... Roddy [SP] and Jay uh, about uh... about possibly Jay finding...

N. Caldellis: No, I wasn't talking about it.

Det. Rittgarn: You didn't talk about it?

N. Caldellis: No.

Det. Rittgarn: Didn't talk about it?

N. Caldellis: They just... I was inside the house and a bunch of people are yelling outside, I go outside, and that's what they're talking about.

Det. Rittgarn: That's what they were talking about outside?

N. Caldellis: Yeah and then...

Det. Rittgarn: Who... Who's they? Who was talking about it?

N. Caldellis: Like Jay and Roddy were talking about it. And...

Det. Rittgarn: Do you know... Do you know Jay's last name?

N. Caldellis: Yeah.

Det. Rittgarn: What is his last name?

N. Caldellis: Uh, Kimura [SP].

Det. Rittgarn: Kimura?

N. Caldellis: Yeah.

Det. Rittgarn: How bout Roddy?

N. Caldellis: Uh-uh.

Det. Rittgarn: You don't know his?

N. Caldellis: No.

Det. Rittgarn: Can you describe Roddy?

N. Caldellis: Small lank kid with shaved head, earrings.

Det. Rittgarn: How old?

N. Caldellis: Looks like he's twelve.

Det. Rittgarn: Looks like he's twelve?

N. Caldellis: He's really... I don't know. I don't know.

Det. Rittgarn: Okay.

N. Caldellis: Probably sixteen, seventeen.

Det. Rittgarn: Okay.

N. Caldellis: I don't know how old he is.

Det. Rittgarn: So they were discussing... Go ahead.

N. Caldellis: Whatever is going on with the... the situation with the drive-by and whatever.

Det. Rittgarn: Okay.

N. Caldellis: I think they were gonna uh...

Det. Rittgarn: All right.

N. Caldellis: ...what I already told you.

Det. Rittgarn: Okay.

N. Caldellis: But uh... And then everyone just left. It was like, "Okay, follow me and lets go." So we all drove off.

Det. Rittgarn: Do you know about what time this is that you drove off?

N. Caldellis: No idea.

Det. Rittgarn: No idea—late?

N. Caldellis: I don't remember.

Det. Rittgarn: Kind of uh...

N. Caldellis: It was late.

Det. Rittgarn: Okay. Uh... Who... Who's everybody? Who drove off? Kind of describe who... who was in which car? Who was with who?

N. Caldellis: I don't know. All I remember is that I know I was driving. Like...I was drinking so I don't like fully recall you know who went and who was there and who was...

Det. Rittgarn: Well, who went...

N. Caldellis: ...in which car.

Det. Rittgarn: Who went with Humaun [SP]?

N. Caldellis: Roddy and Jay.

Det. Rittgarn: Roddy and Jay?

N. Caldellis: Yeah.

Det. Rittgarn: Okay and who went with you?

N. Caldellis: Uh, a guy I think his name is Miguel. I met him at the party.

Det. Rittgarn: Miguel?

N. Caldellis: Um hum.

Det. Rittgarn: Okay. We talked about another guy that was there. Tall black guy... named Mark?

N. Caldellis: Oh yeah.

Det. Rittgarn: Who... Who was he with?

N. Caldellis: I don't know but he wasn't with me so.

Det. Rittgarn: Okay. Well, how many cars were there?

N. Caldellis: Two.

Det. Rittgarn: Two?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. But he... he ended up at the party in Brier?

N. Caldellis: Yeah.

Det. Rittgarn: Okay, so more than likely...

N. Caldellis: So I don't... More than likely he was with...

Det. Rittgarn: He went with Hunaun?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Um, do you know Hanaun's last name? Any... Okay.

N. Caldellis: No.

Det. Rittgarn: How bout Mark?

N. Caldellis: No.

Det. Rittgarn: All right. Uh, so you guys drove up to the Brier area? What... What was the... What was the plan? I mean did... did... did uh, Roddy and Jay talk to you about what was gonna happen up there?

N. Caldellis: We were supposed to meet at some park.

Det. Rittgarn: At a park?

N. Caldellis: Yeah. I don't...

Det. Rittgarn: Okay.

N. Caldellis: I don't know the name of it. And then they weren't there and they were calling to talk on the phone but eventually it was... they told us to go to the house and they were like we'll figure out there so...

Det. Rittgarn: Okay.

N. Caldellis: ...we went there and...

Det. Rittgarn: You had a... You had a gun with you. Uh, was that... was that with you the whole time or how did... how did you get the gun?

N. Caldellis: Um, yeah it was with me.

Det. Rittgarn: It was with you?

N. Caldellis: Yeah.

Det. Rittgarn: Where... Where do you have it on you?

N. Caldellis: In the trunk.

Det. Rittgarn: You had it in the trunk?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Um, so you drove up to Brier. Where... Did you guys go anywhere prior...

N. Caldellis: Park.

Det. Rittgarn: ...to going to the party?

N. Caldellis: I... We were waiting.

Det. Rittgarn: Just waiting?

N. Caldellis: Yeah.

Det. Rittgarn: Waiting for what?

N. Caldellis: For them to meet us.

Det. Rittgarn: Okay and did that happen?

N. Caldellis: No, they were... they were supposed to and they just said come to the party, so...

Det. Rittgarn: Who... Who said come to the party?

N. Caldellis: To my knowledge the Roddy kid was talking to Cole—whoever the hell Cole is. I don't even know what this guy looks like.

