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COA Nos. 43039-8-II, 44780-1-II

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No. 91578-4

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Clerk

SUPREME COURT  
OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT OF

Eduardo Sandoval,

Petitioner.

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**PETITIONER'S OPENING BRIEF**

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## I. INTRODUCTION

This personal restraint petition is about guilt by association, prosecutorial misconduct, and ineffective assistance of counsel. When Eduardo Sandoval was eighteen years old, other members of the gang into which he had been indoctrinated as a thirteen year old committed an undeniably reprehensible crime: they shot a young man and his sister after misidentifying the man as belonging to a rival gang. But Mr. Sandoval was not one of the shooters. Nor was he one of the men who stole the vehicle used to perpetrate the shooting. Nor was he even at the scene of the crime. Instead, he was at a McDonald's drive-thru after spending the previous two hours smoking marijuana in a park while actively disregarding orders from the gang leader to patrol the area around the scene of the crime. Nevertheless, Mr. Sandoval was convicted as an accomplice and co-conspirator to first-degree murder and assault, and is currently serving a 904-month prison sentence—more than twice as long as either of the shooters and more than six times as long as either of the men who stole the vehicle used to perpetrate the shooting. Mr. Sandoval did not get a fair trial, and two of the crimes for which he is currently serving a lengthy prison sentence do not even exist.

First and foremost, the crime of conspiracy to commit murder by extreme indifference does not exist because the mens rea for conspiracy is

intent to kill, but murder by extreme indifference is a non-intent crime requiring only aggravated recklessness. This Court recognized as much in *State v. Dunbar*, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991), when it held that attempted murder by extreme indifference does not exist because the inchoate crime of attempt requires specific intent but murder by extreme indifference does not. As such, the trial court erred and violated Mr. Sandoval's constitutional rights when it entered judgment against him for the non-existent crime of conspiracy to commit murder by extreme indifference. His conspiracy conviction should be reversed.

The same is true for Mr. Sandoval's conviction as an accomplice to murder because the mens rea for accomplice liability is actual knowledge that another person's actions will result in homicide, whereas the mens rea for murder by extreme indifference is merely aggravated recklessness. Because a defendant cannot *actually know* whether another person's reckless conduct will result in a homicide, Mr. Sandoval's conviction as an accomplice to murder by extreme indifference should be reversed.

Additionally, Mr. Sandoval's right to a fair trial was violated when the State committed prosecutorial misconduct by making an improper racial comment during its rebuttal closing and spending nearly all of its rebuttal closing argument asserting facts not in the record and introducing evidence about gang terminology without having presented expert

testimony on the issue. The State's misconduct included repeated, baseless references to Mr. Sandoval being an "Original Gangster" or "OG," meaning he was a founding member of the gang, which he was not. The State further argued he was only permitted to attend meetings spent preparing for the crime by virtue of his elevated status as an OG. Yet this could not be further from the truth. The evidence at trial demonstrated that Mr. Sandoval was *not* an OG, and that he only attended the meetings because failing to do so would have endangered him and his family.

Mr. Sandoval's right to a fair trial was further violated when the trial court abused its discretion by denying his request for an instruction on the lesser-included offense of manslaughter. As this Court recently reiterated in *State v. Henderson*, --- P.3d ---, 2015 WL 847427, at \*4 (Feb. 26, 2015), the two cases relied upon by the trial court in this case, *State v. Pastrana*, 94 Wn. App. 463, 972 P.2d 557 (1999) and *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998), contain an abrogated definition of the mens rea for manslaughter. For this reason, even if it is found that accomplice liability can be applied to murder by extreme indifference, Mr. Sandoval's conviction for first-degree murder should be reversed.

The trial court also abused its discretion and deprived Mr. Sandoval of his right to a fair trial when it denied his request for a cautionary instruction on accomplice liability. The State's case relied

almost exclusively on the testimony of other gang members who were involved in the shooting. Because this testimony was not substantially corroborated by other evidence, Mr. Sandoval was entitled to receive his requested cautionary instruction and the trial court's failure to grant this request further requires that his convictions as an accomplice to first-degree murder and assault be reversed.

Compounding all of these issues, Mr. Sandoval was denied his constitutional right to effective legal assistance on his direct appeal. The attorney appointed to represent him failed to raise any of the issues discussed in the instant petition, even though three of these issues were expressly identified by Mr. Sandoval in support of his notice of appeal. His original appellate counsel also failed to file a reply brief, seek oral argument, or request discretionary review of the Court of Appeals' unpublished decision affirming Mr. Sandoval's convictions.

Lastly, Mr. Sandoval's 904-month sentence is grossly and unconstitutionally disproportionate to his level of involvement in the crime and to the sentences imposed on other, far more culpable participants. For example, the gang member who picked Mr. Sandoval up from his house, drove him to each of the preparatory meetings, and drove him around on the night of the shooting when they were supposed to be serving as lookouts—and who later planned and assisted in the murder of

the gang's leader—only received a 45-month sentence. For these reasons, Mr. Sandoval's convictions and sentence should be reversed.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred by entering judgment against Mr. Sandoval for the inchoate crime of conspiracy to commit first-degree murder by extreme indifference, when the requisite mens rea for conspiracy is intent that a homicide occur, but the mens rea for first-degree murder by extreme indifference is only aggravated recklessness.

2. Whether the trial court erred by entering judgment against Mr. Sandoval for the crime of being an accomplice to first-degree murder by extreme indifference, when the requisite mens rea for accomplice liability is actual knowledge that another person's actions will result in the commission of a homicide, but the mens rea for first-degree murder by extreme indifference is only aggravated recklessness.

