No. 89706-9

IN THE COURT OF APPEALS OF THE

STATE OF WASHINGTON

DIVISION ONE

IN RE THE PERSONAL RESTRAINT OF:

MATTHEW WILSON MOI

PETITIONER.

PERSONAL RESTRAINT PETITION

WITH LEGAL ARGUMENT AND AUTHORITIES

MATTHEW MOI DOC# 873600
C.B.C.C. 1830 EAGLE CREST
WAY, CLALLAM BAY, WA 98326

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

IN RE THE PERSONAL RESTRAINT PETITION OF:	)	NO.
MATTHEW MOI,	)	PETITIONER'S MEMORANDUM OF AUTHORITIES
Petitioner.	)	

A. STATEMENT OF CASE

The facts stated are from the record before this Court of Appeals in State v. Moi, COA 61167-4-I (2010). Additional facts are supported by attached Exhibits. Facts related to each Ground, will be included in their respective subsections. Mr. Moi was charged by an amended information with one count of first degree premeditated murder with a firearm and one count of unlawful possession of a firearm in the first degree.

On October 18, 2006, a trial by jury was held before the Honorable LeRoy McCullough on both counts. Later upon a defense motion to sever count two, the unlawful possession of a firearm charge, Mr. Moi waived his right to a jury trial on count two and allowed the trial judge to sit as trier of fact for count two alone, during the course of the jury's consideration of count one.

On November 30, 2006, a mistrial was declared when the jury indicated that it was unable to return a unanimous verdict. The jury was split 6-6. On December 14, 2006, Judge McCullough entered a finding of not guilty, as to the unlawful possession of a fire-

arm charge. Count two charged Mr. Moi with being a felon in possession of the firearm, "alleged to have been used in the actual shooting of Keith McGowan." However the trial court found Mr. Moi not guilty on that count.

1. SUBSTANTIVE FACTS

The State was unsuccessful in its' first trial, to convict Mr. Moi under the evidence and theory, as charged in the information. Out of concern the second trial would be a failure, the State changed it's theory and portrayed the case, as a gang related killing over Moi's repeat objections. 9/4/07 RP35.

Moi testified in his won defense and admitted to seeing the shooting but explained he was not involved in it. 11-15-07 RP 1943-47. Moi went to the apartment complex to look for his friends in hopes of hearing about what happened to his mother, who was previously jumped by gang members. 11/15/07 RP 1901-02.

Moi testified he was given a ride by someone he knew as JJ. 11/15/07 RP 1898. Moi thought JJ would stay in the car and admitted to seeing two guns in the front seat. 11/15/07 RP 1904-06. Moi went to Keith McGowan's door with, Kevin Carpenter, (Mr. McGowan's cousin). Moi asked if they saw Will or Tiny but was told they don't live there. 11/15/07 RP 1912.

Moi then left and JJ was on side of the building, stepped in and started shooting. 11/15/07 RP 1945. Kevin Carpenter confirmed Moi was with two other guys he did not know. 10/29/07 RP 461. Mr. Carpenter testified in part that, he went in and told his cousin someone wants to talk to him so he put his baby

down and went to the door. The door closed and shots were heard. Carpenter came to the door and his cousin stumbled in. He then ran outside but there was nobody around. 10/29/07 RP 473-76. Mr. Carpenter did not talk to the cops that night because of warrants for his arrest. 10/29/07 RP 479.

Another cousin present at the shooting, Ms. Palmer Jack, initially testified she heard the door shut and gun shots. 11/07/06 RP 124. That the person seen resembled someone with gold teeth and she took money off her cousin. 11/7/06 RP 153,163. Exhibit A. In the second trial, Ms. Palmer Jack's testimony substantially changed, over Moi's objection. She testified in part that, the door shut and she heard shots. That she took drugs off her cousin, as he lay dying. 11/1/07 RP 850.

This time, Ms. Achilla-Jack testified that Moi looked familur from a prior shooting at the bar and grill when someone got murdered. Defense counsel objected and moved to strike but was denied. 11/1/07 RP 857-58. On cross examination, defense counsel clarified that Moi was not connected to the prior murder at the grill. 11/6/07 RP 1067.

The jury was also allowed to hear unreliable testimony from a jailhouse informant, named Ottis Williams. Mr. William's testimony substantially differed from the first trial. Mr. Williams was in the same gang as Keith McGowan, who was a good friend and little homie. RP 51-52. Mr. Williams was trying to get something out of being an informant and was out for justice. RP 61-62.

Mr. Williams was protecting Mr. Moi, from gang retaliation

in jail. RP 63. Mr. Williams was trying not to go to the penitentiary for being an informant. For his cooperation, Mr. Williams had a felony reduced to a gross misdemeanor. RP 75-76. Mr. Williams testified that Moi was looking for anybody from Hoover. "He said he wanted to only shoot him twice but he ended up letting the whole clip off." RP 60. See 11/8/06 RP 51-76 at Exhibit B.

In the second trial, Mr. Williams sang a different song. He testified that Moi said he went up there because his brother got killed by some of the homeys and he wanted to seek revenge for his brother. He slept on his brother's grave all night before he went up to the apartments looking for anybody from hoover, and it just happened to be baby nut he ran into. And he said he didn't let the whole crip out of him, he just want to shoot him but he blacked out. 11/13/07 RP 1511.

Mr. Williams testified that Moi was so scared of him that Moi was giving him everything.... If somebody came in the jail tank and they were from hoover, they could get to Moi. 11/13/07 RP 1549-50. Based on Moi's reported fear of Mr. Williams, the testimony is highly suspect and unreliable. No cautionary instruction was given to the jury. Mr. Moi's trial was unfair and prejudiced in ways argued herein.

B. GROUNDS FOR RELIEF

Mr. Moi seeks relief pursuant to RAP 16.4 (c)(2)(conviction was obtained in violation of the State and Federal Constitutions). This petition raises constitutional issues and the facts herein, warrant a full hearing on the merits in this Court and the appoint-

ment of counsel. RAP 16.11.

GROUND ONE

THE TRIAL JUDGE DENIED MOI HIS FUNDAMENTAL RIGHTS TO A OPEN AND PUBLIC TRIAL, BY PRIVATELY QUESTIONING A EMPANELED JUROR, DURING "A BREAK" OUTSIDE THE PRESENCE OF THE PUBLIC AND MOI.

A. RELEVANT FACTS

During a break in trial, the trial court talked to defense counsel, Moi, and the prosecutor, about a note from juror number 8. The note was a request to the trial court, for permission to be relieved from jury duty, due to financial hardships. Moi would not waive his right to a 12 person jury and sought to have the juror excused.

The trial court was concerned with losing other jurors because of reported hardships and "can't let her go and risk a mistrial." Instead the trial court stated, "I do want to talk to her and just let her know why we can't do this. I think it would be better to do it outside the presence of everyone else. Do you guys want to be here when I do that or should I just talk to her at break."

Defense counsel did not object to the trial court talking to her alone. Sometime after the jury was excused for lunch break, the trial court questioned juror no. 8 outside the presence of the public, Moi, defense counsel, and the prosecutor. The trial court informed all parties that, "let me tell you that I did talk to juror no. 8, and I did tell her that we were sympathetic but there was really nothing we could do."

"But if something came up where we felt we could safely release her, we would do so, but she was not to tell that to the other jurors. And she said she was concentrating and she was paying attention, it was just very difficult for her." And I'm confident after talking to her that she will pay attention.

She understood the constitutional right to a jury of 12 and understood that she had unfortunately gotten herself in this position and so thats it. 11/13/07 RP 1402-07; 1500-01. Exhibit C. See also (Affidavit of Mattew Moi) Exhibit D.

B. MOI IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT PRIVATELY QUESTIONED AN EMPANELED JURY MEMBER.

The trial judge specifically stated that it would be better to question a jury member outside the presence of everyone else. 11/13/07 RP 1406. The trial judge then questioned the juror outside the presence of counsel and Moi. The trial court did not explain why it was necessary to question the juror privately.

The unnecessary private questioning of the juror violated Moi's right to a public trial under Art. 1, Sec. 10 and 22 of the Washington Const. and the 6th Amendment to the United States Const.. See, State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995); Waller v. Georgia, 467 U.S. 39 (1984). "The 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." Waller, 467 U.S. at 45.

"The 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." Waller, 467 U.S. at 45. The trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing 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 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 closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59. When the right to a public trial is violated, prejudice is presumed and a new trial must be granted even when the closure related only to a pretrial hearing. Bone-Club, 128 Wn.2d at 261-62. The same rule applies to the questioning of potential jurors in chambers. Personal Restraint of Orange, 152 Wn.2d 795,100 P.3d 291 (2004).

This standard generally applies when the claim is raised for the first time on post conviction review because appellate counsel would have been ineffective in failing to raise it. See Ground 7 below. It is true that defense counsel did not object to the private questioning and closure in Moi's trial.

The Washington Supreme Court has explained, however, that failure to object cannot constitute a waiver. Bone-Club, 128 Wn.2d at 257, in that case, "the court neither sought nor received an objection or assent from defendant on the record." Id. "the motion to close, not defendant's objection, triggered the trial court's duty to perform the weighing procedure." Id. at 261. See also, State v. Easterling, 157 Wn.2d at 173 n.2 ("A criminal accused's rights to a public trial and to be present at his criminal trial are issues of constitutional magnitude that may be raised for the first time on appeal").

Here, when the trial judge went on record and stated, "I think it would be better to do it (Question The Juror) outside the presence of everyone else," the trial court was required to perform the weighing procedures "As to why questioning the juror outside the presence of the defendant, the public, and defense counsel," fit the closure criteria set out in, Bone-Club, 128 Wn.2d at 261.

The private questioning of the juror was plain error. See, U.S. v. Neff, 10 F.3d 1321 (7th Cir. 1993)(Defendant's 6th Amend. Right to Trial by Jury was violated when trial judge answered jury's questions... Where judge's communications with jury were made outside defendant's presence and there was no record showing who was present when answers to jury's questions were determined nor how whoever was present came up with answers); Estes v. Texas, 381 U.S. 532 (1965)(Purpose of 6th Amendment requirement of public trial is to guarantee that accused would be fairly dealt

with and not unjustly condemned; history has proved secret tribunals are effective instruments of oppression).

See also, State v. Wise, Wn.2d ,288 P.3d 1113 (2012) and State v. Paumier, Wn.2d ,288 P.3d 1126 (2012)(Both cases make it clear that failing to consider Bone-Club before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial).

In State v. Lam, 161 Wn.App. 299 (2011) this honorable Court of Appeal held, "that a trial judge's in chambers questioning of a already seated juror regarding the juror's safety concerns in a murder prosecution without first conducting the analysis and factors specified in Bone-Club, violated defendant's right to a public trial." The court further held that, "Since a defendant's public trial rights apply to voir dire, by analogy they apply to the questioning of a sworn juror in chambers, conducted for the purpose of determining whether that juror will continue to serve."

In the case at bar, the trial court privately questioned the juror for "the sole purpose of determining whether the juror will continue to serve." Therefore this court should follow the holding in State v. Lam, supra. and remand for a new trial.

GROUND TWO

MOI'S STATE AND FEDERAL RIGHTS TO NOTICE OF CHARGES WERE VIOLATED WHERE THE STATE BROUGHT MOI TO A NEW TRIAL, AFTER A MISTRIAL, WITHOUT FILING A NEW CHARGING INFORMATION.

Mr. Moi submits where the State proceeded to a new trial, After a mistrial, but failed to file a new amended information

to substantiate the State's new theory of the case, that his Article 1, Sec. 22 Rights were violated and this caused substantial prejudice to his Right to a fair trial, warranting a new trial.

A. RELEVANT FACTS

On October 26, 2004, Mr. Moi was charged by information with one count of murder in the first degree. On November 15, 2006, the State filed a second amended information charging Moi with count I, murder in the first degree, and count II, unlawful possession of a firearm in the first degree. Exhibit E. (1st and 2nd Amended Infos.).

The charges stemmed from Detective Paul Young's certification for determination of probable cause. Exhibit F. (Cert. for Prob. Cause). Based on the certification and the State's theory in the first trial, Moi went to the Emerald Villa Apartments because Moi's mother had been jumped by Hoovers. See pages 4-5 Exhibit F.

On November 30, 2006, a mistrial was declared, due to a hung jury. On December 14, 2006, count two of the second amended information, was dismissed based on insufficiency of the evidence. The honorable trial judge McCullough, found Moi not guilty of being a felon in possession of the firearm, alleged to have been used in the "shooting" of Keith McGowan.

On September 4, 2007, Moi was called back to jury trial. The State did not refile a new charging document or a third amended information. Nor did Moi get rearraigned. This time around, in front of a new trial judge, the State sought to intro-

duce a new theory to support it's charge. Over defense objection, the State moved for permission to admit evidence of gang membership and motive, and to change the State's theory of the case.

Despite the prejudicial gang evidence being previously excluded in the first trial, the trial court allowed it in. 9/4/07 RP 35; 10/29/07 RP 484-85. On November 21, 2007, the jury found Moi guilty of one count of first degree premeditated murder.

B. MOI WAS CONVICTED OF AN UNCHARGED OFFENSE

It is a fundamental principle of criminal procedure, embodied in Article 1, Sec. 22 of the Wash. Const., that an accused must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. State v. Vangerpen, 125 Wn.2d 782 (1995); State v. Irizarry, 111 Wn.2d 591 (1988).

In State v. Corrado, 78 Wn.App. 612 (1995) The Div. 2 Court of Appeals reversed a conviction for a similar error. In Corrado, the State filed an information charging Corrado with 1° attempted murder. As trial approached, the trial court granted the State's motion to dismiss without prejudice because of a State's lost witness. The State later located the witness and Corrado was rearraigned. No new information was filed. The case proceeded to trial and defendant was convicted.

The Appellate Court held that the Superior Court lost jurisdiction when the information was dismissed without prejudice. The Superior Court acquired jurisdiction when an information

was filed... It lost jurisdiction when the information was dismissed without prejudice. It never reacquired jurisdiction because the State never filed another information. Corrado, 78 Wn.App. at 615-16. In Moi's case, the same must be held by this Court of Appeals. All subject matter jurisdiction was lost when the mistrial was called. The State never refiled a new information and the trial court never reacquired jurisdiction to hear the second trial.

Forcing Moi to a second trial, "absent notice of charges and a valid and properly filed information," was substantially and extremely prejudicial. The State, in the second trial, was allowed to switch theories over Moi's objections. 9/4/07 RP 35. Moi had no notice of this new theory and it is not even alleged in the previous information.

The 6th Amendment requires, in part, that an information state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against. Russell v. U.S., 369 U.S. 749 (1962); Miller v. Stagner, 757 F.2d 988, amended, 768 F.2d 1090 (9th Cir. 1985).