Det. Rittgarn: Okay. Were you uh, next to Roddy when he was on the phone talking to Cole? Could you hear the conversation?

N. Caldellis: Yeah.

Det. Rittgarn: What... What was the conversation like on Roddy's side? What was he...

N. Caldellis: "Come meet us up now." He was, "You and Jay one on one," blah, blah, blah.

Det. Rittgarn: Okay.

N. Caldellis: And then...

Det. Rittgarn: So was he facilitating the fight between uh, Jay and... and Cole?

N. Caldellis: Uh... I guess.

Det. Rittgarn: Is that what it sounded like?

N. Caldellis: I guess, yeah.

Det. Rittgarn: Okay. So they told you guys to come to the party?

N. Caldellis: Yeah.

Det. Rittgarn: Did they give you directions?

N. Caldellis: Yeah. They told us exactly where it was.

Det. Rittgarn: And... What happened next?

N. Caldellis: Went there and parked a little bit down the street.

Det. Rittgarn: How come you parked down the street?

N. Caldellis: 'Cause I didn't know which house it was. So we parked wherever there was... 'Cause I mean it's a party there's like fifty people there.

Det. Rittgarn: Okay.

N. Caldellis: Not necessarily parking in front of the house.

Det. Rittgarn: All right.

N. Caldellis: So we parked a little down the street and walked up there.

Det. Rittgarn: Okay.

N. Caldellis: We saw there were people outside.

Det. Rittgarn: You had the gun in the trunk, did you open up the trunk and get the gun before going over there?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Where did... Where did you put it on your... on your body?

N. Caldellis: It was in like pocket, belt area.

Det. Rittgarn: Pocket, like uh... what side?

N. Caldellis: On my left.

Sgt. Grabinski: Was it inside your waistband like in here or was it...

N. Caldellis: Yeah. No, like... like through a belt.

Det. Rittgarn: Through uh...

N. Caldellis: And into the pocket.

Det. Rittgarn: Through the loop and into the pocket?

N. Caldellis: The loop?

Det. Rittgarn: Through the belt loop?

N. Caldellis: Like...

Sgt. Grabinski: Like this?

N. Caldellis: Yeah. My belt would have been like that, right?

Det. Rittgarn: Ah, okay.

N. Caldellis: So this would go like that.

Det. Rittgarn: Oh, I see, okay.

N. Caldellis: Yeah.

Det. Rittgarn: All right. All right so you got your... got your gun. Does your shirt go over it or...

N. Caldellis: Yeah.

Det. Rittgarn: Okay. So nobody can see it...

N. Caldellis: No.

Det. Rittgarn: ...right off the bat? All right.

N. Caldellis: And then we get there they start like yelling racist stuff at everyone who was there.

Det. Rittgarn: Were... Were people already outside when you got up there?

N. Caldellis: Yeah.

Sgt. Grabinski: Like who... Can you remember?

N. Caldellis: Like I said I don't know like who was fighting.

Det. Rittgarn: Okay.

N. Caldellis: So...

Det. Rittgarn: Can you describe... Did you see anybody that stood...

N. Caldellis: Bunch of white guys.

Det. Rittgarn: A bunch of white guys? How bout girls?

N. Caldellis: There were a few girls.

Det. Rittgarn: A few girls?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. And they were... Uh, can you kind of describe like the house? Is it just like a regular house with a yard in the front or kind of...

N. Caldellis: It's a house.

Det. Rittgarn: House.

N. Caldellis: I mean it's not like an apartment or anything.

Det. Rittgarn: Big yard? Small yard?

N. Caldellis: Yeah, there was a yard.

Det. Rittgarn: Okay.

N. Caldellis: A little yard, I guess.

Det. Rittgarn: All right. So were they standing outside on the...

N. Caldellis: Yeah.

Det. Rittgarn: ...in the front yard?

N. Caldellis: Um hum.

Det. Rittgarn: All right.

N. Caldellis: And right when we started walking up there I think Jay was out front and then just everybody started rushing up at him, at everyone.

Det. Rittgarn: Who... So who was rushing up at who?

N. Caldellis: No, Jay was just walking...

Det. Rittgarn: Um hum.

N. Caldellis: ...like waiting for the guy to come out that's... that's supposed to fight one on one you know.

Det. Rittgarn: Was somebody calling out to... to have Cole come out?

N. Caldellis: Uh, I don't recall.

Det. Rittgarn: Okay.

N. Caldellis: And then...

Det. Rittgarn: All right.

N. Caldellis: So a bunch of people started running out of the house. There's... I'd say there was about like fifty of their... people from the house outside fighting.

Det. Rittgarn: Where were you at?

N. Caldellis: I was kind of in the middle of the cul-de-sac.

Det. Rittgarn: Okay.

N. Caldellis: And...

Det. Rittgarn: And you saw people fighting?

N. Caldellis: Yeah.

Det. Rittgarn: Who... Who from the... from the people who uh... showed up with you who did you see fighting?

N. Caldellis: Um... Jay.

Det. Rittgarn: Jay?

N. Caldellis: Um hum and then there's...

Det. Rittgarn: Do you remember where he was fighting?

N. Caldellis: Uh-uh.

Det. Rittgarn: No? Okay.

N. Caldellis: Like I said... like it was rather dark and I couldn't even see...

Det. Rittgarn: Right.

N. Caldellis: ...who was who.

Det. Rittgarn: Right.

N. Caldellis: So reality like... I don't even know if anyone was fighting. Like who... Like who was fighting who, you know?