3. Whether the State made improper and prejudicial comments constituting prosecutorial misconduct when, without any expert testimony on gang terminology having been presented at trial, it repeatedly described Mr. Sandoval as an "OG," improperly referenced the race of two non-ELS members in a comparison of them with Mr. Sandoval and other ELS members, and separately misrepresented witness testimony in an attempt to prove the elements of the crimes charged.

4. Whether the trial court abused its discretion by denying Mr. Sandoval's request for a jury instruction on the lesser-included offense of manslaughter, when the case law relied upon by the court contained an abrogated definition of the mens rea for manslaughter.

5. Whether the trial court abused its discretion by denying Mr. Sandoval's request for a cautionary instruction on accomplice liability when the State relied heavily on the testimony of accomplices and such testimony was not substantially corroborated by other evidence.

6. Whether Mr. Sandoval was denied his constitutional right to effective legal assistance when his counsel on direct appeal failed to file a reply brief, failed to seek oral argument, failed to request discretionary review, failed to assign errors previously identified by Mr. Sandoval—including issues raised in this petition—and failed to assign errors to the trial court's entry of judgment against Mr. Sandoval for the non-existent crimes of being a co-conspirator and accomplice to first-degree murder by extreme indifference.

7. Whether the trial court erred by sentencing Mr. Sandoval to 904 months in prison, when his co-defendants and the witnesses who testified against him received substantially lower sentences despite having admitted to playing a far greater role in the shootings of Camille Love and Joshua Love.

### III. STATEMENT OF THE CASE

#### A. Factual Background

The Eastside Lokotes Sureños (“ELS”) is a gang in Tacoma, Washington, founded in 2001. RP 2648. The ELS has historically operated in the neighborhood between 38th Street and 72nd Street on Tacoma’s eastside. RP 1901, 2033.

In approximately 2005, Eduardo Sandoval, who was thirteen years old at the time, became a member of the ELS. At no point during his involvement with the ELS was Mr. Sandoval ever regarded as an original gangster (“OG”). In the ELS, an OG is a founding member at the top of the gang’s hierarchy, and the word of an OG carries great importance and clout with the gang. *See* RP 2648-50 (discussion of hierarchy organized around OGs); RP 2123-24, 2543 (further explanation of term).

When Mr. Sandoval was eighteen years old, he was standing on the sidewalk with several other ELS members when a car pulled up and fired multiple gunshots into the group. RP 2531-32. They immediately dropped for cover, but one of them, Naitaalii Toleafoa, was hit. RP 890-91. Minutes later, Mr. Sandoval received a call informing him that the house of his friend, Byron Alvarez, had also been targeted in a drive-by shooting. RP 2534-35. Mr. Alvarez was not an ELS member. RP 2008.

Mr. Sandoval and several others drove to Mr. Alvarez’s house. At

the time, the leader of the ELS was twenty-six year-old, Juan Zuniga, who was present at the scene of the Toleafoa shooting. RP 2531. According to Mr. Zuniga, both shootings had been perpetrated by the Eastside Pirus (“Pirus”), a rival gang affiliated with the Bloods. RP 936-37; Appendix Section A to Petitioner’s Brief (“App. A”) at 5.<sup>1</sup>

Mr. Sandoval, however, did not believe that these shootings were gang related because Mr. Alvarez told him that the real shooter was “some guy that his girl’s been talking to.” App. A at 5. Mr. Sandoval turned out to be correct. As later confirmed by police, both shootings had been carried out by a man named Reynaldo Orozco, who was not a member of the Pirus, but instead, was having an affair with Mr. Alvarez’s wife. RP 3393; App. A at 5. Mr. Zuniga nevertheless ordered that ELS members attend a meeting at his house the next day in order to discuss retaliatory measures against the Pirus. RP 2543-44.

It was widely known that Mr. Zuniga maintained a practice of severely punishing members who failed to attend ELS meetings. At the very least, a member who did not show up would be physically beaten. RP

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<sup>1</sup> An unredacted audio recording of Mr. Sandoval’s entire statement to the police was played before the jury, but not transcribed in the Report of Proceedings. *See* RP 3646 (Exhibit No. 138). Several weeks earlier in the trial, a redacted version of the statement was read to the jury, but was also not transcribed. *See* RP 3213 (Exhibits 5-E and 5-F). Given that his statement was read to the jury and properly part of the record, a full copy of the statement is included for the Court’s reference in the Appendix.

820, 1997-99, 2722. Eyewitness testimony of this practice was presented at trial. RP 1998. But being absent for such meetings could have far more serious consequences. For example, when one ELS member failed to attend meetings, Mr. Zuniga went to his house and “beat up his dad.” RP 2081-82. Similarly, in addition to being physically assaulted for not staying involved in ELS activities, another member was informed that he would be shot in the foot if he continued to avoid gang activities. RP 2722-23. *See also* RP 2031, 2039 (testimony that Mr. Zuniga was planning to shoot absentees in the foot or burn their cars for failing to remain involved in the ELS). There was no way to avoid these consequences because leaving the ELS was not an option. RP 817 (“Q. How does somebody leave the gang? A. You cannot get out. Q. There’s no way out? A. No.”); App. A at 18.

Because of the consequences for not attending a meeting, it was crucial for ELS members to maintain the appearance of participating in the gang, even when not intending to carry out Mr. Zuniga’s specific orders:

Q. Now, appearances are also very important within the gang; correct?

A. Yes.

Q. Like do for instance, I may not really want to do something, but I will put in the best appearance so I don’t get a beatdown. Is that fairly accurate?

A. Yes.

RP 1190; *see also* RP 1191 (confirming that such deception is “regularly practiced” by ELS members).