As interpreted by the Washington Supreme Court, the State and Federal Constitutions guarantee criminal defendants the right "to be apprised with reasonable certainty of the nature of charges against that person in order to prepare an adequate defense." State v. Elliott, 114 Wn.2d 6 (1990); Art. 1, Sec. 22; 5th and 6th Amends. U.S. Const.. The essential purpose of this guaranty is to provide notice. State v. Bailey, 114 Wn.2d 340

(1990); State v. Quismundo, 164 Wn.2d 499 (2008).

In Moi's case, the State failed to comply with the notice requirements and the failure to file charges after mistrial was substantially and actually prejudicial becuase the factual accusations were changed at the beginning of the second trial, over defense's objections. This Court of Appeals should remand for a new trial for these notice errors. Mr. Moi's statement and proof of "the State's failure to refile and provide a new notice of charges" is supported by his review of the clerk's papers and his case docket-Electronic Court Records. Exhibit G. (ECR-Docket).

GROUND THREE

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MOI'S FIRST DEGREE MURDER CONVICTION.

A. DUE PROCESS REQUIRED THAT MOI COULD BE CONVICTED OF FIRST DEGREE PREMEDITATED MURDER ONLY IF THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT A JURY FINDING OF PROOF OF EVERY ELEMENT BEYOND A REASONABLE DOUBT.

In a criminal case, the State has a constitutionally imposed burden to prove every element of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970); U.S. Const., Amends. 5 and 14 (Due Process Clauses); Wash. Const., Art. 1, Sec. 3 (Due Process).

On a challenge to the sufficiency of the evidence, this court must decide, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found all the essential elements of the charged crime beyond

a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Green, 94 Wn.2d 216 (1980).

Mr. Moi was charged with first degree premeditated murder, in violation of RCW 9A.32.020 (1)(a). This section provides that a person is guilty of murder in the first degree when, "with premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person."

In the case at bar the State's "to convict" instruction required the prosecution to prove Moi acted with premeditated intent to kill Keith McGowan. See, Exhibit H. (To Convict Instr.) The very first element of the State's to convict instruction requires the State to prove Moi, "shot Keith McGowan multiple times."

Moi submits the following findings of fact and conclusions of law, entered by the honorable trial judge, LeRoy McCullough, substantiates his claim that he did not "shoot" Keith McGowan.

B. DECEMBER 14, 2006, FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a mistrial was declared, the trial court heard a motion to dismiss the possession of a firearm charge against Moi. See Count Two in Amended Info., Exhibit E.

The trial judge found the following facts: On October 19, 2004, Keith McGowan was shot while standing in his doorway... He died moments later after stumbling back into his apartment and the door closed immediately; by his own testimony and by other evidence including the State's witness Kevin Carpenter,

the defendant Mathew Moi was placed at the scene, near or at the time of the shooting; plaintiff's on scene witness, Achilla Palmer Jack, identified a person at the door at or near the time of the shooting. That person's clothing was consistent with the clothing worn by the defendant the evening of the shooting; by the State's theory; the defendant shot the decendent, a member of the Hoover gang in retribution for another Hoover assault on the defendant's mother.

Following an initial investigation the police named the defendant Mr. Moi as a suspect in the killing; the defendant Moi got a ride from Renton to the Emerald Villa Aparment on the evening of the shooting; the defendant admitted being at the scene but claims first, that a Samoan shot the decendent. Then the defendant claimed someone named JJ, was the assailant.

The defendant explained that his delay in naming JJ as the assailant was due to fear of retribution; After notice of status of being a suspect the defendant initiated a call to the police, denied culpability and seeking direction to the station and did not arrive at the police station as expected, he was apprehended on October 21, 2004.

The defendant testified that his second effort to visit police and the court finds this to be consistent with other testimony offered by the defense, that the second effort to to visit the police was impacted by advice to seek legal counsel; the casings found at the scene of the killing matched the gun found in a well or culvert in the Renton area.

The gun was placed in the well by State's witnesses Knuntson and Ramsdell. Testimony showed that someone by the name of Malcom, a non witness, gave the gun to Knutson adn Ramsdell and instructed them to dispose of it; Otis Williams, a Hoover was in jail at the same time as the defendant and befriended the defendant, who told Williams that he didn't mean to kill McGowan but he ended up unloading the clip on McGowan.

After the shooting, the defendant found his way to his long-time girlfriend Daisy's residence and asked her what would you do if I killed someone. According to the testimony she replied did you. His answer then was, yes. The defendant then said he was joking and explained that a Samoan did it. On direct examination, the defendant explained he was just playing with her about this; others were in the immediate vicinity at the time of the shooting. That is to say, people other than the defendant and the victim.

Before the shooting, someone by the name of Bone was on the balcony, at the same time that the decendent was on the balcony, prior to the shooting. There is no direct physical evidence, either prints, blood or powder, that ties the defendant to the gun; the plaintiff's witnesses' credibility and bias was challenged by the defense. Ramsdell, for example and Ramsdell's father, were involved in an altercation with the defendant which resulted in Ramsdell's father's incarceration.

The defendant was consistent in his reports to the police that he was at the scene but did not kill anyone. October 21, 2004,

Sgt. Collins received a call from a weeping defendant saying that the police were looking for him but that he didn't do it. Although Palmer-Jack saw clothing similar to that worn by the defendant the night of the shooting, she did not identify the defendant as contemporaneously on the scene and did not identify the defendant as the shooter.

There is no physical evidence directly tying the defendant to the gun used in the shooting, either prints, blood, or powder. Other individuals were on the scene at the time of the shooting and theoretically could have committed the act. The verbal connection of the defendant to the gun was theoretically the defendant gave the gun to Malcom, Malcom gave the gun to witnesses Ramsdell and Knutson, and Ramsdell and Knutson hid the gun.

However, Malcom was a non-witness and credibility of others witnesses was in fact challenged, reasonably so. Under the circumstances, then, while the testimony under a different burden of proof could lead one to conclude that the defendant wasn't guilty of the shooting, the requisite proof beyond a reasonable doubt that the defendant, in fact, possessed a firearm and killed the decendant on October, 19, 2004, is not credible and I find the defendant not guilty of count 2. See, 12/14/2006 RP 4-13 at Exhibit I.

In light of the above findings and conclusions, Moi submits he cannot legally be responsible for shooting Keith McGowan, where he was found not guilty of possessing the murder weapon involved in the shooting. Therefore Moi seeks dismissal of his

conviction based on insufficient evidence.

GROUND FOUR

THE STATE VIOLATED MOI'S DOUBLE JEOPARDY RIGHTS BY RELITIGATING AN ISSUE OF ULTIMATE FACT, THAT WAS PREVIOUSLY DETERMINED BY A VALID AND FINAL JUDGMENT IN MOI'S FAVOR.

In Moi's first degree murder trial the State was collaterally estopped from arguing Moi committed the murder with the .22 caliber pistol in question because Moi was acquitted of possessing the firearm alleged to have been used in the shooting of Keith McGowan.

A. RELEVANT FACTS

On December 14, 2006, the honorable trial judge McCullough, found Moi not guilty of the charge of unlawful possession of a firearm in the first degree. Specifically the State accused Moi of possessing the .22 caliber handgun used in the killing of Keith McGowan, count two was alleged to be;

"a crime of the same or similar character and based on the same conduct as another crime charged herein and which crimes were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the other." Count One charged Moi with first degree murder. See Ex. E. (2nd Amend. Info.).

Judge McCullough found the evidence not credible that, "the defendant, in fact, possessed a firearm and killed the decendant on October 19, 2004." 12/14/06 RP at 13. Ex. I. In the second trial, the State relitigated the issue of the .22 caliber gun, using the same unreliable evidence. The State put on Kyle Knutson

who testified in part that he was friends with Moi. That he was friends with Moi. That Malcom Hollingsworth had the .22 pistol at his house and he decided to get rid of it by placing it in the drain. 11/8/07 RP 1316-17. Detective Stuth testified Knutson led the police to the gun. 11/8/07 RP 1307.

The State also submitted a special verdict for purposes of the firearm requiring the State to prove beyond a reasonable doubt that, "the defendant was armed with a firearm." The jury in the second trial found Moi guilty of the firearm. See, Exhibit J. (Special Verdict Instruction And Finding). However, the previous trial judge resolved an ultimate issue of fact, in favor of Moi and this ultimate issue was relitigated in the second trial, violating double jeopardy and principles of collateral estoppel.

B. FORMER JEOPARDY-ACQUITTAL-AND COLLATERAL ESTOPPEL

The Fifth Amendment guarantee against double jeopardy incorporates the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970). Collateral estoppel means that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe, 397 U.S. at 443.

This constitutional guarantee protects a defendant who has been acquitted from having to "run the gauntlet a second time." Ashe, 397 U.S. at 446. Here, an issue of ultimate fact was determined by a valid and final judgment of not guilty, as to being in possession of the firearm used in the shooting death of Keith

McGowan on October 19, 2004. Therefore relitigating the issue "That Moi used the firearm to shoot McGowan," in the second trial, is barred by collateral estoppel and Moi cannot be required to "run the gauntlet" again.

Without evidence of Moi's possession of the firearm, the State cannot prove Moi shot McGowan and therefore remand for retrial or dismissal of charges is appropriate.

GROUND FIVE

THE PROSECUTOR'S CLOSING ARGUMENTS VIOLATED MR. MOI'S STATE AND FEDERAL RIGHTS TO DUE PROCESS OF LAW & FAIR TRIAL, WHERE THE PROSECUTOR VOUCHED FOR THE CREDIBILITY OF STATE WITNESSES AND COMMENTED ON MR. MOI'S CREDIBILITY.

A. RELEVANT FACTS

In closing argument, the prosecutor repeatedly informed the jury that "State witnesses were telling the truth" because they "did not forget nothing" and told the jury," it should not believe the testimony of Mr. Moi because he did not do well on remembering." In a circumstantial case & credibility contest, the prosecutor's comments invaded the jury's province to weigh witnesses' credibility and violated Mr. Moi's fair trial rights.

The prosecutor specifically stated to the jury: Mark Twain said if you tell the truth, you don't have to remember it-Kevin and Ms. Achilla Jack- they've told the same thing. Mr. Minor pointed out little inconsistincies but could not score big ones, if they tell the truth, they don't have to remember anything. Ms. Jack remembers the defendant. The defendant is, not doing well on remembering. 11/20/07 RP 2267.

A minor point. No its a example of fact that its hard to remember when you don't tell the truth. 11/20/07 RP 2269. Later in the prosecutor's rebuttal closing argument the prosecutor continued to attack the credibility of Mr. Moi.

"When he testified there was alot of pausing. Like Mark Twain said, if its the truth you don't have to remember it." 11/21/07 RP 2343. Defense counsel did not object to these flagrant and ill intentioned remarks. However because the prosecutor invaded the jury's province to determine the credibility of witnesses, Mr. Moi submits this honorable Court of Appeals can review his claim as a denial of due process and a fair trial.

B. THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED MOI'S RIGHTS TO DUE PROCESS AND FAIR TRIAL.

The 5th Amendment to the United States Constitution provides in part: No person shall be held to answer for a capital or otherwise infamous crime..... Nor be deprived of life, liberty, or property without due process of law. Likewise the 14th Amend. to the U.S. Const. provides in part: Nor shall any State deprive any person of life, liberty, or property without due process of law.

Similar to the 5th and 14th Amendments of the U.S. Const., the Washington Constitution provides that "No person shall be deprived of life, liberty, or property without due process of law." Art. 1, Sec. 3, Wash. Const.. A prosecutor's duty in a criminal case is to seek justice. Therefore the prosecutor must prosecute with earnestness and vigor but may not use improper methods to produce a wrongful conviction. Berger v. United States,

295 U.S. 78,88 (1935).

If the use of such methods "so infect the trial with unfairness as to make the resulting conviction a denial of due process," It may justify a mistrial or reversal of the conviction. Donelly v. De Christoforo, 416 U.S. 637,643 (1974); State v. Easter, 130 Wn.2d 228 (1996)(Applying substantial likelihood standard that misconduct for a prosecutor to personally vouch for the credibility or witnesses. State v. Brett, 126 Wn.2d 136 (1995); United States v. Brook, 508 F.3d 1205,1210 (9th Cir. 2007).

Whether a witness has testified truthfully is for the jury to determine. Brooks, 508 F.3d at 1210. It is also misconduct for a prosecutor to express personal opinions about a defendant's guilt or credibility. See Boyd v. French, 147 F.3d 319,328-29 (4th Cir. 1998)(Prosecutor's references during closing arguments to his personal opinion of defendant's credibility were improper); Hodge v. Hurley, 426 F.3d 368,377 (6th Cir. 2005)(Prosecutor's comment that defendant was lying, especially when contrasted with comment that goverment witness was "absolutely believable, was improper).

In U.S. v. Garcia-Guizar, 160 F.3d 511,520 (9th Cir. 1998) (Prosecutor's description of defendant as "a liar" was improper because it constituted personal opinion regarding defendant's credibility). Nevertheless, a prosecutor has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility. State v. Smith, 162 Wn.App. 833 (2007) rev. denied 173 Wn.2d 1007 (2012).

Here however, the prosecutor's comments were well outside of reasonable latitude and directly commented on the credibility of State witnesses and on Mr. Moi's credibility. The State used a Mark Twain quote to substitute for an opinion. The quote had substantial and injurious effect upon the jury during deliberations because in a circumstantial case, the credibility of Mr. Moi and that of crucial State witnesses, such as Kevin Carpenter and Ms. Palmer Jack, were of major importance. Both witnesses were impeached by defense counsel and gave inconsistent testimony.

The prosecutor's statements upon credibility, invaded the jury's province to determine who was credible. The prosecutor stated to the jury that because "Mr. Moi does not remember as as much,"-like State witnesses-"and that "forgetting is an example that its hard to remember when you don't tell the truth." 11/20/07 RP 2269. Whether or not Mr. Moi was truthful, was solely to be determined by the jury. The prosecutor was not arguing inferences, but providing a direct example and quote to comment on Mr. Moi's credibility.

The prosecutor used the quote and comments during opening closing argument and in rebuttal. Using these quotes and comments at these times guaranteed their effective message, that Mr. Moi was not truthful. The remarks on Mr. Moi's credibility created actual and substantial prejudice to Moi's fair trial rights. Mr. Moi testified he was around the scene of the crime but did not shoot anyone. Mr. Moi testified someone by the name of JJ did the shooting.

The jury could have believed Moi's version of events, rather then the State's witnesses. The comments assured the jury to only believe State witnesses because they did not forget anything, like Mr. Moi did. In a credibility contenst, the comments were damaging and prejudicial, warranting a new trial.

GROUND SIX

MOI WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

A criminal defendant has a Sixth Amendment right to competent trial counsel. Strickland v. Washington, 466 U.S. 668 (1984). This right is violated when the defendant is prejudiced by counsel's deficient performance, that is, when there is a reasonable likelihood that counsel's error(s) could have affected the result. Id.