Det. Rittgarn: Okay.

N. Caldellis: It was people fighting.

N. Caldellis: You knew they were fighting you just didn't know who was fighting who.

N. Caldellis: Yeah, I don't even know if Jay was fighting and apparently when we got back to the house Jay was... he didn't even think he got... he fought the guy he was supposed to be fighting. That's what he told me.

Det. Rittgarn: Oh, so he was fighting with somebody he didn't even know...

N. Caldellis: Because what happened when we got to the house is they were like waiting and they just all ran out of the house and people had bats and shit and you know...

Det. Rittgarn: Did you see any bats?

N. Caldellis: Yeah.

Det. Rittgarn: Okay.

N. Caldellis: People were even holding sticks like...

Det. Rittgarn: Bats and sticks?

N. Caldellis: Yeah, like I mean kind of like they were prepared.

Det. Rittgarn: Okay.

N. Caldellis: Like when we first arrived they weren't... It wasn't everyone out there. You know it was a few people and they started fighting. But then once people realized people were fighting that's when like the entire house started coming out.

Det. Rittgarn: How come you didn't take off running right off the bat if these guys were holding bats and sticks?

N. Caldellis: Uh, 'cause we were there to fight. I don't know.

Det. Rittgarn: Because you were there to fight?

N. Caldellis: Um hum.

Det. Rittgarn: You guys were there and... the rumble was going down.

N. Caldellis: Yeah.

Det. Rittgarn: All right.

N. Caldellis: And I guess... Because people were fighting like... like I said there was a first group of like people that were fighting and I guess if you're fighting you don't really realize what's going...

Det. Rittgarn: Yeah.

N. Caldellis: ...on other than the fight.

Det. Rittgarn: So you were staying... you were basically standing back and you were watching all this happen, so you weren't really afraid of what was going on because everybody was fighting kind of amongst themselves.

N. Caldellis: Well, until the people started coming out of the house like thirty, forty people.

Det. Rittgarn: Okay, but you didn't run off or you didn't run away?

N. Caldellis: No. I kind of backed up.

Det. Rittgarn: Okay. How far?

N. Caldellis: I don't know—ten... ten steps or something.

Det. Rittgarn: Okay.

N. Caldellis: And then they started saying, "Pull the guns. Pull the guns."

Det. Rittgarn: Who was saying that?

N. Caldellis: Whoever... I don't know the people there like... you know.

Det. Rittgarn: Okay. At what point did you uh, pull your gun out?

N. Caldellis: After they were saying, "Pull the guns." Then I thought I saw someone with a gun.

Det. Rittgarn: Where did you think you saw somebody with a gun?

N. Caldellis: They were like two cars in the driveway.

Det. Rittgarn: Uh huh.

N. Caldellis: I don't know is that right? I recall two cars in the driveway and like...

Det. Rittgarn: You think there were two...

N. Caldellis: Like it was in between those two cars.

Det. Rittgarn: In between the two cars?

N. Caldellis: Yeah.

Det. Rittgarn: Okay, so you...

N. Caldellis: In back going like that.

Det. Rittgarn: In the driveway?

N. Caldellis: Yeah.

Det. Rittgarn: Okay and what do you think that person was doing?

N. Caldellis: Holding the gun.

Det. Rittgarn: Okay. So what did you do?

N. Caldellis: I shot one in the air.

Det. Rittgarn: All right and then what happened when you shot one in the air?

N. Caldellis: Uh, everyone started backing up.

Det. Rittgarn: Okay. And...

N. Caldellis: So we all started leaving.

Det. Rittgarn: What about the person that... that you thought had the gun? What did... What did he do?

N. Caldellis: It looked like he just left.

Det. Rittgarn: Okay.

N. Caldellis: Not left... I don't know like...

Det. Rittgarn: So you...

N. Caldellis: ...kind of like was trying to get away.

Det. Rittgarn: Okay. So you shot one up in the air and it pretty much scared everybody and people were fleeing?

N. Caldellis: And then they started coming back.

Det. Rittgarn: Coming back where?

N. Caldellis: Like at everyone.

Det. Rittgarn: Okay. At your friends that were fighting?

N. Caldellis: Yeah.

Det. Rittgarn: Okay and again nobody... nobody took off running at that point either?

N. Caldellis: No.

Det. Rittgarn: Everybody was still fighting?

N. Caldellis: Yeah.

Det. Rittgarn: Okay and then what happened?

N. Caldellis: And then I shot the gun into the crowd... like not necessarily trying to point out exactly at this person, but I just shot it.

Det. Rittgarn: Okay. Why... Why would you shoot the gun into a crowd... crowd of people?

N. Caldellis: Alcohol affects you... stupid ways. I don't know. If I was normal I don't think I would have even do anything.

Det. Rittgarn: Okay. Well, you said you had a little bit to drink but it really wasn't... it didn't affect you that much.

N. Caldellis: No, I didn't say that.

Det. Rittgarn: So...

Sgt. Grabinski: Were you aiming at somebody specific?

N. Caldellis: No.

Sgt. Grabinski: Okay.

N. Caldellis: And there was... at the party there was drinking going on, pretty much everyone that went there was drunk.

Det. Rittgarn: Okay. But you were sober enough to drive all the way up to Brier and uh, walk up the street.

N. Caldellis: Um, like I said I got a DUI before so I've...

Det. Rittgarn: Okay.

N. Caldellis: ...driven drunk before.

Det. Rittgarn: All right.