Maintaining appearances is exactly what Mr. Sandoval did in the days following the Toleafoa shooting. The next day, Mr. Sandoval was picked up from his house by Antonio Gonzalez, a twenty-four year-old senior ELS member, who drove Mr. Sandoval to Mr. Zuniga’s house for the meeting that had been scheduled the night before. Of the eleven people present at the meeting, Mr. Zuniga did all of the talking. RP 972 (“Juan said everything.”); RP 1927-28. He ordered that certain members steal a van in order to retaliate against the Pirus. RP 1924. Mr. Sandoval did not discuss stealing the van and did not discuss retaliating. RP 1925 (confirming that Mr. Sandoval did not talk about “the retaliation issue”).

Late that night, several ELS members and affiliates who had attended the meeting, including Mr. Toleafoa’s cousins, Dean Salavea and Time Time, stole a van. RP 950, 1926. Mr. Sandoval was not involved.

The following day, Mr. Gonzalez again picked up Mr. Sandoval and drove him to Mr. Zuniga’s house where ELS members had been instructed to reconvene. RP 2037. But like Mr. Sandoval, Mr. Gonzalez had no intention of participating in the planned retaliation and brought along his two young children as an excuse to avoid participating in Mr.

Zuniga's plan. *See* App. A at 9 (“[H]e knew him having his kids wouldn’t get him involved in anything . . . .”); RP 2038-40, 2044. Recently, Mr. Gonzalez had been seeking to minimize his role in the ELS and as a consequence, he was currently being “double-taxed”<sup>2</sup> by Mr. Zuniga. RP 2039.

Once they arrived, Mr. Zuniga issued assignments. Three ELS members were instructed to drive around in the stolen van until they found a Pirus member to retaliate against, while the rest of the ELS members were assigned to drive around in separate cars searching for rival gang members and keeping an eye out for police. Mr. Gonzalez’s assignment was to patrol East 72nd Street, the southernmost boundary of the ELS’s territory. RP 2043. Yet when he left for this assignment, instead of leaving his children with Mr. Zuniga’s wife, whose children were close to the same age, Mr. Gonzalez decided to bring them along.

Knowing that Mr. Gonzalez would not do anything to endanger his children, Mr. Sandoval—whose nickname, “Nesio,” means “stubborn”—volunteered to go along with him:

Q. [Y]ou decided to jump in the car with Antonio Gonzalez.

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<sup>2</sup> Being “double-taxed” means being forced to pay twice as much per month to the ELS as other members. At this time, Mr. Gonzalez was already involved in formulating a plot to kill Mr. Zuniga, which was carried out three months later in May 2010. RP 2022.

A. Yes.

Q. Because he had his children with him, right?

A. Yes.

Q. And did you feel that by going with Antonio that you could remove yourself a little bit from...

A. Well, I knew I could because I knew he wouldn't put his kids, he would never ever put his kids in any kind of situation . . . .

App. A at 8. Like Mr. Gonzalez, he intended only to maintain the appearance of participating in Mr. Zuniga's plan. *See id.* at 8-9.

Mr. Sandoval was right—Mr. Gonzalez's actions proved he wanted nothing to do with any effort to retaliate against the Pirus. From Mr. Zuniga's house, which was located on Tacoma's north end, Mr. Gonzalez drove south on I-5 and exited at East 38th Street, two exits before East 72nd Street and thirty-five blocks north of the area he was assigned to patrol. RP 2042-43. After exiting, Mr. Gonzalez drove east to McKinley Playfield,<sup>3</sup> and parked his car across from Sacred Heart Catholic Church. RP 2043. He then put on a Disney movie for his two young children in the backseat, while he and Mr. Sandoval got out of the car and smoked marijuana. RP 2044. By failing to patrol their assigned

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<sup>3</sup> Incorrectly referred to in the record as McKinley Park. Also, McKinley Playfield has since been renamed "Verlo" Playfield.

area, both Mr. Gonzalez and Mr. Sandoval were actively disobeying Mr. Zuniga. RP 2046 (testimony from Mr. Gonzalez confirming that they were “not following instructions”).

Mr. Gonzalez and Mr. Sandoval remained at McKinley Playfield for approximately thirty minutes. Then, the stolen van drove by and spotted Mr. Gonzalez and Mr. Sandoval in the park, and the occupants of the van advised them to carry out their assigned task. If they had not been spotted, Mr. Gonzalez and Mr. Sandoval would have stayed at McKinley Playfield and waited for word that Mr. Zuniga’s plan was over. RP 2045. But, after being seen disobeying orders, they had to maintain the appearance of participating, so they got back in the car and started heading south toward the area they had been assigned to monitor. RP 2055.

After turning onto 72nd Street, Mr. Gonzalez and Mr. Sandoval saw a police car parked at a Key Bank. RP 2048. At some point thereafter, this information was communicated to Mr. Zuniga. But the details of how this transpired are unclear. *See id.* (cross-examination revealing that Mr. Gonzalez did not remember the details about the call: “A. I don’t remember exactly who called who. Q. Somebody called? A. Somebody called someone.”).<sup>4</sup> It is also unclear whether Mr. Gonzalez or Mr.

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<sup>4</sup> Mr. Gonzalez’s testimony on this point is inconsistent. Even on direct examination when the State asked him who called Mr. Zuniga to tell

Sandoval relayed this information to Mr. Zuniga. *See id.*<sup>5</sup>

Once they passed Key Bank, Mr. Gonzalez and Mr. Sandoval again disobeyed orders and diverted from the area they had been assigned to patrol. Mr. Gonzalez turned off of 72nd Street, drove seven blocks up to Boze Elementary School, parked his car, and he and Mr. Sandoval got out of the car to smoke more marijuana while the children continued watching their movie. RP 2056. Sometime later, they drove to a McDonald's. *Id.* Then, while waiting at the drive-through window, Mr. Gonzalez and Mr. Sandoval saw several police cars heading down 72nd, but against orders, they did not call anyone to report this observation. Instead, Mr. Zuniga called and told them to leave the area. RP 2056-57.