Here Moi submits that his trial counsel's deficient performance prejudiced his trial in a variety of ways. First, trial counsel failed to demand the nature of charges the State was required to refile against Moi. This forced Moi into a second trial absent notice of the nature of the State's accusation and charge to defend against in trial.

Second, trial counsel failed to object to prosecutorial vouching. The jury was allowed to hear the prosecution bolster their witnesses' credibility and give opinions on Moi's credibility. "The prosecutor's argument is likely to have significant persuasive force with the jury." Quoting ABA Standards for criminal justice. Std. 3-5.8.

It was highly prejudicial for the jury to hear this type

of prosecutorial vouching without a single objection by counsel. Failing to object also waives the issue on appeal, subjecting Moi to harsher standards of review, had appellate counsel raised the issue.

Lastly, trial counsel failed to introduce evidence of Moi's prior acquittal on the possession of the firearm charge. Had the collateral estopell issue been raised pre trial, it would be more than likely the State's case would not proceed to a second trial without evidence of the firearm. See State v. Kassahun, 78 Wn.App. 938 (1995)(holding that evidence of the defendant's acquittal of 2nd degree assault of the defendant's girlfriend should have been admitted; that the trial court erred in denying defense counsel's request to enter evidence of his acquittal in the second trial).

Here, counsel's errors reasonably likely affected the result of Moi's trial. Had trial counsel provided effective assistance the result would likely have been different. A new trial is proper relief to be granted.

GROUND SEVEN

MOI WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

The Due Process Clause of the 14th Amendment guarantees the right to effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985). In order to prevail on an appellate ineffective assistance of counsel claim, petitioners must show that the legal issue which appellate counsel failed to raise

had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue. In Re Mayfield, 133 Wn.2d 332 (1997). When appellate counsel was ineffective, the court could remand for a new appeal. In Re PRP of Dalluge, 152 Wn.2d 772 (2004). But when, as here, the appellate court requires no further information to decide the merits of the claim(s), it can be more efficient "to resolve the trial court error under the standard of review applicable upon direct appeal." Id. at 789.

In this case five meritorious issues were not raised on appeal. First, counsel failed to raise the claim regarding the private questioning of the juror outside the presense of Moi and the public. See, Ground One, above. "Because the error would have been per se prejudicial on appeal, the failure of Moi's appellate counsel to raise the issue below constituted ineffective assistance of counsel." In Re PRP of Orange, 152 Wn.2d 795 (2004); Orange, 152 Wn.2d at 814.

See also In Re Morris, 288 P.3d 1140 (2012)(holding, appellate counsel failure to raise issue of violation of right to public trial was ineffective assistance of counsel. In order to establish ineffective assistance of appellate counsel, a petitioner must establish (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. Orange, 152 Wn.2d at 814; Smith v. Robbins, 528 U.S. 259 (2000).

Here Moi establishes prejudice and deficient performance. Had Moi's appellate counsel raised this issue on direct appeal, Moi would have received a new trial. See Orange, 152 Wn.2d at 814, (finding prejudice where appellate counsel failed to raise courtroom closure issue that would have been presumptively prejudicial error on direct appeal).

Deficient performance is shown where Moi's appellate counsel should have known to raise the public trial issue on appeal. Moi filed his direct appeal on December 31, 2008. Orange had been decided at that time and clarified both that Bone-Club applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal. Orange, 152 Wn.2d at 807-08.

On May 15, 2009, Moi's appellate counsel filed supplemental assignments of error. Moi argued in part, "that Moi had a right to be present at a critical stage in jury selection." In State v. Strode, 167 Wn.2d 222 (2009), The Washington Supreme Court made clear that a trial court violates a defendant's public trial rights by conducting a portion of jury selection in chambers.

Caselaw was clear that these types of closures were reversible error warranting a new trial. In Orange, "the failure to raise the courtroom closure issue was not the product of 'strategic' or 'tactical' thinking, and deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal." Orange, 152 Wn.2d at 814.

The Orange rule deprived from the clear rule in Bone-Club. The court reasoned that "had Oranges appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial. Orange, 152 Wn.2d at 814.

The same must be reasoned in Moi's case. Second Moi's notice issue would have been remand for a new trial. Because all Moi's claims are meritorious, and Moi was prejudiced by the errors, the failure to raise the errors likewise constituted ineffective assistance of counsel. Thus, Mr. Moi seeks review of all his Grounds raised in this PRP, under the standard applicable on direct appeal. Upon finding constitutional errors, Moi is entitled to a new trial or dismissal of charges.

C. REQUEST FOR RELIEF

Because substantial prejudice has been established in Moi's trial, this court should vacate the charge and remand for new trial and or dismissal.

D. OATH

After being first duly sworn under the penalties of perjury, I Matthew Moi, Pro Se, have read the petition, know its contents, and believe the petition is true.

Subscribed and sworn to before me, the undersigned notary republic, on this 9th day of April, 2013.

Signature

Barbara J. Gronseth
Notary Public for Washington

My commission expires on Dec 1, 2013

BARBARA J. GRONSETH
COMMISSION EXPIRES
NOTARY
PUBLIC
DEC. 1, 2013
STATE OF WASHINGTON

EXHIBIT A

11-7-06 RP 124; 153; 163.

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	
Plaintiff,	)	C.A. 61167-4I
vs.	)	NO. 04-1-08866-2KNT
MATHEW WILSON MOI,	)	
Defendant.	)	

Verbatim Report of Proceedings
Before The HON. LEROY MCCULLOUGH
Regional Justice Center

November 7, 2006

APPEARANCES:

FOR THE PLAINTIFF: Norm Maleng, Prosecuting Attorney
Erin Ehlert, Deputy
Robin Sheridan, Deputy
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

FOR THE DEFENDANT: Donald Minor
1119 First Avenue, Suite 308
Seattle, Washington 98101

ERMA DEMAR, RPR
Court Reporter

COPY

1 though but I could still see like part of the hat. He had,
2 it looks like he had like a Walkman or something, or
3 something. I seen like cords, you know what I am saying, to
4 a Walkman, and that's it. And then the door just slammed
5 and then I was like, you know.
6 Q. Could you tell what race this man was?
7 A. He was Black.
8 Q. Okay.
9 So is it fair to say, Miss Palmer-Jack, that
10 when that door opens, you only see him for a few seconds?
11 A. Yes.
12 Q. All right. And the door shuts. Does the
13 door shut all the way closed?
14 A. Yes, it shuts all the way closed.
15 Q. And once the door shuts all the way closed,
16 tell us what you next see or hear.
17 A. I heard gunshots, like five of them, and then
18 I seen my cousin run back in the door and he was screaming,
19 saying, call the -- call the police, I've been shot. And
20 then I started screaming, and then I run over there to where
21 he was at because he had set in the staircase. And I just
22 laid down and I holded him, and I was asking, I asked him, I
23 said, where did you get shot at? Where did you get shot at,
24 baby net.
25 Because I couldn't find no blood. I couldn't

1 Q. I'm sorry?
2 A. I said, just the color he had on and the side
3 of his face.
4 Q. And the person you say you saw outside the
5 door as Keith exited inside of the apartment to go into the
6 hallway, was familiar to you as a person you had seen in the
7 building before; is that correct?
8 A. Yes.
9 Q. The person you had seen in the building
10 before was a person with gold teeth; is that correct?
11 A. Yes.
12 Q. Now, you did indicate in the interview that
13 the person you saw that night standing in the hallway, you
14 could only see the side of the face; you did not see that
15 person's teeth that night?
16 A. No, sir.
17 Q. You did not see that person's teeth that
18 night?
19 A. No, I didn't see his teeth.
20 Q. Okay.
21 But the side of his face and his clothing
22 resembled the person you had seen before with gold teeth?
23 A. Yes.
24 Q. Now, you said that Keith was outside, the
25 door was closed behind him, and you heard gunshots?

1 front of the table, you could look off to your right and you
2 could see the door?
3 A. Yes.
4 Q. Okay.
5 MS. EHLERT: Just a moment. Okay. Miss
6 Palmer-Jack, I don't have any more questions. Mr. Minor
7 might have another question or two. Thank you.
8 THE COURT: Thank you.
9 Mr. Minor.
10 MR. MINOR: Your Honor, can we approach briefly?
11 THE COURT: Yes.
12 (Sidebar conference.)
13
14 RECROSS-EXAMINATION
15 BY MR. MINOR:
16 Q. Miss Palmer-Jack, let me ask you after Keith
17 McGowan was shot on October 19th, 2004, did you remove any
18 money from his pockets?
19 A. Yes, I did.
20 Q. You did?
21 A. Yes.
22 Q. And what money did you remove from his
23 pockets?
24 A. Like -- it was like three dollars and some
25 other stuff.

EXHIBIT B

11-8-06 RP 51-76.

EXHIBIT B

1 A About 16 years, 17 years.
2 Q Just a general question about the gang. Is
3 there a color that's often associated with the Hoover
4 Crips?
5 A Orange and blue.
6 Q Orange and blue?
7 A Yes.
8 Q And if a person has something like a blue
9 bandanna, is that something that you might see someone
10 who's a Hoover Crip wearing?
11 A Yes.
12 Q Did you know an individual by the name of
13 Keith McGowan?
14 A Yes.
15 Q Did you know him by the name Keith or did
16 you also know him by another name?
17 A I knew him by Keith and Baby Nut.
18 Q Baby Nut?
19 A Yes.
20 Q Was that the name that he used with his
21 fellow gang members?
22 A Yes.
23 Q How long did you know Keith McGowan or Baby
24 Nut?
25 A About eight years.

1 Q What was your relationship with him? Could
2 you explain was he someone that you considered to be a very
3 good friend or a colleague in the gang? How would you
4 describe it?
5 A He was a good friend. He was a little
6 homey.
7 Q A little homey? What does that mean to you?
8 A Somebody, like, under me.
9 Q All right. So in the realm of this gang,
10 you were senior to him?
11 A Yes.
12 Q When I say senior, does that mean that you
13 had power over him or does that mean you were older than
14 him?
15 A Older than him, probably power over him.
16 Just being older, being there longer than he was.
17 Q All right. Prior to his death on
18 October 19th, 2004, how often would you have contact with
19 Keith or with Baby Nut?
20 A All the time but I kinda' stopped hanging
21 out a little bit and moved away for a while so I wasn't
22 really there everyday, but I would come up there every so
23 often and see what they was getting into and see what was
24 going on on the set.
25 Q When you say coming up here to see what was

1 Hoover gang member?
2 A I'm pretty sure a lot of -- nine times of
3 ten he heard of me now.
4 Q So I guess my question is, would you talk
5 about the fact that you were a Hoover gang member while you
6 were in custody?
7 A Yeah, he knew that. He knew because I would
8 talk to my homeboys on the phone.
9 Q All right. And when you would talk to your
10 homeboys on the phone, would Mr. Moi be close by to hear
11 those conversations?
12 A Sometimes he would and sometimes he would
13 walk away because I be like I'm talking to him right now to
14 see what's going on with the homies, what they think about
15 the situation.
16 Q And when you say that you were talking --
17 when you said the situation, what were you referring to?
18 A About, I mean, what's going on with him
19 killing the homeboy.
20 Q Tell us what Mr. Moi described to you about
21 killing Baby Nut. What did he tell you?
22 A After a short period of time we'd be out
23 there, we be talking and kickin' it. I would be talking to
24 the homies or talking to my girl and then I get off the
25 phone and me and him would talk a minute. Then he told me

1 how he went up there and what he did and the reason why he
2 did it, and he really didn't mean to kill him.
3 Q Let's start with what he did.
4 What did he tell you that he did?
5 A He walked up to the apartments and got on
6 the elevator. He was looking for anybody from Hoover. He
7 wanted to talk but he didn't know what he wanted to do. He
8 went up the elevator with another little homey, and went up
9 and came back down and had little dude go knock on the door
10 and Baby Nut came to the door. And he told Baby Nut to put
11 his baby down and come outside and talk to him, and Baby
12 Nut came outside to talk to him. He said he wanted to only
13 shoot him twice but he ended up letting the whole clip off.
14 Q Did he tell you what kind of gun he had?
15 A A .22.
16 Q What caliber? A .22?
17 A Yes.
18 Q And if I understand you correctly,
19 Mr. Williams, you said that Mr. Moi told you that he was
20 looking for a Hoover?
21 A Yes.
22 Q Did he indicate he was looking for Baby Nut
23 or he was looking for Keith?
24 A No, he wasn't looking for Baby Nut but he
25 wanted somebody from Hoover.

1 Q He wanted someone from Hoover? That's what
2 he told you?
3 A Yes.
4 Q Now, is it fair to say that what you just
5 told us, did that all come out in one conversation or lots
6 of conversations? Lots of short conversations?
7 A One time. We had a whole bunch of short
8 conversations because at the same time I was trying to get
9 something out of it, so we had a whole bunch. I was trying
10 to get all that I could out of it. Then we had long
11 conversations, short conversations. He was -- just keep
12 telling me over and over again how he didn't mean to do it
13 and it wasn't supposed to happen like this, but at the same
14 time I'm using it because I was trying to get out of jail
15 time even though I didn't get nothin' out of it and still
16 went to the penitentiary.
17 Then I thought about it, well, man, so
18 justice needs to be served for Keith's family. So I just
19 went on and continued to do it.
20 Q So let's talk a little bit about that.
21 First of all, you indicated that when Mr. Moi told you
22 initially that he had killed Baby Nut you weren't sure what
23 to do. You weren't sure whether to hit him or what to do.
24 A Or get something out of the deal.
25 Q So what do you mean when you say get

whether the witness appeared to have a difficult time remembering his version of events. The closing argument made by the State was not improper.

5. Ineffective Assistance of Counsel

Moi contends that trial counsel was ineffective for: (1) failing to "demand the nature of the charges the State was required to refile against Mr. Moi," (2) failing to object to the State's closing argument; and (3) failing to introduce evidence of Moi's acquittal of the possession charge. To establish ineffective assistance, Moi must show that trial counsel's performance was deficient and that prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient if it fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Moi also bears the burden of rebutting the strong presumption that counsel's representation was not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Moi does not demonstrate that trial counsel's performance was deficient. As discussed above, the State was not required to file a new charging document after the mistrial, the State's closing argument did not constitute misconduct, and the State was not collaterally estopped from introducing evidence to support the firearm enhancement in the retrial. As a result, it was reasonable for trial counsel not to

object on these grounds. Because trial counsel's performance was not deficient, there is no need to analyze whether Moi was prejudiced.

Moi further claims that appellate counsel was ineffective for failing to raise on direct appeal the issues he raises in this petition. Because none of the issues raised by Moi have merit, appellate counsel was not ineffective for failing to raise them on direct appeal.