N. Caldellis: So it's not...

Det. Rittgarn: So should... Can you... Can you kind of describe how you... how you shot the gun?

N. Caldellis: Um...

Det. Rittgarn: Can you describe kind of what stance you took when you shot the gun?

N. Caldellis: Uh...

Det. Rittgarn: Were you aiming or was it just...

N. Caldellis: No, I wasn't... I wasn't like looking down the barrel trying you know... specifically aiming.

Det. Rittgarn: Okay.

N. Caldellis: Nor was I holding it with two hands. It was just kind of like boom, boom, boom.

Det. Rittgarn: Okay.

N. Caldellis: Yeah.

Det. Rittgarn: Do you remember what uh... what happened after you... you fired the three shots?

N. Caldellis: We all left.

Det. Rittgarn: Just kind of walked?

N. Caldellis: No, we ran.

Det. Rittgarn: You ran?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Did you hear any... anybody screaming or...

N. Caldellis: No.

Det. Rittgarn: No? So at that point after you shot the... the three rounds then everybody started running?

N. Caldellis: Yeah.

Det. Rittgarn: Okay.

N. Caldellis: I guess like the first one didn't scare them or something, so.

Det. Rittgarn: The first one up in the air?

N. Caldellis: Yeah.

Det. Rittgarn: Yeah, that didn't scare... but the three straight on that... that scared everybody?

N. Caldellis: There were two. I don't know... I think I fired two in the air maybe.

Det. Rittgarn: Okay.

N. Caldellis: Two.

Sgt. Grabinski: Say that again.

N. Caldellis: I think I fired two in the air at first.

Sgt. Grabinski: Okay.

N. Caldellis: Like boom, boom.

Sgt. Grabinski: Bang, bang or one now and one later?

N. Caldellis: No, like boom... like in a row.

Sgt. Grabinski: Okay. Did you hear any other gunshots?

N. Caldellis: No.

Sgt. Grabinski: Okay. Just yours? Okay.

Det. Rittgarn: So you guys took off running where uh... where did you go?

N. Caldellis: To the car and then we left.

Det. Rittgarn: You went to your car?

N. Caldellis: Yeah.

Det. Rittgarn: What kind of car is that?

N. Caldellis: A black Mazda 6.

Det. Rittgarn: Mazda... okay is that your mom's car?

N. Caldellis: It's my car.

Det. Rittgarn: It's your car?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Uh, who... who was with you?

N. Caldellis: Uh, Mark.

Det. Rittgarn: Mark?

N. Caldellis: Yeah.

Det. Rittgarn: The tall black guy?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Anybody else with you?

N. Caldellis: No.

Det. Rittgarn: All right. Was anybody uh... What was Hanaun driving?

N. Caldellis: His...

Det. Rittgarn: Do you know what kind of car he had?

N. Caldellis: No. No, I don't know him that well.

Det. Rittgarn: You don't know...

N. Caldellis: I think it was like a small like two door but I don't know.

Det. Rittgarn: Okay.

Sgt. Grabinski: Do you remember what color it was?

N. Caldellis: I don't remember.

Sgt. Grabinski: Light? Dark?

N. Caldellis: Light maybe.

Sgt. Grabinski: Light maybe?

N. Caldellis: Yeah. I don't know.

Det. Rittgarn: So you guys drove back down to the uh... the same party?

N. Caldellis: Yeah. Well, it wasn't a party anymore.

Det. Rittgarn: Oh, okay.

N. Caldellis: By that time it was done.

Det. Rittgarn: What happened down there?

N. Caldellis: We just talked about what was going on and then I went home.

Det. Rittgarn: Nobody... What was the demeanor of everybody? Were they... Were they afraid? Were they uh... Were they like hyped up or...?

N. Caldellis: I didn't know. No one even... Like I didn't even know I shot anyone.

Det. Rittgarn: You didn't know you shot anybody?

N. Caldellis: Uh-uh.

Det. Rittgarn: Okay.

N. Caldellis: Yeah, either did they so they just...

Det. Rittgarn: (Phone beeping--I'll call you back.) What was that?

N. Caldellis: Oh, what was I saying...

Det. Rittgarn: You didn't know you shot anybody?

N. Caldellis: Uh-uh and either did whoever I was with.

Det. Rittgarn: Okay. Um, so when you get... you have the gun back at the uh... back at the house.

N. Caldellis: Yeah.

Det. Rittgarn: What did you do with it?

N. Caldellis: Uh, put it in a plastic bag like a grocery bag.

Det. Rittgarn: Okay.

N. Caldellis: And then put it where I showed you guys.

Det. Rittgarn: Okay and obviously somebody must have taken it because it wasn't there.

N. Caldellis: Yeah.

Det. Rittgarn: Uh... Why'd ya... Why'd you throw it out?

N. Caldellis: Because I didn't want it. I don't know.

Det. Rittgarn: Because you didn't want it? It's...

N. Caldellis: I mean would... would you have kept it? Probably...

Det. Rittgarn: Well...

N. Caldellis: Probably not.

Det. Rittgarn: Yeah, that's uh... that's kind of a difficult question uh, you know it depends on what you have the gun...

N. Caldellis: Yeah.

Det. Rittgarn: ...what you're using the gun for. I mean if you're just target shooting and uh, you... you take the gun home yeah, you're gonna keep it.

N. Caldellis: Yes.

Det. Rittgarn: But uh, if you shoot somebody and uh, and kill somebody then yeah, more than likely you're... you're gonna get rid of it. So is that why you got rid of it?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. All right. Uh, who did you tell that the gun was there?