As was later revealed, the police cars they saw driving past McDonald's were responding to the scene of a shooting perpetrated by the

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him about the police, it did so in a compound question that obscures the meaning of Mr. Gonzalez's answer: "Q. Did you make the call or did Nesio [Mr. Sandoval] make the call after seeing the police officers?

A. Yes." RP 1918.

<sup>5</sup> In fact, the record indicates that Mr. Gonzalez spoke to Mr. Zuniga during the phone call when the information about the police was communicated. That evening, there were only two phone calls with Mr. Zuniga: (1) after Mr. Gonzalez and Mr. Sandoval saw the police, RP 2048; and (2) after the shooting occurred, RP 2056-57.

Mr. Gonzalez testified that he did not speak to Mr. Zuniga during the second phone call, RP 1919, but testified that he *did* speak with Mr. Zuniga at least "once" that evening. RP 1950. By process of elimination, this could only mean that Mr. Gonzalez spoke with Mr. Zuniga during the first phone call, when the information about seeing the police was transmitted.

ELS members in the stolen van. Joshua Love, who had been riding in the front passenger seat of his sister's car, had been shot after the van's occupants mistook him for a member of the Pirus. His sister, Camille Love, was also shot. Mr. Love survived the shooting; Ms. Love did not.

## **B. Procedural Background**

### **1. Investigation, Trial, and Sentencing**

Several months later, Mr. Zuniga was murdered by Mr. Toleafoa, the ELS member whose shooting had prompted the ill-fated plan to retaliate against the Pirus.<sup>6</sup> Mr. Gonzalez assisted in the murder of Mr. Zuniga, along with ELS members, Alfredo Villagomez and Ruben Basilio, who had also been involved in the events that led to the shootings of Ms. Love and her brother. Mr. Sandoval was not involved in the planning or commission of Mr. Zuniga's murder.

When Mr. Gonzalez, Mr. Villagomez, and Mr. Basilio were charged with murdering Mr. Zuniga, they volunteered information that led authorities to arrest Mr. Sandoval and several other ELS members alleged to have been involved in the shooting death of Ms. Love. In return for volunteering this information and testifying in support of the State's case,

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<sup>6</sup> Mr. Zuniga's murder had been ordered from prison by two incarcerated ELS leaders, who had stopped receiving the monthly funds that Mr. Zuniga was supposed to be sending them. The perpetrators of his murder had also been threatened by Mr. Zuniga with violence against them or their families. *See* RP 2081 (“[H]e was planning to do stuff to my family, also to my other co-defendants' families”).

these three men received drastically reduced sentences for the murder of Mr. Zuniga and were not charged for their involvement in the shootings of Ms. Love or her brother. *See* RP 1093 (Villagomez); RP 1986-87 (Gonzalez); RP 2848 (Basilio).

Mr. Sandoval and four co-defendants—Saul Mex, Jerrod Messer, Time Time, and Dean Salavea—were tried for murder by extreme indifference, assault, and conspiracy to commit murder by extreme indifference. Each co-defendant, however, pleaded guilty shortly before closing argument in exchange for a reduced sentence, leaving only Mr. Sandoval to stand trial for the crimes alleged by the State.<sup>7</sup> For example, Mr. Mex (who shot and killed Ms. Love) received a sentence of 421 months, less than half of Mr. Sandoval's sentence.

When Mr. Sandoval sought to include a jury instruction on the lesser-included crime of manslaughter, the trial court denied his request. RP 3675. The trial court based its decision to do so on two decisions, *Pastrana*, 94 Wn. App. 463, 972 P.2d 557 and *Pettus*, 89 Wn. App. 688, 951 P.2d 284. *See id.* The trial court also denied Mr. Sandoval's request to include a cautionary instruction to the jury regarding the testimony of his alleged accomplices. RP 3660-74.

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<sup>7</sup> Mr. Salavea's trial was severed, but like several of his co-defendants, he also pleaded guilty in exchange for a reduced sentence.

On nine separate occasions during the State's rebuttal closing argument, the prosecutor misidentified Mr. Sandoval as an "OG," which stands for "original gangster," and used this term to persuade the jury that he masterminded the shooting of Ms. Love and her brother. *See, e.g.*, RP 3736 ("He's an OG."); *id.* ("He has been identified as an OG."); RP 3738 ("Who are the OGs? . . . Mr. Sandoval."). Among other things, the prosecutor argued that Mr. Sandoval only got to be at the meetings at Mr. Zuniga's house because he was an OG. *See* RP 3636-37.

Additionally, while arguing that Mr. Sandoval was an OG, the prosecutor impliedly compared Mr. Sandoval's ethnicity to that of his co-defendants, Time Time and Dean Salavea, who were not technically ELS members, but were responsible for stealing the van used to commit the shooting. RP 3737 (emphasizing their "Asian/Pacific Islander descent" and implicitly arguing that Mr. Sandoval, who was a Hispanic member of the ELS, therefore had to "monitor" and "make" sure of their involvement).

Defense counsel objected to all references of Mr. Sandoval being an "OG" and moved for a mistrial. The court overruled defense counsel's objections and denied the motion for mistrial. RP 3753-57.

Further, to support its argument that Mr. Sandoval was a willing and intentional participant in the shootings of Ms. Love and her brother,

the State twice misrepresented to the jury that Mr. Sandoval had driven his own car to Mr. Zuniga's house, when in fact Mr. Gonzalez drove him there. *Compare* RP 3736 and RP 3741 with RP 1192, 2037. Finally, the State gratuitously referred to Mr. Sandoval as only having a "10th grade education," an assertion that lacks any basis in the record. RP 3742.