In his reply brief, Moi raised additional claims for the first time, including: (1) that the trial court erred in admitting gang evidence to establish motive; (2) that the trial court violated the Code of Judicial Conduct in meeting with Juror 8; and (3) that trial counsel was ineffective for failing to object to the trial court's meeting with Juror 8 and failing to seek a bill of particulars.[5] The State moved to strike these claims. This court will not consider claims raised for the first time in a reply brief. In re Pers. Restraint of Peterson, 99 Wn. App. 673, 681, 995 P.2d 83 (2000). Thus, these claims were not considered.

Because Moi has not demonstrated that he is entitled to relief by means of a personal restraint petition, now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this _____ day of _____, 2013.

---

[5] Moi also appears to argue in his reply that the State was obligated to file a new charging document following the mistrial because the State added a gang aggravator under RCW 9.94A.535(3)(aa) (providing that an exceptional sentence may be imposed if "the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang..."). But a review of Moi's judgment and sentence shows that Moi received a standard range sentence plus 60 months for the firearm enhancement; Moi's sentence was not aggravated under RCW 9.94A.535(3)(aa).

Acting Chief Judge

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 DEC -2 AM 9:11

1 something out of the deal?
2 A I was trying to get out of jail instead of
3 going to the penitentiary.
4 Q Is that the decision that you were trying to
5 make, whether to physically harm Mr. Moi or whether to use
6 the information for your own advantage?
7 A Yeah, that's what I was trying to decide.
8 Q And the decision you made was not to harm
9 Mr. Moi?
10 A Yeah.
11 Q And so you asked him questions or you
12 continued to talk with him about what he did?
13 A Yes.
14 Q And did that continue then through the month
15 of February that you were in custody at the RJC?
16 A The whole time until I left.
17 Q Now, the next question I have, Mr. Williams,
18 is do you know or did Mr. Moi ever say to you why he would
19 continue talking to you?
20 A I believe because I was talking to the
21 homies on the streets. He knew that, and so it was like if
22 he did get out it was basically like I would try to tell
23 them, you know, really don't do nothin' to him. But at the
24 same time I'm thinking I'm running game on him to try to
25 better get something out of it for myself.

1 Q So were you suggesting to Mr. Moi that you
2 would be protecting him in some way?
3 A Basically so he would feel like that or
4 think that I'm talking to them so nothin' would happen.
5 Q So you were talking to fellow gang members
6 on the phone?
7 A Yes.
8 Q And telling them or making Mr. Moi believe
9 that you were telling them not to do any harm to Mr. Moi?
10 A Yes.
11 Q And, likewise, were you insuring that no
12 harm was coming to Mr. Moi while he was there in custody --
13 A Yes.
14 Q -- with you?
15 A Yes.
16 Q Did Mr. Moi tell you after the shooting --
17 well, first of all, let me ask you this.
18 Did he tell you how many times he shot
19 Mr. McGowan?
20 A He told me he let the whole clip out.
21 Q So a number of times he shot the gun, not
22 just once?
23 A Yes.
24 Q And did he tell you that he was with anyone
25 else?

1 A Yes.
2 Q At some point in time, at least after
3 February of 2005, did you make a decision to contact the
4 police?
5 A I had somebody do it for me.
6 Q Why did you do that?
7 A To see if I can get out of jail.
8 Q And did you then have a conversation with
9 Detective Paul Young?
10 A Yes.
11 Q Were you still there in custody at the RJC
12 or had you been moved?
13 A I first talked to him at the RJC.
14 Q And then after your conversation with Mr. --
15 or, I'm sorry, with Detective Young, were you then moved to
16 the downtown jail?
17 A Uh, probably about a week or so later.
18 Q Now, you stated that you were trying to get
19 something out of this.
20 A Yes.
21 Q And what did you want to get out of this?
22 A From going to the penitentiary.
23 Q You didn't want to spend more time in the
24 penitentiary?
25 A No, I didn't want to go period.

1 Q All right. And how much time or do you
2 recall how much time you were looking at in the
3 penitentiary?
4 A Seventeen months.
5 Q Did you get any advantage? Well, let me
6 rephrase that.
7 Did you have to spend 17 months in the
8 penitentiary?
9 A Yes.
10 Q Was there still some sort of deal though
11 that was negotiated?
12 A Yes, for the felony harassment but it
13 didn't -- I mean, it didn't really benefit me. I didn't
14 get nothing out of it.
15 Q There was still an outstanding felony
16 harassment charge?
17 A Yes.
18 Q And in return for your talking with us and
19 giving us testimony, the State gave you a gross misdemeanor
20 charge?
21 A Yes.
22 Q And that time on the gross misdemeanor
23 charge ran together with the 17 months?
24 A Yes.
25 Q So the six month time that you had to serve

1 on the gross misdemeanor you didn't serve it in addition?
2 A No.
3 Q All right. So that's run, I think we call
4 it concurrent?
5 A Yes.
6 Q But what you had requested from the State
7 was time off from the 17 months?
8 A Yes.
9 Q That was not provided to you?
10 A No.
11 Q Mr. Williams, is this something -- you have
12 been in custody before?
13 A Yes.
14 Q Is this something in the sense of trying to
15 get information from an inmate so that you could get an
16 advantage out of it, is this something that you have done
17 frequently?
18 A No, never.
19 Q So this was the first time that you tried to
20 get information and then use it to your advantage?
21 A Yes.
22 Q What was it about these circumstances that
23 made you want to get information?
24 A Because he talked to everybody about the
25 case. When we use to be in jail people just had to tell

EXHIBIT C

11-13-07 RP 1402-07; RP 1500-01

about that in between the witnesses, so --

THE COURT: Okay. Mr. Minor?

MR. MINOR: I have had a chance to review that portion of the statement Ms. Hauro gave to police. It appears to be, from the transcription appears to be consistent with the recording. There was possibly one or two words that were insignificant in terms of whether you could actually hear them on the recording. But I'm satisfied that the transcription is a fair representation of what was said in the recording.

THE COURT: Okay.

MR. MINOR: In those two places or those portions that we talked about.

THE COURT: That we talked about. Okay.

Now, we have -- we have juror problems.

MS. HERRMAN: Huh-oh.

THE COURT: Yeah. Or potential problems. And which is why it's very important for us not to have down time, because we're starting to -- it looks like we're going to start losing jurors.

There was a -- which juror was it -- did the house sell? Did we hear back about that?

THE BAILIFF: We figured that out.

THE COURT: All right. Because we had one juror who had -- whose house was sold and he had to be out in 90 days and the only place he had to go was his new house in Bremerton.

1 THE BAILIFF: Bellingham.
2 THE COURT: Huh? Bellingham. Yeah, Bellingham,
3 and he didn't think he could commute here every day. So --
4 THE BAILIFF: That's been resolved.
5 THE COURT: But that's been resolved.
6 I have another letter from Ms. Matthews. She is the --
7 the woman who, after she got impaneled, found out she was not
8 paid for jury duty and I'm going to read that letter to you.
9 It says, "I was notified, again, by my job that only 15
10 days maximum will be paid for jury duty. I am already recovering
11 from a wrong financial hardship resulting in bankruptcy. This
12 has really effected by credit and my life.
13 "I have been using temp agencies for two years and just
14 got this permanent job in June 2007. I am still juggling bills,
15 including using my lunch money for gas to and from jury duty.
16 Therefore, without my pay check from my job, there is no way I
17 can make it. I have no other income or financial help.
18 "Please reconsider my circumstances. It's an honor to
19 do my civic duty but not at the risk of my survival. There is no
20 way I can concentrate on this trial 100 percent if I'm worried
21 about paying my rent and bills, et cetera. That wouldn't be fair
22 to anyone.
23 "Thank-you, in advance for your reconsideration in this
24 life-changing matter."
25 And -- and then the only other problem that we are

1 aware of is Juror No. 1 who has the business -- or has the two-
2 week vacation or whatever his trip planned starting on the 30th.
3 So, I don't know what you want to do about Ms.
4 Matthews. I feel very sorry for her. And, like I said, had she
5 told me this before, she would never had been impaneled on this
6 jury. But I want to let you know, so anything you want to do
7 about any of this?
8 MS. HERRMAN: Last time this came up, your Honor,
9 was a request that Mr. Minor talk to Mr. Moi about the
10 possibility of an 11-person jury if we got to that. I wonder if
11 that conversation has taken place?
12 MR. MINOR: Well, your Honor, Mr. Moi would not
13 waive his right to a 12-person jury. But I don't believe that --
14 I believe this is Juror No. 8 who wrote the letter?
15 THE COURT: Yes.
16 MR. MINOR: Given what she's stated, that she
17 cannot fairly decide this case and it appears, at this point,
18 listen to what's being presented, so I'm -- again, as I indicated
19 before, am concerned about her being asked to stay given her
20 stated circumstance. And I'm -- I'm going to ask that she --
21 well, be excused from deciding the case, whether that's now or
22 later. I -- if it's going to be later, it might as well be now.
23 THE COURT: Right.
24 Ms. Herrman?
25 MS. HERRMAN: Well, I want to agree with Mr.

1 Minor, because I want to let her go. But I'm concerned with the
2 possibility of us losing another juror. And we're back at the
3 same place where we were before. As we calculated it, as I
4 calculated it, our 15th day of trial is next Tuesday the 20th.
5 So the most that she's talking about losing is the 21st and then
6 the week of the 26th, depending on how long she's here.
7 THE COURT: Well, that assumes that -- that her
8 employer has let her come back and work on those days when we are
9 not in session. And --
10 MS. HERRMAN: Well, yeah, it certainly does.
11 THE COURT: -- and I -- and I don't know that
12 that's true, I guess, because, you know, if she -- they may,
13 like, hire a temp for the week instead of hiring somebody for
14 Friday. So --
15 MS. HERRMAN: My only concern, your Honor, is that
16 we go all the way to the end and have only 11 people, and that's
17 a pretty major concern at this point.
18 THE COURT: Yeah. And -- and that's my concern,
19 too. I can't -- I can't let her go and risk a mistrial in this
20 case, so -- I wish I could. I think the chances are probably
21 pretty slim at this point, but with all the time we've invested
22 in this case, I'm not willing to risk that -- that chance. So
23 without a stipulation that if that slim chance occurs that we
24 could go forward with 11 jurors, I'm not willing to release her.
25 MS. HERRMAN: And I would say that I think we can

1 probably both agree that she switch to the position of first --
2 or second alternate so that she be first one dismissed. In other
3 words that the second alternate be the -- you understand.
4 THE COURT: I understand.
5 MS. HERRMAN: It takes too much math for me to
6 figure it out.
7 THE COURT: So -- and I -- I trust that -- I do
8 want to talk to her and just to let her know, again, why we can't
9 do this. I think it would be better to do it outside the
10 presence of everyone else. Do you guys all want to be here when
11 I do that or should I just talk to her at break?
12 MR. MINOR: Your Honor, I'd be satisfied with
13 Court speaking to her --
14 THE COURT: Okay.
15 MR. MINOR: -- alone.
16 THE COURT: All right. And I'll just let her know
17 that, again, the same thing. And I trust that she'll be able to
18 concentrate and if she has to go forward during the entire -- so
19 that is why I don't care if you have witnesses sitting out in the
20 hall, we have to keep going with this case.
21 MS. HERRMAN: We have, your Honor. We have.
22 THE COURT: I know. I know. But I'm just saying
23 we have to do that.
24 MS. HERRMAN: And we continue to do so.
25 THE COURT: So, okay. Are we ready to get the

1 jury, then?
2 MR. MINOR: I believe so, yeah.
3 THE COURT: Okay.
4 (Pause in proceedings.)
5 MS. HERRMAN: Oh, as far as those passages from
6 interview with Ms. Hauro, does the Court just want me to read
7 those?
8 THE COURT: I hadn't thought about it. You kept
9 saying you were going to read them. Do you want me to? I think
10 it would be better for you to read them, and I trust you'll read
11 them in a neutral manner.
12 MS. HERRMAN: I'll do that.
13 THE COURT: Not infusing them with undue emotion.
14 MS. HERRMAN: That's fine.
15 THE COURT: Should I read the language that the
16 Court's to consider it -- the jury's to consider it in the same
17 way as any other evidence, so on and so forth?
18 MS. HERRMAN: That seems to make sense.
19 MR. MINOR: Yes.
20 THE COURT: I've got to see if I can find that
21 language; I said I was going to do that.
22 THE BAILIFF: Please rise for the jury.
23 THE COURT: Have a seat. And are we -- I
24 everybody had a nice, long weekend. I hope it was for productive
25 than mine was. All it did was tangle my tongue up.

1 A. No.
2 Q. So that initial conversation that you had, where did
3 that take place?
4 A. Right out in the little foyer at a -- at a tank. It's
5 a big tank like this and everybody come out at a certain time and
6 we talk.
7 Q. Okay. So maybe we should talk about the jail and how
8 it's set up.
9 MS. SHERIDAN: And does the Court -- do you
10 want --
11 THE COURT: I think we'll take our lunch break and
12 -- so, we'll be back about 1:30. Just to let everyone know, I
13 have two meetings over the lunch period, but I will try to come
14 back on time. They're probably pretty boring so I should be able
15 to come back on time.
16 But you need to be downstairs ready to go at about a
17 quarter after. Remember to wear your jury badges where they're
18 visible at all times when you're in and around the courthouse.
19 Leave your notebooks in the jury room and don't discuss this case
20 amongst yourselves or with anyone else when you're at lunch.
21 We'll see you back here about a quarter after 1:00.
22 (Jury not present.)
23 THE COURT: And just before you leave, let me tell
24 you that I did talk to Juror No. 8, and I did tell her that we
25 were sympathetic but there was really nothing that we could do.

1 But if something came up where we felt we could safely release
2 her, we would do so, but she was not to tell that to the other
3 jurors. And she said she understood how important it was that
4 the trial go forward and wish she had known this information
5 before. And she said that she was -- she -- she was
6 concentrating and she was paying attention, it was just very
7 difficult for her. So --
8 MS. HERRMAN: Okay.
9 THE COURT: And I'm confident after talking to her
10 that she will pay attention. She -- she understood the
11 constitutional right of a defendant to a jury of 12 and
12 understood that she had, unfortunately, gotten herself in this
13 position and so that's it.
14 We'll see everybody about 1:30.
15 MS. HERRMAN: Thank-you.
16 (Recess taken.)
17 THE COURT: We rise when the jury comes in.
18 THE WITNESS: Oh, all right.
19 THE BAILIFF: Please rise for the jury.
20 (Jury present.)
21 THE COURT: Have a seat. Okay.
22 Q. (By Ms. Herrman.) All right, Mr. Williams, just before
23 the lunch break we were starting to talk about how the RJC is set
24 up. Are each -- when you were there with Mr. Moi at that time,
25 were you and he in your own cells? In other words did you share

EXHIBIT D

Affidavit of Matthew Moi

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

STATE OF WASHINGTON	) ss.	NO. _____
County of Clallam	)	PERSONAL AFFIDAVIT Affidavit of Matthew W. Moi

1. I am the person in the above entitled action and make this affidavit based on personal knowledge.

2. I am over the age of eighteen years. I am competent to be a witness therein.

3. Upon oath, says: That on November 13, 2007, I was present in open court when trial judge Middaugh informed myself, My lawyer, Donald Minor, and the prosecutors, about a note from Juror Number 8. That my lawyer Donald Minor explained to me that the trial judge must talk to the juror in private and that I cannot be where the judge and juror will be because inmates are not allowed in a judge's room. That I was not present when the trial judge spoke to juror number 8, outside of open court and outside the presence of the public, my family, myself, and defense counsel. That I did not waive my Rights to a Public trial.