N. Caldellis: Uh, my friend.

Det. Rittgarn: Page [SP]?

N. Caldellis: Yeah.

Det. Rittgarn: Okay and uh... we're gonna be able to call him up and you think he's gonna uh... uh...

N. Caldellis: I'll call him.

Det. Rittgarn: Okay. You think we'll be able to find out where he... he took it?

N. Caldellis: I'll see when I talk to him.

Det. Rittgarn: Okay. Uh, where did you get the gun originally?

N. Caldellis: Uh, like I was telling you the party back a few months ago some guy had it in his trunk. I don't know the guy well. I don't even know who... I think his name was John.

Det. Rittgarn: John?

N. Caldellis: Yeah. Just bought it from him.

Det. Rittgarn: What was the...

N. Caldellis: The reason for buying it or...?

Det. Rittgarn: Yeah, what was the reason for buying it?

N. Caldellis: Looked cool, whatever.

Det. Rittgarn: Looked cool? How much did you pay?

N. Caldellis: A hundred something, a hundred fifty, right around there, something like that.

Det. Rittgarn: Okay. Um, did you register the gun in your name?

N. Caldellis: No.

Det. Rittgarn: How come?

N. Caldellis: Uh, I didn't know you have to or...

Det. Rittgarn: Okay.

N. Caldellis: I didn't know how.

Det. Rittgarn: Do you think it was a stolen gun?

N. Caldellis: Yeah.

Det. Rittgarn: Yeah?

N. Caldellis: Prob... I mean if someone is gonna sell it to you for that cheap then...

Det. Rittgarn: Yeah.

N. Caldellis: ...most likely.

Det. Rittgarn: Okay. When did you find out that this... that you uh... that you shot this kid?

N. Caldellis: Uh, the news thing.

Det. Rittgarn: On the news?

N. Caldellis: Yeah or I like I read on it.

Det. Rittgarn: Okay.

Sgt. Grabinski: When was that?

N. Caldellis: Oh, yesterday.

Sgt. Grabinski: What were you reading?

N. Caldellis: (Inaudible).

Sgt. Grabinski: Um hum.

Det. Rittgarn: How'd you feel?

N. Caldellis: Shitty.

Det. Rittgarn: Shitty?

N. Caldellis: Yeah.

Det. Rittgarn: Yeah.

N. Caldellis: Couldn't sleep.

Det. Rittgarn: Couldn't sleep? What uh... Did... Did you think about calling us?

N. Caldellis: Yeah, I thought about it but... You always want to hold on to like last hope you know. Like... Like if I called you then it would be turning myself in and I could be like well, what if they couldn't have, you know?

Det. Rittgarn: You think that's a bad thing turn yourself in?

N. Caldellis: Not that that's a bad thing but I might have been thinking like well, what if they would've never found out or something, you know?

Det. Rittgarn: Yeah. Well, like I said I mean there were forty to fifty peo...kids there, six people that you were there... you knew all of them, they know your names. Uh, it's easy to pick people out of a crowd and uh... you know see who was... who was with who. So yeah, eventually we would have caught up... caught up with ya. Uh... How... How do you feel about him?

N. Caldellis: About... what?

Det. Rittgarn: How do you feel about that that he's... he's dead? That... That you're the person that shot... shot this kid and...

N. Caldellis: Not good.

Det. Rittgarn: Not good?

N. Caldellis: It's gonna be something that's on my conscious for a long time.

Det. Rittgarn: Um hum.

Sgt. Grabinski: When uh... Page... When you told Page where the gun was uh, did Page say he was gonna go get it or...

N. Caldellis: No, he said... He's like, "Can't believe you did that. I don't want part of it." And then...

Sgt. Grabinski: He said, "I don't want any part of it,"?

N. Caldellis: Yeah.

Sgt. Grabinski: Okay and how do you know Page? Is he a long time friend or what?

N. Caldellis: Yeah.

Sgt. Grabinski: Okay and when we talk to him is he likely to be honest with us?

N. Caldellis: If I talk to him.

Sgt. Grabinski: Okay. Okay.

Det. Rittgarn: Going back to uh... uh, Roddy and Jay; uh, you know what... what was their... what was their main goal in this whole... uh... this whole incident? Like what... What was their purpose?

N. Caldellis: Roddy was probably... like I said you know Jay wanted to fight the guy that he believed did a drive-by on his uncle's house.

Det. Rittgarn: Okay. Did they know you had the gun?

N. Caldellis: Who?

Det. Rittgarn: Roddy? Uh, Jay?

N. Caldellis: Uh, no.

Det. Rittgarn: They didn't?

N. Caldellis: No.

Det. Rittgarn: Nobody knew you had the gun? You didn't show it to them before you put it in your trunk?

N. Caldellis: Um-um.

Det. Rittgarn: You didn't tell them, "Hey, I got this just in case." Okay. Were you uh... Why... Why'd you bring it?

N. Caldellis: No, no they knew I had it.

Det. Rittgarn: They knew you had it?

N. Caldellis: Yeah.

Det. Rittgarn: Well, why did you tell me they didn't?

N. Caldellis: I don't know. Stupid.

Det. Rittgarn: So what was the... How... How did the conversation go?

N. Caldellis: Like I... Like they just knew like I had it you know like...

Det. Rittgarn: So they knew you had it?