On January 12, 2012, after deliberating for approximately ten hours,<sup>8</sup> the jury returned a guilty verdict on all charges, including firearm enhancements and gang enhancements. Just before delivering its verdict, however, the jury asked the trial court whether it could rely on the definition of murder by extreme indifference to clarify its understanding of the jury instruction on conspiracy: "To clarify Instruction No. 20, may we use the definition of Murder in the First Degree as written in Instruction No. 12?" The Court's answer was "Yes." RP 3768-69; CP 353. Less than an hour later, the jury delivered its verdict.

At sentencing, Mr. and Ms. Love's father requested that Mr. Mex receive the longest sentence: "He is the one that deserves the most time

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<sup>8</sup> While the length of the jury's deliberations is not directly apparent from the trial transcript, it is apparent when the transcript is read in conjunction with media coverage of the trial. The transcript shows that the jury's deliberations began on January 11, 2012 and continued through the following day, and local news coverage reported that the verdict was read at 2:40 p.m. on January 12, 2012. *Compare* RP 3763 with THE NEWS TRIBUNE, *Jury Convicts Defendant in Camille Love Trial*, <http://blog.thenewstribune.com/crime/2012/01/12/verdict-reached-in-camille-love-trial> (Jan. 12, 2012, 2:04 PM).

here. He is the one that pulled the trigger.” RP 3785. The State separately proposed that Mr. Sandoval be sentenced for a total of 724 months, which represented the low end of the sentencing guidelines.

Instead, the trial court disregarded the requests of the Loves and the State and sentenced Mr. Sandoval to serve 904 months (75.3 years), the maximum for each charge, plus sixty months per charge for the firearm enhancement. Mr. Sandoval’s 904-month sentence was more than twice as long as his co-defendants, Mr. Mex or Mr. Messer, who admitted to shooting Ms. Love and her brother, and more than six times as long as Mr. Time or Mr. Salavea, who admitted to stealing the van. CP 266-279. Lastly, Mr. Sandoval’s sentence was more than *twenty times* as long as the sentence imposed on Mr. Gonzalez, who not only picked up and drove Mr. Sandoval around on the night of the shooting, but also served as a getaway driver in the murder of Juan Zuniga.<sup>9</sup> RP 1986-87 (Mr. Gonzalez testifying that he received a 45-month sentence for the murder of Juan Zuniga and was not charged in the shooting of Camille Love).

## **2. Direct Appeal and Personal Restraint Petition**

Two days after sentencing, Mr. Sandoval filed a notice of appeal. In doing so, he identified three specific issues to be reviewed on appeal:

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<sup>9</sup> KOMO NEWS, *Gang members get 168 ½ years in killing of Tacoma woman*, <http://www.komonews.com/news/local/75-year-prison-term-in-killing-of--138678149.html> (February 3, 2012, 9:12 PM).

(1) “prosecutorial misconduct”; (2) “the court’s failure to instruct the jury on lesser included offenses”; and (3) the court’s “failure to instruct the jury on accomplice testimony.” CP 397-400 (Application for Order of Indigency, filed with Notice of Appeal). The Court appointed appellate counsel, Sheri Arnold, to represent Mr. Sandoval during his direct appeal.

On appeal, however, Ms. Arnold failed to raise any of the three issues for review identified by Mr. Sandoval. Instead, when Ms. Arnold filed her opening brief, the only argument she made was that the evidence presented at trial was insufficient to support Mr. Sandoval’s convictions. Brief of Appellant at 1, *State v. Sandoval*, 180 Wn. App. 1005, Not Reported in P.3d, 2014 WL 1092844 (March 19, 2014) (No. 43039-8-II).

To make matters worse, Ms. Arnold failed to file a reply brief. Shortly thereafter, the Court of Appeals removed Ms. Arnold from all of her pending appeals. Appendix Section B to Petitioner’s Brief (“App. B”) ¶ 2. In the meantime, Mr. Sandoval filed a *pro se* petition for a writ of habeas corpus, which was transferred to the Court of Appeals for consideration as a personal restraint petition.

On July 11, 2013, the law firm of Nielsen, Broman & Koch filed a notice of appearance as Mr. Sandoval’s substitute counsel. Yet they made no effort to file a supplemental brief raising the issues previously identified by Mr. Sandoval. Nor did they object when notified by the

Court of Appeals that Mr. Sandoval's case would be placed on the non-oral-argument calendar.

On March 19, 2014, the Court of Appeals issued an unpublished decision denying Mr. Sandoval's direct appeal and personal restraint petition, and affirming his convictions. *State v. Sandoval*, 180 Wn. App. 1005, Not Reported in P.3d, 2014 WL 1092844 (March 19, 2014). Substitute counsel did not seek discretionary review with this Court.

#### IV. ARGUMENT<sup>10</sup>

Mr. Sandoval's convictions and sentence should be reversed on several grounds.<sup>11</sup> First, Mr. Sandoval's convictions for being a co-

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<sup>10</sup> The instant petition is not barred as a successive petition because it does not seek similar relief so as to require a showing of good cause as set forth in RAP 16.4(d). *In re Martinez*, 171 Wn.2d 354, 363, 256 P.3d 277 (2011) ("A successive petition seeks 'similar relief' if it raises matters which have been 'previously heard and determined' on the merits or 'if there has been an abuse of the writ or motion remedy.'" (quoting *In re Jeffries*, 114 Wn.2d 485, 488-92, 789 P.2d 731 (1990))).