SUBSCRIBED AND SWORN TO ME ON THIS 9th DAY OF April, 2013

Signature of Affiant

Matthew Moi

Typed Name of Affiant

STATE OF WASHINGTON)
) SS.
COUNTY OF CLALLAM)

On the 9th day of April, 2013, the above did appear before me, and known by me to be the person herein, and did sign and execute this instrument of his own free will.

DATED: 4-9-13

Barbara J. Gronseth

Signature

Notary Public

TITLE State of Washington

Dec. 1, 2013

Appointment Expires

(STAMP OR SEAL)

BARBARA J. GRONSETH
COMMISSION EXPIRES
NOTARY
PUBLIC
DEC. 1, 2013
STATE OF WASHINGTON

PERSONAL AFFIDAVIT

EXHIBIT E

1st And 2nd
Amended Informations

513911

FILED

2004 OCT 26 PM 3:52

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

WARRANT ISSUED
CHARGE COUNTY $110.00

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff,	)	
v.	)	No. 04-1-08866-2 KNT
MATHEW WILSON MOI,	)	INFORMATION
Defendant.	)	

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MATHEW WILSON MOI of the crime of **Murder in the First Degree**, committed as follows:

That the defendant MATHEW WILSON MOI in King County, Washington on or about October 19, 2004, with premeditated intent to cause the death of another person, did cause the death of Keith McGowan, a human being, who died on or about October 19, 2004;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant MATHEW WILSON MOI at said time of being armed with a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.510(3).

NORM MALENG
Prosecuting Attorney

By: [signature]
Erin E. Ehlert, WSBA #26340
Senior Deputy Prosecuting Attorney

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

FILED
KING COUNTY, WASHINGTON

NOV 15 2006

SUPERIOR COURT CLERK
RHONDA HOYEM
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff,	)	
v.	)	No. 04-1-08866-2 KNT
MATTHEW MOI AKA MATHEW WILSON MOI	)	SECOND AMENDED INFORMATION
Defendant.	)	

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MATTHEW MOI AKA MATHEW WILSON MOI of the crime of **Murder in the First Degree**, committed as follows:

That the defendant MATTHEW MOI AKA MATHEW WILSON MOI in King County, Washington on or about October 19, 2004, with premeditated intent to cause the death of another person, did cause the death of Keith McGowan, a human being, who died on or about October 19, 2004;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant MATTHEW MOI AKA MATHEW WILSON MOI at said time of being armed with a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.510(3).

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse MATTHEW MOI AKA MATHEW WILSON MOI of the crime of **Unlawful Possession of a Firearm in the First**

Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

103

Degree, a crime of the same or similar character and based on the same conduct as another crime charged herein, and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant MATTHEW MOI AKA MATHEW WILSON MOI in King County, Washington on or about October 19, 2004, previously having been convicted in Washington State King County Superior Court, of the crime of Robbery in the Second Degree, a serious offense as defined in RCW 9.41.010, knowingly did own, have in his possession, or have in his control, a .22 caliber handgun, a firearm as defined in RCW 9.41.010;

Contrary to RCW 9.41.040(1), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: R. Sheridan
Robin E. Sheridan, WSBA #32029
Deputy Prosecuting Attorney

Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

EXHIBIT F

Certification for Probable Cause

513911

04-1-08866-2 KNJ

ORIGINAL
LODI
OCT 26 2004

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Paul Young is a Detective with the Des Moines Police Department, King County Washington and has reviewed the investigation conducted under Des Moines Police Department Case Number **2004-3328.**

There is probable cause to believe that, **Matthew Wilson Moi 05-26-85** committed the crime(s) of: **Murder 2nd Degree with a deadly weapon.**

This belief is predicated on the following facts and circumstances:

On 10-19-04 at 2239 hours, Officers from the Des Moines Police Department and assisting agencies responded to 2459 South 216th #221, Des Moines, King County, Washington after receiving numerous 911 calls that someone had been shot in unit #221 of the Emerald Villa Apartments. It is well known that the Emerald Villa Apartments is the home to many "Hoover" gang members.

Officers entered the apartment building and were directed to apartment #221 where they found victim Keith McGowan, a known "Hoover," being comforted by witness A.P. and witness Beckwith with witness Jackson standing at the front door. Victim McGowan was lying motionless on interior stairs within a few feet of the front door of the apartment. Officers on the scene requested medical attention and attempted to provide care for Victim McGowan who was not breathing and whose pupils were fixed and unresponsive. Ofc Arico and Ofc. Montgomery checked the rest of the two story apartment for any other people and found the apartment clear. Assisting patrol units secured the inner and outer scene.

Fire District #26 and Medic One personnel attempted to revive Victim McGowan without success noting at least three gunshot wounds to the left torso of Victim McGowan. Medic One personnel declared Victim McGowan deceased at the scene.

Ofc. Montgomery spoke to witness A.P. and asked what had happened. A.P. replied only that Victim McGowan had been shot. A.P. told Officer Montgomery that she did not know who shot Victim McGowan saying that it was "some black guy."

Ofc Montgomery contacted witness Beckwith who said that she was in her apartment when she heard five gunshots in the hallway and then screaming from the apartment. Witnesses Beckwith said that she went to unit #221 and attempted to provide Victim McGowan CPR until police arrived. Witness Beckwith said that she did not see who shot Victim McGowan.

Officer Haglund spoke to witness Jackson. She stated that she did not observe the shooting, but the residents from unit #221 had come to her apartment and told her to call 911.

Ofc Montgomery, Officer Haglund and Officer Arico located at total of five .22 caliber shell casing in the hallway in front of unit #221 and took action to identify and protect the evidence. A small bullet hole was also observed in the right exterior door frame near the middle hinge to unit #221. Officer Graddon located what appeared to be a bullet slug in the hallway north of unit #221 and in front of unit #115. Officer Graddon took action to identify and protect the item. Officer Haglund and Officer Arico secured the interior scene and maintained a scene log.

While on exterior scene security, Officer Montgomery recognized witness Cooper, the girlfriend of Victim McGowan, in the crowd. Officer Montgomery spoke to Witness Cooper and informed her that Victim McGowan had been shot and that he had died. Witness Cooper said that she had received a call from A.P. telling her that Victim McGowan had been shot. Witness Cooper told Ofc Montgomery that she also learned from A.P. that a male subject, K.C., was with A.P. and Victim McGowan in the apartment just prior to the shooting.

Des Moines Detective Ross Stuth drafted a search warrant for 2459 South 216th Unit #221, Des Moines, King County Washington, which was reviewed and later signed by King County District Court Judge Seitz.

At 0405 hours Detective Bob Bohl, Detective George Jacobowitz and Detective Paul Young executed the search warrant and began photographing and processing the crime scene both inside and outside of unit #221. Detective Young collected evidence which included five .22 caliber bullet casings, a bullet slug from the hallway north of unit #221, as well as a partial bullet slug from behind the metal door frame. Also collected was a section of drywall from the east wall just north of unit #221, a section of the metal door frame to unit #221 where a bullet had impacted, a carpet sample from the interior of apartment #221 with apparent blood stains, and items believed to be worn by victim McGowan.

At 0750 hours Dr. Lacey and Dr. Fletch from the King County Medical Examiner's office arrived on scene and examined Victim McGowan. Preliminary inspection showed that Victim McGowan had sustained multiple gunshot wounds to the upper left torso area of his body and back with some being through and through wounds. At approximately 0810 hours, Victim McGowan was removed from the scene by Dr. Lacey and Dr. Fletch. At 900 hours the scene was cleared and the apartment secured.

Det. Sgt. Collins contacted A.P. for an interview. A.P. stated that she and K.C., were with Victim McGowan and his one year old son, inside the apartment prior to the shooting. A.P. stated that about 15 minutes prior to the shooting, K.C. left the apartment. When he returned, she heard K.C. telling Victim McGowan that there was a person outside who wanted to "game" with him. A.P. said that "Game" means to bet on video game playing. A.P. said that she watched as Victim McGowan went to the apartment front door and stepped outside into the hallway. She then heard several shots. A.P. said that Victim McGowan came back into the apartment holding his chest and body. He told her to call 911 and then collapsed into her arms and fell to the floor.

Detective Stuth and Detective Tschida identified K.C. and he was later located and interviewed. K.C. said that prior to leaving the apartment, Victim McGowan was standing on the balcony of his apartment and a black male in the parking lot called out to Victim McGowan asking him to tell someone he will be right back. K.C. believed that Victim McGowan did not know what the black male was talking about, but responded

before returning back inside the apartment. K.C. stated that he then left the apartment to go to another apartment upstairs when the same black male he had just seen in the parking lot, enter the apartment building through the south doors and caught the same elevator. K.C. described the black male as being 5'06" to 5'07", 18-19 years of age, 175 pounds, and wearing black and red tennis shoes, black jeans with gray lining, a black jacket and black hat. While on the elevator, K.C. said that the male told him his name was "Mat Mat" and started asking questions about whether he knows "KB" or "JO" as well as someone's brother who had been recently shot. K.C. said that the male then asked to use his cellular phone and he heard him introduce himself as 'Mat Mat" as he talked to a female on the other end of the call. K.C. said that they both went to the upper floor of the apartment building and they returned together to the hallway outside unit #221. K.C. said that as he prepared to go inside, "Mat Mat" asked if he could come inside. K.C. said that he replied that he did not think so as it was his cousin's house, but Mat-Mat responded by asking if he could have his cousin come outside so that he could ask him directly if he could wait inside the apartment while he waited for his friends. K.C. said that he would check, but that he doubted his cousin would let him inside since they did not know him. K.C. walked inside and told Victim McGowan that he was wanted outside. Victim McGowan gave K.C. his baby son to hold and victim McGowan walked to the door and into the hallway. K.C. said that less than 5 seconds of Victim McGowan going outside, he heard five shots and watched as Victim McGowan stumbled back inside the apartment saying "I've been shot." K.C. remained briefly inside the apartment. He stated that he later received a call on his cellular phone from a female saying she was from Renton and asking for "Mat Mat." K.C. said that the telephone number the female was calling from showed up on his caller ID. K.C. said that he could identify the person "Mat Mat" again. K.C. provided a recorded statement.

Det Stuth obtained subscriber information for the telephone number on K.C.'s caller ID. Using investigative resources, Det. Stuth then located and confirmed a current address for that individual.

On 10-21-04 at approximately 0950 hours, Detectives with the Des Moines Police Department went to the confirmed address and contacted witness "CeCe." Witness CeCe stated that on 10/19/04 she received a call from a person she identified as "Matthew" and that she later called back the same number asking for "Mat-Mat" but spoke to a different person. CeCe provided information to Detective Stuth as to the identity of "Mat Mat" or "Matthew" as well as information that she has received threatening calls from unknown persons since the time of the shooting.

At approximately 1000 hours, Det. Bohl and Det. Young identified "Mat Mat" as Matthew Wilson Moi DOB 05-26-85 through school records. At approximately 1410 hours, Des Moines records staff employee received a call from a male who sounded if he was crying. The male said he was calling about the murder that occurred within the past several days. Det. Sgt Collins took the call from a male, noted that he was still crying, and that the male made reference to the subject shot at South 216th. The caller told Sgt. Collins "I was there." The caller stated that he has heard that people are saying that he did it and that the police were looking for him. The caller then told Sgt. Collins "I did not do it." Sgt. Collins asked the caller for his name and he identified himself as Matthew Moi. Matthew Moi stated that he wanted to talk to the police and Sgt. Collins provided the caller directions to the station. About 10 minutes later, Matthew Moi called back

requesting a different route to the station fearing the first directions would take him pass Emerald Villa Apartments . Sgt Collins provided an alternate route and Matthew Moi stated he would be on his way. Matthew Moi never showed up at the Des Moines Police Department as promised, nor did he call again.

On 10-21-04 at approximately 1611 hours, Det. Stuth contacted K.C. and showed him a photomontage containing a photograph of Matthew W. Moi. K.C. viewed the six photos and selected the photograph of Matthew Moi as the person most resembling the person he had observed in the parking lot and later riding on the elevator just moments prior to the shooting of Victim McGowan. K.C. stated that the subject's hair was different than depicted in the photographs, adding that he would be more sure if he saw the individual in person.

Detective Stuth later received a record of phone calls made to CeCe's cell phone showing that a call was made to her telephone, eight minutes before the 911 call reporting a shooting outside of unit #221.

At approximately 1930 hours, information was provided to Det Tschida and members of the King County Street Crimes units as to possible addresses for Matthew Moi. On 10-21-04 at approximately 2256 hours Detective Tschida and members of the King County Street Crimes unit located and arrested Defendant Matthew Moi based on probable cause for investigation of homicide.

Det. Tschida was contacted by witness Harvo, Defendant Moi's estranged girlfriend. Witness Harvo told Det. Tschida that early in the evening of 10-19-04, she received a call from Defendant Moi who said that his mother had been "jumped" by "Hoovers" on Pacific Hwy South and that he was going to go out to Pacific Hwy. Witness Harvo said that Defendant Moi seemed to be crying while he spoke. Witness Harvo than located Defendant Moi in person and described him as being very angry. Witness Harvo told Det. Tschida that Moi arrived at her residence at about 0300 hours on the night of the shooting and appeared to be intoxicated. Witness Harvo said she helped Moi get undressed and into bed. According to witness Harvo, when they awoke the next morning, Defendant Moi told her that he had killed someone. Witness Harvo said she reacted in shock, and that Defendant Moi than retracted his statement, saying he witnessed someone get shot by a mysterious Samoan Male.

On 10-22-04 at approximately 0035 hours, Detective Stuth and Detective Young contacted Defendant Moi at the Des Moines Police Department interview room. Det. Young advised Defendant Moi of his Constitutional Rights from a preprinted form and that Defendant Moi acknowledged his rights by saying "yes sir" and agreed to answer questions and talk about the incident at the Emerald Villa Apartments. Defendant Moi stated that he had been at the Emerald Villa Apartments only two previous times, with the last visit approximately 10 months prior. Defendant Moi confirmed that he had made a phone call to CeCe on a cellular phone that belong to a person he met while riding on a elevator at the Emerald Villa Apartments and that he later asked the same person if he could wait for his friends in front of unit #221. Defendant Moi stated that an unknown male came out of unit #221 and started speaking to him when an unknown Samoan male in a red jacket approached from behind. The Samoan male asked Moi if he was a "Hoover." When Moi replied in the negative, the Samoan told him to leave. Defendant Moi told detectives that he walked in front of the Samoan and after he had passed by the individual, he heard numerous gun shots coming from the area he had just left.