N. Caldellis: Yeah. There wasn't like a conversation about it like, "Bring it," or something. It was just like...

Det. Rittgarn: They just... They just knew you had it?

N. Caldellis: Yeah.

Det. Rittgarn: Okay. Did they have any weapons with them?

N. Caldellis: Not that I know of.

Det. Rittgarn: Okay. Did any of you get injured during the uh... the fight?

N. Caldellis: I don't think so.

Det. Rittgarn: You don't think so?

N. Caldellis: I mean there was some cuts and scrapes.

Det. Rittgarn: Nothing...

N. Caldellis: But nothing like...

Det. Rittgarn: Nothing major?

N. Caldellis: No.

Det. Rittgarn: Nothing that would have drawn blood or anything. Okay, because you all made it back to the... the house and...

N. Caldellis: Yeah.

Det. Rittgarn: ...and talked? Okay. Um, there's one... one person that I don't know and um... but I'm sure you know we'll find out uh, through everybody else is Miguel. Uh, how... How do we get a hold of him?

N. Caldellis: I have no idea.

Det. Rittgarn: No idea?

N. Caldellis: Um-um. Like I said I met him that night at the party, so.

Det. Rittgarn: Who... Who was he friends with? Who was he friends with?

N. Caldellis: Uh, I think he came with Hunaun and them.

Det. Rittgarn: Hunaun?

N. Caldellis: Yeah, maybe Roddy. I don't know.

Det. Rittgarn: Okay.

Sgt. Grabinski: I may have missed this part but when you got back to J.D's house after the party or after...

Det. Rittgarn: Jordan.

Sgt. Grabinski: Jordan?

Det. Rittgarn: Yeah.

Sgt. Grabinski: Okay. Does he go by that name?

Det. Rittgarn: Yeah, I think...

N. Caldellis: I don't know.

Det. Rittgarn: Somewhere down the road we heard J.D. and...

Sgt. Grabinski: Okay.

Det. Rittgarn: I think it's the same person.

Sgt. Grabinski: Okay, so after you got back did everybody go back to Jordan's house?

N. Caldellis: After we...

Sgt. Grabinski: Yeah, that was at the fight?

N. Caldellis: Yeah.

Sgt. Grabinski: Okay and what did you guys talk about?

N. Caldellis: Just what happened.

Sgt. Grabinski: Okay. Was it a big deal or no big deal, just another day?

N. Caldellis: Not really 'cause no one thought anybody got shot.

Sgt. Grabinski: Okay. Okay. Did you ever see... Did police cars ever come by you or anything?

N. Caldellis: No.

Sgt. Grabinski: Never saw a police car? Okay. When you left there do you know what route you took back to Jordan's? Or when you left the party what was your way out of town do you know?

N. Caldellis: Uh... I have no idea.

Sgt. Grabinski: Did you get on the freeway?

N. Caldellis: I didn't get on the freeway. I just drove down a bunch of roads until I figured out where the hell I was.

Sgt. Grabinski: Were you following the other car?

N. Caldellis: I wasn't following.

Sgt. Grabinski: So were you kind of lost?

N. Caldellis: Yeah.

Sgt. Grabinski: Okay. Did you end up on Bothell Way or Ken... in... up... go up on to Lake City Way that way?

N. Caldellis: We were... right by the LFP mall.

Sgt. Grabinski: By the what?

N. Caldellis: LFP mall.

Det. Rittgarn: Lake Forest Park?

N. Caldellis: Yeah.

Det. Rittgarn: Oh, the LF...

N. Caldellis: I think I ended up on the...

Sgt. Grabinski: Okay.

N. Caldellis: ...Ballinger and then...

Sgt. Grabinski: Okay. Okay. I know where you're talking about. Did this... Did this uh, gun have a long barrel? How long was the barrel?

N. Caldellis: A glass. I can't really...

Sgt. Grabinski: Longer than this pen?

N. Caldellis: Maybe a little longer.

Sgt. Grabinski: Okay.

Det. Rittgarn: What color?

N. Caldellis: Silver.

Det. Rittgarn: What... What type of handgun was it?

N. Caldellis: Revolver.

Det. Rittgarn: Revolver?

N. Caldellis: Yeah.

Sgt. Grabinski: When uh... When you pulled the trigger did the hammer go back on itself or did you have to cock it and then shoot it?

N. Caldellis: Uh, you have to cock it.

Sgt. Grabinski: You have to cock it each time you want to shoot it? Okay.

Det. Rittgarn: Is there anything you would like to add to this statement at this time Noel?

N. Caldellis: No. Show me mercy for what I did. I didn't mean to shoot anyone. I never really wanted to even and all that.

Sgt. Grabinski: (Inaudible).

Det. Rittgarn: Okay. Is the information given in this statement true to the best of your knowledge?

N. Caldellis: Yeah.

Det. Rittgarn: Was there any force used or threats or promises made to make...

N. Caldellis: No.

Det. Rittgarn: ...you give this statement?

N. Caldellis: No.

Det. Rittgarn: No?

N. Caldellis: No.

N. Caldellis: Okay. This statement ends at 8:26 p.m. and it's uh, still September 4th, 2006.

Murder
Interview of Noel Caldellis

Lynnwood PD 06-8576

Tape Stops.