The only issue addressed in Mr. Sandoval's direct appeal was insufficiency of the evidence, and the only issues addressed in his previous personal restraint petition—which he filed *pro se*—were the legality of his arrest, interrogation, and prosecution. As such, none of the issues raised herein have been "previously heard and determined." *See id.* Further, this Court is not bound by the good cause requirement set forth under RCW 10.73.140 (requiring petitioner who files consecutive personal restraint petitions in the Court of Appeals to show "good cause why the petitioner did not raise the new grounds in the previous petition").

<sup>11</sup> In addition to the state law grounds discussed in Mr. Sandoval's petition, when the errors of the trial and sentencing are considered as a whole, the result is a deprivation of Mr. Sandoval's federal right to due process because it resulted in a trial that was fundamentally unfair. *See*

conspirator and accomplice to first-degree murder should be reversed because these crimes require a higher mens rea than the underlying substantive offense. Whereas the inchoate crime of conspiracy requires intent that the crime of first degree murder be performed, and the crime of being an accomplice to first-degree murder requires actual knowledge that a homicide will result from the actions of another person, the crime of first degree murder by extreme indifference only requires aggravated recklessness. Because it is impossible to “intend” or “actually know” the consequences of another party’s reckless actions, the trial court erred by entering judgment against Mr. Sandoval for the crimes of conspiracy and being an accomplice to murder by extreme indifference. The trial court’s errors also violated Mr. Sandoval’s due process rights and his Sixth Amendment right to a fair trial.

Second, Mr. Sandoval’s convictions should be reversed because the State committed prosecutorial misconduct by improperly and prejudicially asserting that he was an “original gangster” or an “OG” without any expert testimony about gang terminology being presented at trial. The State committed further prosecutorial misconduct by improperly and prejudicially misrepresenting to the jury that Mr. Sandoval had driven

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*e.g.*, *Parle v. Runnels*, 505 F.3d 922, 924 (9th Cir. 2007); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992).

himself to Mr. Zuniga's house on the night of the shooting as a means of establishing that he was a willing participant in the crimes. The State also inappropriately referred to Mr. Sandoval as having only a tenth-grade education, which was unsupported by the evidence during trial. Further, the State made improper racial comments during its rebuttal closing argument. The State's misconduct during closing argument violated Mr. Sandoval's constitutional right to a fair trial.

Third, Mr. Sandoval's conviction for first-degree murder should be reversed because the trial court erred by relying on outdated case law to deny his request for a jury instruction on the lesser-included offense of manslaughter. The trial court's error is clear from *State v. Henderson*, 2015 WL 847427, at \*5, where this Court reiterated its previous holding that the two cases relied upon by the trial court to deny Mr. Sandoval's request contain an "outdated definition of recklessness." The trial court's refusal to give the jury instruction on the lesser-included offense deprived Mr. Sandoval of his due process rights and right to a fair trial.

Fourth, the trial court erred in rejecting Mr. Sandoval's request for a cautionary instruction on the accomplice charge. To convict him of first-degree murder and assault, the State relied heavily on testimony from Mr. Sandoval's alleged accomplices and that evidence was not substantially corroborated. The trial court's refusal to provide the cautionary instruction

deprived him of his constitutional right to due process and a fair trial.

Fifth, Mr. Sandoval's convictions should be reversed because the performance of his counsel on direct appeal fell below the constitutional threshold for effectiveness and prejudiced his defense. Counsel on direct appeal failed to raise key legal issues that had merit and counsel's failure to raise these issues caused Mr. Sandoval actual prejudice. Appellate counsel's failure to file a reply brief, seek oral argument, and request discretionary review also caused Mr. Sandoval actual prejudice. Had Mr. Sandoval received effective assistance during his direct appeal, his convictions would have been reversed. Here, Mr. Sandoval was deprived of his constitutional right to effective counsel.

Sixth, Mr. Sandoval's 904-month sentence should be vacated because it is grossly and unconstitutionally disproportionate to the sentences imposed on his co-defendants and other ELS members who admitted to being involved in the shooting. Given the disparity between Mr. Sandoval's exceptional sentence and that of his co-defendants who pleaded guilty and were more culpable than Mr. Sandoval, it appears he was punished for exercising his constitutional right to a trial. Mr. Sandoval was denied his right to a fair trial.

**A. The Trial Court Violated Mr. Sandoval's Right to Due Process by Entering Judgment Against Him for the Non-Existent Crimes of Being a Co-Conspirator and Accomplice to Murder by Extreme Indifference**

Being a co-conspirator or accomplice to first-degree murder by extreme indifference is impossible because both crimes require proof of a more culpable mens rea than the underlying offense of murder by extreme indifference. The mens rea for conspiracy is specific intent to kill, and the mens rea for accomplice liability is actual knowledge that another person's actions will result in the commission of a homicide. By contrast, the mens rea for first-degree murder by extreme indifference is only an aggravated form of recklessness, which by its definition is a less culpable state of mind that is incompatible with intent or actual knowledge.

Additionally, the trial court's entry of judgment against Mr. Sandoval for the crimes of conspiracy and first degree murder violated his right to due process. The United States Supreme Court has made clear that "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29, 121 S. Ct. 712 (2001). Therefore, the imposition of a conviction for a nonexistent offense violated Mr. Sandoval's due process rights. *See Ex Parte Royall*, 117 U.S. 241, 6 S. Ct. 734 (1886).

**1. Conspiracy to Commit Murder by Extreme Indifference Is Not a Cognizable Offense and Mr. Sandoval's Right To Due Process Was Violated By His Conviction**

In Washington, “[a] person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.” RCW 9A.28.040(1). Thus, the mens rea for conspiracy to commit murder is “specific intent” that a homicide occur. *See State v. Jensen*, 164 Wn.2d 943, 950-51, 195 P.3d 512 (2008); *State v. Smith*, 131 Wn.2d 258, 266, 930 P.2d 917 (1997) (granting new trial for failure to properly instruct on conspiracy charge).