During the interview, Defendant Moi also spoke about his mother getting "jumped" by Hoover gang members on the same evening as the shooting. Defendant Moi told detectives that he was not upset and got over it. He also admitted that he told witness Harvo that he had killed someone. However, Defendant Moi said he contacted witness Harvo shortly after the shooting and told her right away that he had killed someone only to see her reaction. Defendant Moi said he then changed his statement saying he only witnessed a shooting.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this **26th day of October 2004**, at Des Moines, Washington.

Paul Young 8811

Paul Young 8811
Des Moines Police Department

Exhibit G

(ECR-Docket)

Exhibit G

EXHIBIT G

(ECR-DOCKET)

Electronic Court Records

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04-1-08866-2

Case Number: 04-1-08866-2 KNT

Case Title: STATE OF WASHINGTON VS MOI, MATHEW WILSON

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☐	3	11-04-2004	SHERIFF'S RETRN ON WARRNT OF ARREST	2
☐	4	11-08-2004	NOTICE OF SCHEDULING	1
☐	5	11-22-2004	HEARING CONTINUED: STIPULATED	1
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☐	8	12-15-2004	HEARING CONTINUED: STIPULATED	1
☐	9	01-06-2005	HEARING CONTINUED: STIPULATED	1
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☐	18	03-30-2005	ORDER OF CONTINUANCE	1
☐	19	03-30-2005	HEARING CONTINUED: STIPULATED	1
☐	20	04-20-2005	ORDER OF CONTINUANCE /SCHED	1
☐	21	04-20-2005	HEARING CONTINUED: STIPULATED	1
☐	22	05-02-2005	NOTE FOR MOTION DOCKET	1
☐	23	05-02-2005	MOTION /DEFT/ADD DISCOVERY	3
☐	24	05-11-2005	ORDER OF CONTINUANCE /SCHED	1
☐	25	05-11-2005	HEARING CONTINUED: STIPULATED	1
☐	26	05-24-2005	MOTION HEARING	1
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☐	28	05-31-2005	NOTICE OF APPEARANCE	3
☐	29	05-31-2005	ORDER FOR WITHDRWL OF ATTORNEY	1
☐	30	05-31-2005	MOTION HEARING	1
☐	31	06-01-2005	HEARING CONTINUED: STIPULATED	1
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☐	34	06-22-2005	HEARING CONTINUED: STIPULATED	1
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☐	37	08-09-2005	DISPOSITION REPORT RCV'D	1
☐	38	08-10-2005	STATUS CONFERENCE / HEARING	1
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☐	40	08-10-2005	OMNIBUS APPLICATION OF PROS ATTY	2
☐	41	11-29-2005	ORDER DENYING MT FR TEMP RELEASE	1
☐	42	11-29-2005	MOTION HEARING	1
☐	43	02-03-2006	HEARING CONTINUED: UNSPECIFIED CR DAVE ERWIN	1
☐	44	02-03-2006	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	45	04-12-2006	ORDER OF CONTINUANCE /OMNI	1
☐	46	04-25-2006	RETURN OF SERVICE	4
☐	47	04-28-2006	HEARING CONTINUED: UNSPECIFIED CR VELMA HAYNES	1
☐	48	04-28-2006	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	49	06-02-2006	RETURN OF SERVICE	3
☐	50	06-13-2006	RETURN OF SERVICE	3
☐	51	06-26-2006	RETURN OF SERVICE	32
☐	52	06-30-2006	HEARING CONTINUED: UNSPECIFIED	1
☐	53	06-30-2006	ORDER OF CONTINUANCE /OMNI	1
☐	54	07-05-2006	RETURN OF SERVICE	1
☐	55	07-06-2006	OMNIBUS ORDER	3
☐	56	07-06-2006	ORDER DENYING MTN TO FIRE ATTRNY	1
☐	57	07-06-2006	OMNIBUS HEARING	1
☐	58	07-06-2006	MOTION TO FIRE COUNSEL/ DEF	4
☐	59	07-07-2006	SUBPOENA DUCES TECUM	1
☐	60	07-07-2006	SUBPOENA DUCES TECUM	1
☐	61	07-07-2006	SUBPOENA DUCES TECUM	1
☐	62	07-17-2006	HOLD TRIAL UNTIL:	1
☐	63	07-17-2006	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	64	07-17-2006	MOTION AND AFFIDAVIT/DECLARATION	2
☐	65	07-17-2006	MOTION AND AFFIDAVIT/DECLARATION	2
☐	66	07-17-2006	ORDER TO DETAIN MATERIAL WITNESS	2
☐	67	07-17-2006	ORDER TO DETAIN MATERIAL WITNESS	2
☐	68	07-18-2006	TRIAL CONTINUED: UNSPECIFIED	1
☐	68A	07-24-2006	HOLD TRIAL UNTIL:	1
☐	68B	07-24-2006	MOTION HEARING	1
☐	68C	07-24-2006	ORDER QUASHING BENCH WARRANT /MAT WITNS	1
☐	68D	07-24-2006	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	69	07-25-2006	TRIAL CONTINUED: UNSPECIFIED	1
☐	70	08-03-2006	RETURN OF SERVICE - INFO	6
☐	71	08-04-2006	MOTION HEARING	1
☐	72	08-04-2006	ORDER ESTABLISHING COND. OF RELEASE	1
☐	73	08-09-2006	RETURN OF SERVICE	1
☐	74	08-14-2006	ORDER SEALING DOCUMENT /SUB 75,76	2
☐	75	08-14-2006	MOTION AND AFFIDAVIT/FORENSIC SERV / SEALED PER SUB 74	23
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☐	77	08-17-2006	SHERIFF'S RETURN ON BENCH WARRANT	4
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☐	80	08-23-2006	RETURN OF SERVICE	34
☐	81	09-28-2006	HOLD TRIAL UNTIL:	1
☐	82	09-28-2006	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	83	09-29-2006	HEARING CONTINUED: UNSPECIFIED	1

☐	84		10-09-2006	RETURN OF SERVICE	33
☐	84A		10-18-2006	JURY TRIAL	33
☐	85		10-19-2006	ORD PERMITTING FILING AMENDED INFO	2
☐	86		10-19-2006	HOLD TRIAL UNTIL:	1
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☐	86B		10-19-2006	TRIAL MEMORANDUM /STATE	43
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☐	87		10-20-2006	ASSIGNED TO JDG MCCULLOUGH	1
☐	88		10-24-2006	ORDER RE JAIL ACTIVITIES	1
☐	88A		10-24-2006	ORDER WAIVING POTENTIAL CONFLICT	1
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☐	89		10-25-2006	ORDER TO TRANSPORT	2
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☐	92		11-02-2006	ORDER RE MEDICAL ATTENTION	1
☐	93		11-02-2006	STIPULATION RE CASINGS	1
☐	94		11-06-2006	ORDER TO DETAIN MATERIAL WITNESS	2
☐	95		11-06-2006	ORDER TO DETAIN MATERIAL WITNESS	2
☐	96		11-06-2006	MOTION & CERTIFICATION TO APPREHEND	3
☐	97		11-06-2006	MOTION TO DETAIN MATERIAL WITNESS	2
☐	98		11-07-2006	ORDER APPOINT OPD FOR K CARPENTER	1
☐	99		11-08-2006	SHERIFF'S RETURN ON BENCH WARRANT	8
☐	100		11-08-2006	ORDER QUASHING MAT WIT WARRANT	1
☐	101		11-14-2006	ORDER OF RELEASE WITNESS CARPENTER	1
☐	102		11-15-2006	ORD PERMIT FILING AMENDED INFO/2ND	2
☑	103		11-15-2006	AMENDED INFORMATION / 2ND	2
☐	104		11-20-2006	ORDER TO DETAIN MATERIAL WITNESS	7
☐	105		11-20-2006	DEFENDANT'S PROPOSED INSTRUCTIONS	35
☐	106		11-22-2006	COURT'S INSTRUCTIONS TO JURY	33
☐	107		11-30-2006	VERDICT / NOT USED	1
☐	108		11-30-2006	VERDICT / NOT USED	1
☐	109		11-30-2006	VERDICT / NOT USED	1
☐	110		11-30-2006	VERDICT / NOT USED	1
☐	111		11-30-2006	VERDICT / NOT USED	1
☐	112		11-30-2006	VERDICT / NOT USED	1
☐	113		11-30-2006	VERDICT / NOT USED	1
☐	114		11-30-2006	VERDICT / NOT USED	1
☐	115		11-30-2006	WITNESS RECORD	6
☐	116		11-30-2006	JURY NOTE	2
☐	116A		12-01-2006	STIP&OR RET EXHBTS UNOPNED DEPOSTNS	2
☐	116B		12-01-2006	EXHIBIT LIST/PRETRIAL	2
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☐	117		12-06-2006	ORDER OF RELEASE /MALCOM HOLLINGSWO	1
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☐	119		12-06-2006	HEARING CONTINUED: STIPULATED	1
☐	119A		12-06-2006	MOTION HEARING CR ERMA HAYNES	2

☐	120			12-14-2006	FINDINGS OF FACT&CONCLUSIONS OF LAW	5
☐	121			12-14-2006	MEMORANDUM IN LAW /STATE	4
☐	122			12-14-2006	MOTION HEARING CR VELMA HAYNES	1
☐	123			01-10-2007	ORDER OF CONTINUANCE /SCHED	1
☐	124			01-10-2007	HEARING CONTINUED: STIPULATED	1
☐	125			01-24-2007	HEARING CONTINUED: STIPULATED	1
☐	126			01-24-2007	ORDER OF CONTINUANCE /SCHED	1
☐	127			02-07-2007	HEARING CONTINUED: STIPULATED	1
☐	128			02-12-2007	HEARING CONTINUED: STIPULATED	1
☐	129			02-13-2007	STATUS CONFERENCE / HEARING	1
☐	130			02-13-2007	ORDER SETTING TRIAL DATE	1
☐	131			05-04-2007	HEARING CONTINUED: UNSPECIFIED	1
☐	132			05-04-2007	ORDER TO CONTINUE OMNIBUS HRG	1
☐	133			05-24-2007	ORDER SEALING DOCUMENT /SUBS 134-5	2
☐	134	🔒		05-24-2007	MOTION FOR TRANSCRIPTION EXPENSE / SEALED PER SUB 133	11
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☐	136			05-25-2007	ORD FOR CONTINUANCE OF TRIAL DATE	1
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☐	141			06-08-2007	HEARING CONTINUED: UNSPECIFIED	1
☐	142			06-15-2007	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	143			06-15-2007	HEARING CONTINUED: UNSPECIFIED	1
☐	144			07-20-2007	RETURN OF SERVICE	32
☐	145			07-25-2007	RETURN OF SERVICE	1
☐	146			07-27-2007	HEARING CONTINUED: UNSPECIFIED	1
☐	147			07-27-2007	ORDER TO CONTINUE OMNIBUS HRG	1
☐	148			08-03-2007	HEARING CONTINUED: UNSPECIFIED	1
☐	149			08-03-2007	ORD FOR CONTINUANCE OF TRIAL DATE	1
☐	150			08-17-2007	HEARING CONTINUED: UNSPECIFIED	1
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☐	152			08-24-2007	OMNIBUS HEARING	1
☐	153			08-24-2007	OMNIBUS ORDER	3
☐	154			09-04-2007	ORD ALLOW DAILY RACK OUT TIME	1
☐	155			09-04-2007	ASSIGNED TO JUDGE MIDDAUGH	1
☐	156			09-04-2007	PLAINTIFF'S PROPOSED INSTRUCTIONS	29
☐	157			09-04-2007	TRIAL MEMORANDUM / STATE	21
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☐	158A			09-04-2007	JURY TRIAL CR JOYCE STOCKMAN	30
☐	159			10-04-2007	MOTION HEARING	1
☐	160			10-24-2007	ORDER SEALING DOCUMENT /SUB 161-2	2
☐	161	🔒		10-24-2007	MOTION FOR EXPERT SERVOCES / SEALED PER SUB 160	10
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☐	173	11-15-2007	DEFENDANT'S PROPOSED INSTRUCTIONS	37
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☐	175	11-21-2007	WITNESS RECORD	6
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☐	177	11-26-2007	JURY NOTE	2
☐	178	11-26-2007	VERDICT FORM A/GUILTY	1
☐	179	11-26-2007	VERDICT FORM B/NOT USED	1
☐	180	11-26-2007	VERDICT FORM C/NOT USED	1
☐	181	11-26-2007	SPECIAL VERDICT FORM D	1
☐	182	11-26-2007	SPECIAL VERDICT FORM E/NOT USED	1
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☐	184	11-26-2007	COURT'S INSTRUCTIONS TO JURY	31
☐	185	11-26-2007	EXHIBIT LIST	16
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☐	187	11-26-2007	STIP&OR RET EXHBTS UNOPNED DEPOSTNS	2
☐	188	01-18-2008	ORDER TO PROCEED IN FORMA PAUPERIS	7
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☐	190	01-18-2008	NOTICE INELIGIBLE POSSESS FIREARM	1
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☐	192	01-18-2008	SENTENCING HEARING	2
☐	193	01-18-2008	COURT ORAL NOTICE RIGHT OF APPEAL	1
☐	194	01-18-2008	SENTENCE RECOMMENDATION /DEFT	9
☐	194A	01-18-2008	NOTICE OF APPEAL TO COURT OF APPEAL	1
☐	195	01-22-2008	STATEMENT OF PROSECUTING ATTORNEY	14
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☐	201	03-19-2008	ORDER SETTING RESTITUTION	1
☐	202	03-20-2008	DESIGNATION OF CLERK'S PAPERS 61167-4/WAP	2
☐	203	03-31-2008	INDEX CKS PPRS PGS 1-230	2
☐	204	04-09-2008	CKS PPRS PGS 1-230	230
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☐	206	01-07-2009	DESIGNATION OF CLERK'S PAPERS/SUPL 61167-4/WAP	3
☐	207	01-13-2009	INDEX CKS PPRS PGS 231-276	2
☐	208	01-20-2009	CKS PPRS PGS 231-276	46
☐	209	02-26-2009	MOTION RE INDIGENCY /MOI	2
☐	210	02-26-2009	ORDER OF INDIGENCY	1
☐	211	03-05-2009	DESIGNATION OF CLERK'S PAPERS-SUPP 61167-4/ KCPA	2
☐	212	03-17-2009	DESIGNATION OF EXHIBITS	2
☐	213	03-24-2009	TRANSMITTAL LETTER - COPY FILED	1

☐	214	05-11-2009	PERFECTION NOTICE FROM CT OF APPLS #61167-4-I	1
☐	215	05-18-2009	TRANSMITTAL LETTER - COPY FILED	1
☐	216	10-11-2012	MANDATE /61167-4-I/AFFIRMED	17

EXHIBIT H

(To Convict Instruction)

No. 14

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

(1) That on or about October 19, 2004, the defendant shot Keith McGowan multiple times;

(2) That the defendant acted with intent to cause the death of Keith McGowan;

(3) That the intent to cause the death was premeditated;

(4) That Keith McGowan died as a result of the 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 any one of these elements, then it will be your duty to return a verdict of not guilty.