Transcribed on 09/07/06 by A. M. Williams at Williams Transcripts
Reviewed on 09/ /06 by # , Lynnwood Police Department

Detective Rittgarn
Sergeant Grabinski

09/04/06

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Appendix H

Juror No. _____

CONFIDENTIAL JUROR QUESTIONNAIRE

State v. Noel Evan Caldellis

Snohomish County Superior Court Cause No. 06-1-02485-5

You have been selected as a prospective juror in the above-referenced case. This is a criminal case involving a charge of murder. The case involves a 21-year-old man, Jay Clements, who was shot and killed during a fight outside a party involving teenagers and young adults at a home in the town of Brier. The incident occurred on September 3, 2006. Please answer the following questions truthfully.

1. Have you heard of this case? Yes _____ No _____
2. Do you recall seeing, hearing, or reading anything about this case in newspapers, television, radio, or the internet? Yes _____ No _____

If your answer to either question above is "Yes," please explain: _____

3. Do you feel there is anything about your knowledge or memory of this case that would affect your ability to be a fair and impartial juror if selected to sit as a juror in this case?
- Yes _____ No _____

4. Given the nature of this case, is there anything about your own personal experience or feelings, or that of a close friend or relative, that might affect your ability to serve as a fair and impartial juror if selected to sit as a juror in this case? Yes _____ No _____

If your answer to this last question is "Yes," please explain: _____

JSM007 DISPLAY DOCKET SNOHOMISH SUPERIOR 01-27-11 14:46 26 OF 40
CASE#: 06-1-02485-5 JUDGMENT# YES
TITLE: STATE OF WASHINGTON VS CALDELLIS, NOEL EVAN
NOTE1:
NOTE2: NEW J&S #262 (RE CNT 1)

STATUS: CMPL DATE: 04/26/2010
SECONDARY

SUB#	DATE	CODE	DESCRIPTION/NAME
		JDG13	JUDGE THOMAS J. WYNNE
161	11 06 2007	CNRSE	CONFIDNTL REPORT IN SEALED ENVELOPE
-	11 06 2007	AT	ATTACHMENT /DFDT GENERAL QUESTIONS FOR JURY PANEL
162	11 06 2007	ORSJ	ORDER SEALING DOCUMENT
		JDG13	JUDGE THOMAS J. WYNNE
163	11 06 2007	CNRSE	CONFIDNTL REPORT IN SEALED ENVELOPE
-	11 06 2007	OTHER	OTHER /JUROR QUESTIONNAIRES/ INDIVIDUAL VOIR DIRE
164	11 07 2007	ORSJ	ORDER SEALING DOCUMENT
		JDG13	JUDGE THOMAS J. WYNNE
165	11 07 2007	CNRSE	CONFIDNTL REPORT IN SEALED ENVELOPE
-	11 07 2007	OTHER	OTHER /JUROR FORMS
166	12 11 2007	EXLST	EXHIBIT LIST JURY TRIAL
-	12 18 2007	EXR	EXHIBITS RECEIVED TTL-277 JB

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JSM007 DISPLAY DOCKET SNOHOMISH SUPERIOR 01-27-11 14:46 25 OF 40
CASE#: 06-1-02485-5 JUDGMENT# YES
TITLE: STATE OF WASHINGTON VS CALDELLIS, NOEL EVAN
NOTE1:
NOTE2: NEW J&S #262 (RE CNT 1)

STATUS: CMPL DATE: 04/26/2010
SECONDARY

SUB#	DATE	CODE	DESCRIPTION/NAME
			ARMED WITH FIREARM CNT 3
154	12 11 2007	VRD	VERDICT FORM 4: GUILTY CNT 4 ASSAULT 2ND DEG
155	12 11 2007	SPV	SPECIAL VERDICT FORM S4: YES AS TO ARMED WITH FIREARM CNT 4
156	12 11 2007	ORCMT	ORDER OF COMMITMENT - TEMP
		JDG13	JUDGE THOMAS J. WYNNE
157	12 11 2007	ORST	ORDER SETTING SENTENCING DEPT 7 JDG WYNNE 1PM
		JDG13	JUDGE THOMAS J. WYNNE
158	11 06 2007	ORSJ	ORDER SEALING DOCUMENT
		JDG13	JUDGE THOMAS J. WYNNE
159	11 06 2007	CNRSE	CONFIDNTL REPORT IN SEALED ENVELOPE
-	11 06 2007	OTHER	OTHER /JUROR QUESTIONNAIRES
160	11 06 2007	ORSJ	ORDER SEALING DOCUMENT

01-08-2008JC

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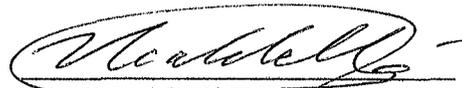
Appendix I

DECLARATION OF NOEL CALDELLIS

I, Noel Caldellis, declare:

1. I am the petitioner in this Personal Restraint Petition.
2. I am aware that prior to the questioning of jurors in my case that they were given a questionnaire to complete.
3. This questionnaire was private. No one was allowed to see it other than the attorneys, the judge, and myself. In other words, my family and other members of the public were not allowed to read the completed questionnaires.
4. I recall that my attorneys did not object to the confidential nature of the juror questionnaire.
5. I was not asked if I objected.
6. I did not think I had a right to object. Instead, I thought it was my attorneys' decision.
7. I did not waive and did not authorize my attorneys to waive my right to an open and public trial by permitting jurors to answer certain questions privately.
8. My trial attorneys simply made those decisions without discussing them with me at all.
9. If my rights had been explained to me and if I had been asked, I would not have waived my right to an open and public trial.
10. When I chose not to testify, I believed that the law said that my decision could not be used against me. I was upset when the prosecutor later asked jurors if they could think of a big reason that someone might not testify. If that statement was properly made in response to my attorney's statements it is important for me to point out that I did not authorize my attorney to invite a violation of my constitutional rights.