By contrast, “the crime of first degree murder by creation of a grave risk of death . . . does not require a specific intent to kill.” *State v. Dunbar*, 117 Wn.2d at 594, 817 P.2d 1360. Rather, the mens rea for first degree murder by extreme indifference is “an aggravated form of recklessness which falls below a specific intent to kill.” *Id.* at 593.

There is no such thing as “conspiracy to commit first degree murder by extreme indifference”<sup>12</sup> because the inchoate crime of

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<sup>12</sup> This is the phrase used by the Court of Appeals to describe Mr. Sandoval’s conviction for conspiracy. *See State v. Sandoval*, 180 Wn. App. 1005, Not Reported in P.3d, 2014 WL 1092844, at \*4.

conspiracy requires specific intent, but the underlying crime of murder by extreme indifference only requires aggravated recklessness. The same was true as to the inchoate crime of attempt in *State v. Dunbar*, where this Court concluded that first-degree murder by extreme indifference “may not serve as the basis for the crime of attempt” because the requisite mens rea for attempt is specific intent to kill. 117 Wn.2d at 595.

In *Dunbar*, two defendants were charged with attempted first-degree murder by extreme indifference after allegedly shooting from a moving car into a crowd of people. *Id.* at 589. When they successfully persuaded the trial court to dismiss the charge on the basis that “one cannot attempt a nonintent crime,” the State appealed and this Court accepted review. *Id.* On appeal, this Court concluded that attempt to commit murder by extreme indifference is not a cognizable offense because the crime of attempt requires specific intent to kill, but murder by extreme indifference does not. *Id.* at 592 (“[F]irst degree murder by creation of a grave risk of death will support an attempt charge only if the underlying murder statute requires the intent to kill as an element.”).

The same is true of conspiracy. Like the crime of attempt, the crime of conspiracy is one of three anticipatory offenses defined by RCW Chapter 9A.28 as requiring proof that the defendant intended for the underlying substantive crime to be committed. *See* RCW 9A.28.040(1).

As the trial court instructed in this case, Mr. Sandoval was only to be convicted of conspiracy if the jury found he made an “agreement with the intent that . . . conduct constituting the crime of murder in the first degree be performed.” CP 343 (emphasis added). But, as demonstrated by the Court’s holding in *Dunbar*, this instruction is unsupported by law because it is impossible to intentionally conspire to commit the unintentional crime of murder by extreme indifference.

Although this Court has not yet had the opportunity to apply its holding in *Dunbar* to the crime of conspiracy, other jurisdictions have held that the crime of conspiracy to commit murder by extreme indifference does not exist. For instance, the North Dakota Supreme Court recently concluded that “conspiracy to commit extreme indifference murder . . . is not a cognizable offense.” *State v. Borner*, 836 N.W.2d 383, 391 (N.D. 2013) (relying on a “majority of jurisdictions”). As the Court reasoned, “conspiracy to commit unintentional murder creates a logical inconsistency because ‘one cannot agree in advance to accomplish an unintended result.’” *Id.*; see also *State v. Baca*, 950 P.2d 776, 788 (N.M. 1997) (holding that conspiracy to commit depraved-mind murder does not exist).

This logical inconsistency applies with equal force to Mr. Sandoval’s conviction for conspiracy to commit murder by extreme

indifference because it was impossible for him to have intended that other ELS members would unintentionally kill Ms. Love. The fundamentally flawed nature of Mr. Sandoval's conviction is especially apparent from the *only question* asked by the jury during its deliberations: whether it could rely on the definition of murder by extreme indifference to interpret the court's instruction on conspiracy. RP 3768. When the court answered, "Yes," the jury took less than an hour to end its ten-hour deliberation process. Thus, the trial court erred by entering judgment against him for the non-existent crime of conspiracy to commit murder by extreme indifference and his conviction should be reversed. *See In re Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) ("Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.").

**2. Accomplice Liability for Murder by Extreme Indifference Is Not a Cognizable Offense and Mr. Sandoval's Constitutional Rights to Due Process and a Fair Trial Were Violated**

Under Washington law, a person is only liable as an accomplice to a crime if he or she knowingly "[a]ids or agrees to aid such other person in planning or committing it . . . ." RCW 9A.08.020(3)(a)(ii). The mens rea of aggravated recklessness is therefore insufficient to convict an accomplice of murder by extreme indifference.

The requisite mens rea for being convicted as an accomplice to

murder by extreme indifference is “actual knowledge” that a homicide will occur. *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268, 273 (2015); *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000). As this Court recently reiterated, an accomplice can only be convicted of murder where the State proves that the defendant “*actually knew*” that homicide would be committed. *See Allen*, 182 Wn.2d 364, 341 P.3d at 273 (emphasis in original).<sup>13</sup>

Yet, in this case, the trial court incorrectly instructed the jury on the mens rea for accomplice liability because the jury instructions provided that Mr. Sandoval could be convicted as an accomplice to first-degree murder if he “knew of and disregarded the grave risk of death.” CP 335. This is not the standard for actual knowledge—this is the standard for aggravated recklessness, which as a matter of law is insufficient to prove accomplice liability.<sup>14</sup> On its own, the trial court’s failure to properly

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<sup>13</sup> Divisions One and Three of the Court of Appeals appear to be divided on this point. *Compare Sarausad II v. State*, 109 Wn. App. 824, 836, 39 P.3d 308 (2001) (requiring that, to prove murder by extreme indifference, the State must prove that defendant “knew generally that he was facilitating a homicide”) with *State v. Guzman*, 98 Wn. App. 638, 646, 990 P.2d 464 (1999) (requiring “merely” that defendant “knew that his actions . . . were extremely dangerous”). *See also* 40 C.J.S. Homicide § 29 (2015) (contrasting the different holdings of *Sarausad* and *Guzman*).