EXHIBIT I

12-14-2006

RP 1-15

CERTIFICATE

STATE OF WASHINGTON)

) ss

COUNTY OF KING)

I, VELMA HAYNES, certified shorthand reporter, licensed by the State of Washington, in and for the County of King, hereby certify that I personally recorded in shorthand the proceedings in Cause No. 04-1-08866-2 KNT of December 6 and 14, 2006, before the Honorable LeRoy McCullough, and that I later caused the same to be transcribed; and that the foregoing record is true and correct to the best of my knowledge and belief.

IN WITNESS WHEREOF, I have subscribed my name this 23rd day of April, 2008.

Velma L. Haynes

Velma L. Haynes, CSR
Official Court Reporter

December 14, 2006

THE COURT: Thank you. Be seated, please.

Good afternoon. Call the case for the record.

MS. EHLERT: Good afternoon, Your Honor. This is State of Washington versus Matthew Moi, 04-1-08866-2, Kent designation. Erin Ehlert for the State of Washington. My co-counsel, Ms. Sheridan, was unable to attend today. Mr. Minor is here on behalf of his client. His client is here, in custody.

Your Honor, I have placed on the bar there the 3.5 findings. We presented those to counsel. Mr. Minor signed off on them this afternoon and they are awaiting signature of Your Honor.

I also provided copies to everyone of the briefing on the legal issue that we were discussing at our last hearing with regard to Count 2.

THE COURT: The Court received that, reviewed it, and the Court received the brief acknowledgement from defense counsel that he

had no contrary authority.

MS. EHLERT: Correct, Your Honor. And, actually, I have nothing further beyond those two points.

THE COURT: Mr. Minor, anything for this record.

MR. MINOR: Good afternoon, Your Honor. I would simply indicate to the Court that I did review the State's proposed findings and conclusions on the 3.5 issue and, as indicated, it's signed, the original that was presented to the Court this afternoon. And, as indicated, I did notify the State and Your Honor that I had no authority that contradicts the State's position with respect to the ruling on Count 2. And simply defer to the Court on that matter.

THE COURT: The 3.5 findings and conclusions, do they vary substantially from that which was initially given to the Court?

MS. EHLERT: No, Your Honor.

MR. MINOR: No. There would be some changes, but I would not consider them materially significant.

THE COURT: Okay. I'll give the

1 original, then, to the clerk. The Court has
2 signed it.
3 Count 2, based on the memorandum
4 submitted and the lack of contrary information
5 from the defense, the Court is prepared to make
6 its ruling on Count 2. But I wanted to give
7 the parties any brief opportunity to supplement
8 the argument.
9 I know that, at the end of our last
10 session, the Court had suggested that the
11 parties might want to argue that. I went back
12 and reviewed my notes. I see that it was
13 substantially argued. But if there are some
14 updates or some other information, items that
15 the parties would like to share, you can do
16 that now.
17 Anything from the State?
18 MS. EHLERT: No, Your Honor.
19 THE COURT: And from the defense?
20 MR. MINOR: No, Your Honor.
21 THE COURT: Let me make one inquiry
22 of both of you regarding the physical evidence.
23 As I recall, from reviewing my notes,
24 there was no direct fingerprint evidence; is
25 that correct?

1 MS. EHLERT: That's correct.
2 THE COURT: Or anything tying the
3 defendant to the gun.
4 MS. EHLERT: That's correct. There
5 were no fingerprints found on the gun.
6 THE COURT: And, with respect to the
7 defendant's clothing, there was some
8 information about splatter. As I recall, there
9 was nothing there, either blood or powder; is
10 that correct?
11 MS. EHLERT: Correct.
12 MR. MINOR: Correct, Your Honor.
13 THE COURT: The Court, then, would
14 enter the proposed findings on Count 2 as
15 follows: And these are, by the very nature of
16 what we are having to do, general findings and
17 general conclusions. We are incorporating the
18 evidence of record and we'll go from there.
19 Finding one: On October 19, 2004, at
20 approximately 10:30 p.m., Keith McGowan was
21 shot while standing in the doorway of his Des
22 Moines apartment, Number 221, Emerald Villa
23 Complex. He died moments later, after
24 stumbling back into his apartment and the door
25 closed immediately behind him.

1 Finding two: By his own testimony
2 and by other evidence of record, including the
3 State's witness, Kevin Carpenter, the
4 defendant, Matthew Moi, was placed at the
5 scene, near or at the time of the shooting.
6 In addition, plaintiff's on-scene
7 witness, Achillia Palmer-Jack (phonetic),
8 identified a person at the door at the time or
9 near the time of the shooting. That person's
10 clothing was consistent with clothing that was
11 worn by the defendant the evening of the
12 shooting.
13 By the State's theory, the defendant
14 shot the decedent, a member of the Hoover gang,
15 in retribution for another Hoover assault on
16 the defendant's mother.
17 Finding: Following an initial
18 investigation, the police named the defendant,
19 Mr. Moi, as a suspect in the killing.
20 Finding: The defendant Moi got a
21 ride from Renton to the Emerald Villa Apartment
22 on the evening of the shooting.
23 Finding: The defendant admitted
24 being at the scene but claims alternatively,
25 first, that a Samoan shot the decedent. Then

the defendant claimed that someone by the name of J.J., who is a cousin of his sister's one-time boyfriend, was the assailant. The defendant explained that his delay in naming J.J. as the assailant was due to fear of retribution.

In the early stages of the investigation, the defendant spontaneously told police that he was at the scene but that he did not shoot the decedent. After notice of his status as a suspect, this is another finding, the defendant initiated a call to the police, denied culpability and seeking direction to the station.

Although the defendant called the second time for alternative directions, he did not arrive at the police station as expected, and he was apprehended on October 21, 2004, at approximately 10:45 p.m., after conveniently exiting the rear door of a Renton residence as the officers approached that residence.

The defendant testified that his second effort to visit the police, and the Court finds this to be consistent with the other testimony offered by the defense, that

that second effort to visit the police was impacted by advice on the part of others to first seek legal counsel.

Finding: The defendant has a juvenile conviction for robbery in the second degree and is prohibited thereby from possessing a firearm.

Finding: The casings found at the scene of the killing matched the gun found in a well or culvert in the Renton area. The gun was placed in the well by State's witnesses Knutson and Ramsdell. Testimony showed that someone by the name of Malcolm, a non-witness, gave the gun to Knutson and Ramsdell and instructed them to dispose of it.

Finding: Otis Williams, a Hoover, was in jail at the same time as the defendant and, in fact, befriended the defendant. The defendant told Williams that he didn't mean to kill McGowan but he ended up unloading the clip on McGowan.

Finding: After the shooting, the defendant found his way to long-time girlfriend Daisy's residence and asked her the following question. What would you do if I killed

1 someone. According to the testimony, she
2 replied, did you.
3 His answer then was, yes. Upon
4 watching her response, the defendant then said
5 that he was just joking and explained that a
6 Samoan did it. On direct examination, the
7 defendant explained that he was just playing
8 with her about this.
9 Finding: Others were in the
10 immediate vicinity at the time of the shooting.
11 That is to say, people other than the defendant
12 and other than the victim. Before the
13 shooting, there was someone by the name of Bone
14 on the balcony, at the same time that the
15 decedent was on the balcony, prior to the
16 shooting.
17 Finding: There is no direct physical
18 evidence, either prints, blood or powder, that
19 ties the defendant to the gun.
20 Finding: the plaintiff's witnesses'
21 credibility and bias was challenged by the
22 defendant. Ramsdell, for example, and
23 Ramsdell's father, were involved in an
24 altercation with the defendant which resulted
25 in Ramsdell's father's incarceration.

1 Finding: The defendant denied
2 contact with Malcolm, any contact with Malcolm
3 the night of the shooting. The defendant
4 testified that he never gave Malcolm any weapon
5 nor asked Malcolm to get rid of any gun.
6 Witnesses Knutson and Ramsdell claimed that
7 Malcolm, again, a non-witness, gave them the
8 gun ostensibly to get rid of the gun at the
9 defendant's behest.
10 General conclusions as follows: The
11 Court has jurisdiction of the parties and of
12 the subject matter.
13 Conclusion two: The State has the
14 burden of proving beyond a reasonable doubt
15 that the defendant possessed a firearm in
16 violation of a prohibition which attaches
17 pursuant to his juvenile robbery second degree
18 conviction.
19 Conclusion: The defendant was, in
20 fact, placed at the scene of the killing by his
21 own testimony. He denied shooting the victim,
22 however, and blamed first a Samoan, then
23 another person, Jason, and this is a part of
24 the findings as well, who, according to the
25 defendant, gave the defendant a ride to the

scene.

The defendant gave various reasons for being at the Emerald Villa that were not credible, but the defendant did claim that Jason, this other person, ended up shooting the decedent, that he did not want to risk any physical harm by naming Jason or J.J.

Conclusion: The State's witnesses also placed the defendant at the scene, specifically Kevin Carpenter and, circumstantially, Achillia Palmer-Jack.

Conclusion: The defendant's conversations after the killing could support an inference that the defendant shot the decedent with the weapon at issue. If the defendant did, in fact, shoot the decedent, quite naturally, he would be found guilty in this Count 2 of possession or using a firearm. It is undisputed that the firearm that killed the decedent was the one located in the culvert, and placed there by the State's witnesses.

Conclusion: As noted above, the defendant's post-shooting conversations support the inference that the defendant did shoot and

1 kill the decedent. He had conversations with
2 Otis Williams. He had conversations with his
3 ex-girlfriend, Daisy. And, as it relates to
4 the latter, it was a hypothetical, but this
5 could support the conclusion that the defendant
6 did shoot and kill Mr. McGowan.
7 Conclusion seven: The defendant was
8 consistent in his contemporaneous reports to
9 the police that he was at the scene, but did
10 not kill anyone. October 21, 2004, Sergeant
11 Collins received a call from a weeping
12 defendant saying that the police were looking
13 for him but that he didn't do it.
14 Conclusion: Although Palmer-Jack saw
15 clothing similar to that worn by the defendant
16 the night of the shooting, she did not identify
17 the defendant as the shooter. Although Kevin
18 Carpenter identified the defendant as
19 contemporaneously on the scene, he did not
20 identify the defendant as the shooter. There
21 is no physical evidence directly tying the
22 defendant to the gun used in the shooting,
23 either prints, blood or powder.
24 Other individuals were on the scene
25 at the time of the shooting and, theoretically,

1 could have committed the act. The verbal
2 connection of the defendant to the gun was
3 theoretically the defendant gave the gun to
4 Malcolm, Malcolm gave the gun to witnesses
5 Ramsdell and Knutson, and Ramsdell and Knutson
6 then hid the gun. However, Malcolm was a non-
7 witness and credibility of the other witnesses
8 was, in fact, challenged, reasonably so.
9 Under the circumstances, then, while
10 the testimony under a different burden of proof
11 could lead one to conclude that the defendant
12 circumstantially wasn't guilty of the shooting,
13 the requisite proof beyond a reasonable doubt
14 that the defendant, in fact, possessed a
15 firearm and killed the decedent on October 19,
16 2004 is not credible and I find the defendant
17 not guilty of Count 2.
18 If I can get an update on where you
19 are with respect to Count 1.
20 MS. EHLERT: Your Honor, we have a
21 case-setting date. I believe it's January 10th
22 or January 11, 2007. Early January, and Mr.
23 Minor and myself will certainly still discuss
24 the possibility of whether a plea is possible
25 in this case.

1 I would anticipate that any
2 conversations to that effect will be completed
3 by the case-setting date, as we need to order
4 transcripts, if we are going to be proceeding
5 to a second trial. And I know that Mr. Minor
6 and myself will want to get on that quickly
7 since that would take a substantial amount of
8 time.
9 So I don't believe that it's
10 unrealistic to say that by January 10th the
11 parties will know whether this is going to
12 resolve itself in a plea or whether there will
13 be a second trial.
14 I believe that both parties
15 understood that today's ruling could influence
16 the defendant's decision as to whether or not
17 he wanted to proceed to trial or discuss
18 further a plea in this case. And certainly the
19 defense needs to discuss this now with his
20 client about how to proceed forward.
21 Since Mr. Minor has some time off
22 coming to him, we probably will not discuss
23 this again until after the holidays. But I
24 still believe that we'll have enough time
25 before case-setting to have that conversation.

1 THE COURT: Thank you. Mr. Minor,
2 your update.
3 MR. MINOR: Your Honor, I have
4 informed Ms. Ehlert that we did not wish to
5 close any doors and do plan to have a
6 discussion that will be in much more detail,
7 once I return, and I do anticipate an answer
8 one way or another before case-scheduling.
9 THE COURT: All right. I'm not sure,
10 I think you may or may not want to write up
11 your findings and conclusions, obviously,
12 polish it up on Count 2, and unless I hear back
13 from you further, that will conclude this
14 matter. So I'll hear back from you on or
15 around the time of case-setting.
16 MS. EHLERT: Thank you, Your Honor.
17 MR. MINOR: Thank you, Your Honor.
18 (Recess was taken.)
19
20
21
22
23
24
25

EXHIBIT J

Special Verdict
And Finding

No. 22

For purposes of a special verdict, the state must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The state must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The state must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

FILED
KING COUNTY, WASHINGTON
NOV 26 2007
SUPERIOR COURT CLERK
KARLA GABRIELSON
DEPUTY

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

STATE OF WASHINGTON, Plaintiff,	)	No. 04-1-08866-2 KNT
vs.	)	SPECIAL VERDICT FORM D
MATTHEW MOI, Defendant.	)	

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant Matthew Moi armed with a firearm at the time of the commission of the crime of Murder in the First Degree?