04/15/2011
Date and Place


Noel Caldellis

Appendix J

DECLARATION OF SHERRI CALDELLIS

I, Sherri Caldellis, declare:

1. I am the mother of Noel Caldellis.
2. I attended nearly every day of my son's trial. I watched and listened to the pre-trial and trial proceedings carefully.
3. I recall Judge Wynne briefly dozing off and sleeping on two occasions.
4. On both occasions, Judge Wynne's head would slowly drop down; his eyes would close; and he'd remain still in this position for a short period of time until his head would jerk up and his eyes open.
5. Both times Judge Wynne fell asleep, it was in the afternoon after the lunch hour.
6. In neither instance did Judge Wynne stay asleep for very long. When he awoke, he would briefly look around and then return his attention to the witness.
7. I discussed the fact that Judge Wynne fell asleep with some members of my family on at least one occasion as we drove home from the court.
8. I do not remember discussing this with Noel's lawyer.
9. I did not observe any of the jurors sleeping. However, because I was sitting right behind Noel and his attorney it was difficult for me to see the jurors. In addition, I was taking notes during the trial so I was usually looking toward the witness and the judge, as opposed to looking at the jury members who were seated on my right.
10. Instead, my focus was often on the judge because he was directly in front of me.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

4/11/11 Seattle, WA.
Date and Place

Sherri Caldellis
Sherri Caldellis

Appendix K

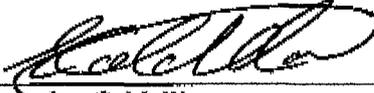
DECLARATION OF EVANGELOS CALDELLIS

I, Evangelos Caldellis, declare:

1. I am the father of Noel Caldellis.
2. I attended almost all of my son's trial in Snohomish County Superior Court before Judge Wynne.
3. At trial, I sat next to my wife, Sherri. We both sat behind our son, Noel, and his attorneys.
4. From where I was sitting, the judge and the witnesses were usually right in front of us. The jurors were off to my right.
5. Sometimes during trial, the judge was looking down--maybe resting his eyes. However, I recall one time when he briefly fell asleep in the late afternoon. It was the afternoon when a number of the kids testified. If I recall correctly, Judge Wynne fell asleep when defense attorney Ray McFarland was cross-examining one of the witnesses.
6. I remember that we talked about this in the car ride home. However, I do not recall mentioning it to the defense attorneys.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

4-11-11 Seattle
Date and Place


Evangelos Caldellis

Appendix L

DECLARATION OF JENNIFER MERANTO

I, Jennifer Meranto, declare:

1. I am the maternal aunt of Noel Caldellis.
2. I was present almost daily from jury selection to final day. I was seated in the second row of the courtroom directly behind my sister and her husband who sat behind the defense table. I had a clear view of the members of the jury, as well as the judge, the defense and the prosecution.
3. I did not take notes during the trial and instead I focused on observing. Observation plays a key role in my own work as a photographer. I am sensitive to the undercurrent messages we all emit through body language and expression and I was focused on trying to read as best I could the reactions and mood changes of the judge and jury members.
4. From the first day I knew the names of each juror and where they were seated.
5. In the courtroom there were some who were very focused on taking notes and others who randomly took notes. Some took no notes at all.
6. In order to fully understand why people were sleeping and how and when they slept it is important to understand the atmosphere of the courtroom. It was November and in the mornings the courtroom was unheated and I was often uncomfortably cold. Members of the jury wore layers of clothing as I did to keep warm. During this time everyone was awake and attentive. In the afternoon, after lunch when the courtroom was warmer and bellies were full the atmosphere was more conducive to sleep. I remember that we talked about this in the car ride home.
7. I observed Josiah Tregoning sleeping on more than one occasion. I watched him a lot because he never took notes and I wondered about him. Shortly after the verdict I wrote a comment in an email to one of the investigators dated 12/14/07.

"I have a bad feeling about Josiah, I did not like him all along, he never took notes, he slept a lot, how could he be the foreman?"

8. There were two other jurors who sat right beside each other that also slept. Voltaire Marave who was the alternate, and Donald Rehfeldt who was the

oldest jury member. We did not understand at the time the implications of jurors and others sleeping, it seemed a normal human response to the long hours, closed atmosphere and the content of some of the testimony.

9. For several days in a row Mr. Hunter spent long hours on detailing maps. There was frequent fidgeting, restless movement, yawning, and other clear signs of boredom all over the courtroom. It was during this time that I observed the jurors and others sleeping. The specific days I recall were 11/21/2007 and 11/26/2007 in the afternoon.
10. Officer Rittgam who was sometimes seated at the prosecution table frequently slept, more than once we discussed his sleeping among ourselves as he was almost close enough for us to reach out and tap him on the shoulder.
11. The judge was farther away and could have been resting his eyes, but he seemed immobile at times

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

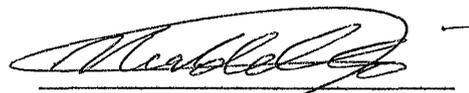
4-18-11 Artigua West Indies
Date and Place

Jennifer Merranto
Jennifer Merranto

VERIFICATION OF PETITION

I, Noel Caldellis, verify under penalty of perjury that the attached petition is true and correct and filed on my behalf.

04/15/2011
Date and Place


Noel Caldellis