ANSWER: yes (Write "yes" or "no")

11/21/07
Date

Michelle L DeYoung
Presiding Juror

ORIGINAL

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APPENDIX B

(TRUST ACCOUNT)

TRUST ACCOUNT STATEMENT

DOC# 0000873600 Name: MOI, MATHEW BKG# 225427
LOCATION: B02-026-HA24U

Account Balance Today (09/17/2012)	Current :	1094.22
	Hold :	30.00
	Total :	1124.22

Account Balance as of 09/17/2012 1094.22

SUB ACCOUNT	START BALANCE (08/16/2012)	END BALANCE (09/17/2012)
COMM SERV REV FUND ACCOUNT	0.00	0.00
EDUCATION ACCOUNT	0.00	0.00
SAVINGS BALANCE	1082.07	1092.07
SPENDABLE BAL	45.04	0.00
WORK RELEASE SAVINGS	0.00	0.00
POSTAGE ACCOUNT	2.15	2.15
MEDICAL ACCOUNT	0.00	0.00

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.
EL	ESCORTED LEAVE	09-2011	UNLIMITED	0.00	0.00
HYGA	INMATE STORE DEBT	08122004	0.00	6.59	0.00
CVC	CRIME VICTIM COMPENSATION	08062004	UNLIMITED	78.60	0.00
MEDD	MEDICAL COPAY DEBT	06172009	0.00	3.00	0.00
COIS	COST OF INCARCERATION /07112000	08062004	UNLIMITED	2184.07	0.00
TVD	TV CABLE FEE DEBT	07122008	0.18	2.48	0.00
CVCS	CRIME VICTIM COMPENSATION/07112000	08062004	UNLIMITED	546.02	0.00
POSD	POSTAGE DEBT	12192008	0.00	3.60	0.00
IDTD	ID TAG DEBT	06162009	0.00	2.53	0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20080307	UNLIMITED	1931.82	0.00
HYGA	INMATE STORE DEBT	07092008	0.00	3.75	0.00
COI	COST OF INCARCERATION	08062004	UNLIMITED	0.00	0.00

TRANSACTION DESCRIPTIONS -- COMM SERV REV FUND ACCOUNT SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS -- EDUCATION ACCOUNT SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS -- SAVINGS BALANCE SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE
08/25/2012	Deductions-SAV-07092008 D D		10.00	1092.07

TRUST ACCOUNT STATEMENT

DOC# 0000873600 Name: MOI, MATHEW BKG# 225427
LOCATION: B02-026-HA24U

TRANSACTION DESCRIPTIONS -- SPENDABLE BAL SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE
08/16/2012	Recreation Activities - Dairy Fresh		(25.00)	20.04
08/20/2012	CRS SAL ORD #6941759WEST		(14.07)	5.97
08/25/2012	WUINTERF: SUZETTE\MOI, 210 37TH ST, AUBURN, WA, 98002, 2532668909 CLIE		100.00	105.97
08/25/2012	Deductions-LFO-20080307 D D		(20.00)	85.97
08/25/2012	Deductions-CVCS-08062004 D D		(5.00)	80.97
08/25/2012	Deductions-SAV-07092008 D D		(10.00)	70.97
08/25/2012	Deductions-COIS-08062004 D D		(20.00)	50.97
08/28/2012	CRS SAL ORD #6952705WEST		(12.49)	38.48
09/06/2012	CRS SAL ORD #6962472WEST		(38.16)	0.32
09/08/2012	TV CABLE FEE DEBT		0.18	0.50
09/08/2012	I05 - TV CABLE FEE		(0.50)	0.00

TRANSACTION DESCRIPTIONS -- WORK RELEASE SAVINGS SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS -- POSTAGE ACCOUNT SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS -- MEDICAL ACCOUNT SUB-ACCOUNT

DATE	TRANSACTION DESCRIPTION	RECEIPT#	TRANSACTION AMT	BALANCE

DECLARATION OF SERVICE BY MAIL
GR 3.1(c)

I, Matthew Moi, declare that, on this _____ day of April, 2013, I deposited the forgoing documents:

Pers. Restraint Pet. with Memorandum of Law and Attached Exhibits A-J.

or a copy thereof, in the internal legal mail system of Clallam Bay Correction Center

And made arrangements for postage, addressed to: (name & address of court or other party.)

Court Clerk/Administrator
Richard D. Johnson
Division One Court of Appeals
One Union Square
600 University Street
Seattle, WA. 98101-4170

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

Dated at Clallam Bay, WA. (City & State) on 4-9-2013 (Date)

Signature

Matthew Moi
Type / Print Name

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 70180-1-I
MATTHEW WILSON MOI,	)	ORDER DISMISSING PERSONAL RESTRAINT PETITION
Petitioner.	)	

Matthew Moi filed a personal restraint petition challenging his conviction by a jury of first degree murder in King County Superior Court Cause No. 04-1-08866-2 KNT. Moi raises several claims of error: (1) that his right to a public trial was violated when the trial court questioned an empaneled juror in private; (2) that he was denied notice of the charges against him because the State did not file a new charging document after his first trial ended in a mistrial; (3) that the evidence was insufficient to sustain his conviction; (4) that he was subjected to double jeopardy; (5) that the prosecutor committed misconduct; (6) that trial counsel was ineffective; and (7) that appellate counsel was ineffective. To prevail on a personal restraint petition, the petitioner bears the burden of demonstrating either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Moi fails to meet this burden, his petition is dismissed.

In 2004, the State charged Moi with one count of first degree murder while armed with a firearm and first degree unlawful possession of a firearm for the shooting death of Keith McGowan. In 2006, the murder charge proceeded to a jury trial but Moi stipulated to a bench trial on the firearm charge. The jury was unable

to reach a verdict on the murder charge and a mistrial was declared. The trial court acquitted Moi of the firearm charge, concluding that the State failed to prove beyond a reasonable doubt that Moi was the shooter in the murder. In 2007, Moi was retried and convicted of the murder charge.

1. Courtroom Closure

During the retrial, Juror 8 sent a note to the trial court requesting to be relieved from jury duty due to a financial hardship. Out of the presence of the jury, the trial court notified the parties of Juror 8's concern, and stated that he was disinclined to grant her request. The trial court stated, "I do want to talk to her and just let her know, again, why we can't do this. I think it would be better to do it outside the presence of everyone else. Do you guys want to be here when I do that or should I just talk to her at break?" Defense counsel agreed with the trial court's suggestion. During the lunch break, the trial court spoke with Juror 8. After the parties returned to the courtroom but before the jury entered, the trial court stated, "And just before you leave, let me tell you that I did talk to Juror No. 8, and I did tell her that we were sympathetic but there was really nothing we could do."[1]

Moi contends that the trial court's discussion with Juror 8 outside the presence of the parties without a Bone-Club[2] hearing constituted a violation of his right to a public trial and the public's right to open court records, constituting structural error requiring reversal of his convictions. The right of a criminal defendant to a public trial is guaranteed by both the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution. Additionally,

[1] Juror 8 was later excused due to illness and did not deliberate.
[2] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995)

article I, section 10 of the Washington Constitution guarantees the public's open access to judicial proceedings. The court may close a portion of a trial to the public only if the court openly engages in the five-part balancing test stated in Bone-Club.[3] "[U]nless the trial court considers the Bone-Club factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial [on direct appeal]." State v. Wise, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012). A closure of a trial "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

Here, Moi does not demonstrate that there was a closure triggering the requirements of Bone-Club. From the record it appears as though the trial court's intention was to speak with Juror 8 in the courtroom during the lunch break. The parties agreed that they did not wish to be present, but nothing in the record indicates that the courtroom was closed or the public was excluded during the trial court's discussion with Juror 8. Without an affirmative showing that the courtroom was closed, Moi cannot obtain relief on a public trial violation claim in a personal restraint petition.

2. Failure to File New Charging Document

[3] The five factors are: (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of 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 public and of the closure, and (5) the order must be no broader in application or duration than necessary. Bone-Club, 128 Wn.2d at 258-59.

Moi claims that he was denied his right to a fair trial when the State did not file a new charging document after his first trial ended in a mistrial. Citing State v. Corrado, 78 Wn. App. 612, 898 P.2d 860 (1995), abrogated on other grounds by State v. Franks, 105 Wn. App. 950, 22 P.3d 269 (2001), he claims that this error divested the trial court of subject matter jurisdiction. In Corrado, the State moved to dismiss the charges without prejudice when a material witness could not be located, but later re-arraigned the defendant without filing a new charging document. Because the dismissal terminated the proceedings against the defendant, the trial court had no subject matter jurisdiction until a new charging document was filed. But a mistrial does not terminate the proceedings such that filing of a new charging document is necessary. Rather, the effect of a mistrial is to return the defendant to the same position he was in before the trial. State v. Mayovsky, 25 Wn. App. 155, 157, 605 P.2d 793 (1980). Because Moi does not cite to any authority supporting his claim that a mistrial divests a trial court of subject matter jurisdiction absent the filing of a new charging document, his claim fails.

Moi further claims that the State's failure to file a new charging document denied him the opportunity to be informed of the charges against him because the State changed its theory of the case following the mistrial to emphasize the victim's gang affiliation. But the purpose of the charging document is to notify the defendant of the charges against him, not outline the State's theory of the case. See, e.g., State v. Hennessy, 114 Wn. 351, 358, 195 P. 211 (1921). Moreover, the certification of probable cause attached to the charging document fully outlined the State's theory that Moi killed McGowan because McGowan was a member of the

Hoover Crips gang and Moi believed that his mother and best friend had been targeted for violence by the gang.

3. Sufficiency of the Evidence/Double Jeopardy/Collateral Estoppel

Moi argues that the State's evidence was insufficient to support a conviction for first degree murder with a firearm enhancement because the trial court had previously acquitted him of the charge of first degree unlawful possession of a firearm. In other words, argues Moi, he cannot be found guilty of shooting McGowan when he had already been found not guilty of possessing the murder weapon. But "[w]here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count."[4] State v. Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). Moi does not argue that the State did not carry this burden of proof in his second trial. As a result, sufficient evidence supported the verdict.

In a related argument, Moi argues that he was subjected to double jeopardy when the State charged him with first degree murder with a firearm enhancement after the trial court acquitted him on the separate firearm charge. The double jeopardy clauses of the United States and Washington Constitutions prohibit multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Parmelee, 108 Wn. App. 702, 708, 710, 32 P.3d 1029 (2001). But if the legislature has clearly authorized cumulative punishments for the same

[4] Though Moi appears to claim that the jury's finding that he was armed with a firearm was inconsistent with the trial court's acquittal, the Washington Supreme Court has held that it is "no less problematic to second-guess the jury when a general verdict conflicts with a special verdict than when two general verdicts conflict." State v. McNeal, 145 Wn.2d 352, 359, 37 P.3d 280 (2002).

conduct in a single proceeding, double jeopardy is not violated. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). Washington courts have repeatedly held that the imposition of firearm enhancements do not violate double jeopardy based on clear legislative intent. State v. Nguyen, 134 Wn. App. 863, 866-68, 142 P.3d 1117 (2006) (holding the legislative intent in adopting the firearm enhancement statute and in mandating additional punishment for the use of a firearm is "unmistakable.") The fact that both the crime of unlawful possession of a firearm and the firearm enhancement to the murder charge required the State to prove that Moi possessed a firearm does not make the two offenses the same, and double jeopardy was not violated.

Finally, Moi argues that the State should have been collaterally estopped from arguing that he committed the murder with a firearm when the trial court previously entered findings of fact that the State failed to prove the firearm charge beyond a reasonable doubt. Collateral estoppel applies in criminal cases if the following criteria are met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior adjudication must be a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003). "Collateral estoppel, however, does not bar the later use of evidence merely because it relates to alleged criminal conduct for which a defendant has previously been acquitted." State v. McPhee, 156 Wn. App. 44, 57, 230 P.3d 284

(2010) (citing State v. Eggleston, 164 Wn.2d 61, 71, 187 P.3d 233 (2008)). As a result, the State was not barred from arguing in the second trial that Moi was armed with a firearm.

4. Prosecutorial Misconduct

Moi claims that the deputy prosecutor committed misconduct in closing argument by improperly vouching for the credibility of the State's witnesses and casting doubts on Moi's credibility. To prevail on a claim of prosecutorial misconduct, Moi must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 717 (2000). Where, as here, the defendant failed to object, move for mistrial, or request a curative instruction, review is only appropriate if the prosecutorial misconduct is "so flagrant and ill intentioned" that no curative instruction could have obviated the prejudice engendered by the misconduct. State v. Emery, 174 Wn.2d 742, 761-62, 278 P.3d 653 (2012).

It is misconduct for a deputy prosecutor to express a personal opinion about a witness's credibility. State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984). But "there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case." State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Here, the deputy prosecutor did not express a personal opinion that the State's witnesses were telling the truth and Moi was not. Rather, the deputy prosecutor instructed the jury that, in determining whether a witness was credible, they should analyze whether that witness's statements were consistent with those of other witnesses or

whether the witness appeared to have a difficult time remembering his version of events. The closing argument made by the State was not improper.

5. Ineffective Assistance of Counsel

Moi contends that trial counsel was ineffective for: (1) failing to "demand the nature of the charges the State was required to refile against Mr. Moi," (2) failing to object to the State's closing argument; and (3) failing to introduce evidence of Moi's acquittal of the possession charge. To establish ineffective assistance, Moi must show that trial counsel's performance was deficient and that prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient if it fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Moi also bears the burden of rebutting the strong presumption that counsel's representation was not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Moi does not demonstrate that trial counsel's performance was deficient. As discussed above, the State was not required to file a new charging document after the mistrial, the State's closing argument did not constitute misconduct, and the State was not collaterally estopped from introducing evidence to support the firearm enhancement in the retrial. As a result, it was reasonable for trial counsel not to

object on these grounds. Because trial counsel's performance was not deficient, there is no need to analyze whether Moi was prejudiced.

Moi further claims that appellate counsel was ineffective for failing to raise on direct appeal the issues he raises in this petition. Because none of the issues raised by Moi have merit, appellate counsel was not ineffective for failing to raise them on direct appeal.

In his reply brief, Moi raised additional claims for the first time, including: (1) that the trial court erred in admitting gang evidence to establish motive; (2) that the trial court violated the Code of Judicial Conduct in meeting with Juror 8; and (3) that trial counsel was ineffective for failing to object to the trial court's meeting with Juror 8 and failing to seek a bill of particulars.[5] The State moved to strike these claims. This court will not consider claims raised for the first time in a reply brief. In re Pers. Restraint of Peterson, 99 Wn. App. 673, 681, 995 P.2d 83 (2000). Thus, these claims were not considered.

Because Moi has not demonstrated that he is entitled to relief by means of a personal restraint petition, now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this _____ day of _____, 2013.

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[5] Moi also appears to argue in his reply that the State was obligated to file a new charging document following the mistrial because the State added a gang aggravator under RCW 9.94A.535(3)(aa) (providing that an exceptional sentence may be imposed if "the defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang..."). But a review of Moi's judgment and sentence shows that Moi received a standard range sentence plus 60 months for the firearm enhancement; Moi's sentence was not aggravated under RCW 9.94A.535(3)(aa).

Acting Chief Judge

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