<sup>14</sup> The State compounded the inaccuracy of this instruction during closing argument when it informed the jury that being an accomplice to murder does not require actual knowledge that a homicide would be committed: “[Y]ou don’t have to know that the crime is Murder in the

instruct the jury on the requisite mens rea for accomplice liability requires that Mr. Sandoval's murder conviction be reversed. *Cronin*, 142 Wn.2d at 581-82, 14 P.3d 752 (reversing accomplice liability murder conviction because jury was improperly instructed on the elements of the crime).

Mr. Sandoval could not have been an accomplice to first-degree murder by extreme indifference because the mens rea of actual knowledge is incompatible with the mens rea of aggravated recklessness. A person cannot have actual knowledge that a homicide will occur as a result of another person's reckless conduct. By nature, the consequences of another person's recklessness are unpredictable and cannot be known with the level of certainty required to prove actual knowledge.

Here, Mr. Sandoval could not be convicted as an accomplice to first-degree murder by extreme indifference because he could not have *actually known* that the reckless conduct of other ELS members, however extreme, would result in the commission of a homicide. For this reason, in addition to the trial court's failure to properly instruct the jury on the mens rea for accomplice liability, Mr. Sandoval's conviction for first-degree murder by extreme indifference should be reversed.

Additionally, the trial court's failure to properly instruct the jury

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First Degree. Only that the act that you agree to or that you're facilitating *could result* in that." RP 3704 (emphasis added).

deprived Mr. Sandoval of his Sixth Amendment right to a jury trial and violated the Due Process Clause. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970) (The Court held due process “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”) *Laird v. Horn*, 414 F.3d 419, 430 (3rd Cir. 2005) (finding that a jury instruction on accomplice liability erroneously permitted the jury to convict the defendant of first degree murder without finding the necessary intent which lightened the State’s burden and violated the Due Process Clause).

**B. The State Committed Prosecutorial Misconduct and Violated Mr. Sandoval’s Constitutional Rights to a Fair Trial by Making Improper and Prejudicial Remarks During Closing Argument**

The State committed prosecutorial misconduct during rebuttal closing argument by repeatedly referring to Mr. Sandoval as an “original gangster” or “OG” and saying he only had a “tenth-grade education.” Additionally, the State made improper racial remarks and misrepresented Mr. Sandoval’s involvement leading up to the shooting by claiming he drove himself to the two meetings at Mr. Zuniga’s house. While prosecutors are permitted some latitude in arguing facts and inferences

from the record, they cannot make improper prejudicial statements unsupported by the record. Following the prosecutor's improper statements, defense counsel objected and moved for a mistrial. RP 3753:24. The Court overruled the objections and denied the request for a mistrial. RP 3756:17-3757:9.

To prevail on a claim of prosecutorial misconduct, a defendant must prove that: "(1) the prosecutor's comments were improper and (2) the comments were prejudicial." *State v. Asaeli*, 150 Wn. App. 543, 587, 208 P.3d 1136 (2009) (citing *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). A prosecutor's comments are considered prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *McKenzie*, 157 Wn.2d at 52 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). The comments are viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Although parties are provided leeway during closing argument to draw inferences from the evidence, prosecutors are strictly prohibited from suggesting evidence not previously presented during trial as grounds for finding the defendant guilty. *See State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006) (citing *State v. Russell*, 125 Wn.2d 24, 87

(1994)). Here, the State's improper statements were prejudicial to Mr. Sandoval and are grounds for reversal.

**1. The State Improperly and Prejudicially Asserted that Mr. Sandoval Was an OG and Argued Facts Not in Evidence to Embellish His Purported Involvement in the Shooting**

The prosecutor's *nine separate references* to Mr. Sandoval being an OG were improper because the record does not reasonably support any inference that he was an OG. *See* RP 3736-38. The only testimony presented on the term indicated that an OG is a founding member of the gang, is superior to other members, and that the word of an OG commands great importance. RP 2123-24, 2543, 2650.

Mr. Sandoval was not a founding member and did not join the ELS until he was thirteen years old, approximately four years after it was established. If Mr. Sandoval was in fact an ELS member since its founding, he would have been only nine years old when he joined. In fact, according to the only evidence presented on this topic at trial, the only OGs in the ELS were Mr. Zuniga, three incarcerated ELS members, Mr. Basilio, and Mr. Gonzalez, all of whom had been members of the ELS since its inception. RP 2123-24 (Zuniga and incarcerated ELS members); RP 2543, 2648 (Basilio); RP 1151 (Gonzalez was "next in charge"). This, however, did not stop the prosecutor from arguing that "Mr. Zuniga, Mr.

Basilio, Mr. Gonzalez, Mr. Villagomez, Mr. Alvarez,<sup>15</sup> and Mr. Sandoval are OGs.” RP 3736. Because the record does not support a reasonable inference that Mr. Sandoval was an OG, the State argued facts not in evidence and the trial court erred by overruling Mr. Sandoval’s objections.

The prosecutor’s assertions were also improper because the implications and meaning of the term “OG” is a topic requiring expert testimony on gang terminology, yet the State presented no such testimony at trial. *Cf. State v. Rodriguez*, 163 Wn. App. 215, 231, 259 P.3d 1145 (2011) (discussing gang expert’s testimony about the term “OG”); *People v. Ayala*, 105 Cal. Rptr. 3d 575, 579 (Cal. Ct. App. 2010) (expert testimony about violent implications of the term “OG”).

The State’s assertions that Mr. Sandoval was an OG were prejudicial because it exaggerated his role in the ELS and his involvement with the Love shooting. The prosecutor asked the jury: “Do you think anybody gets to go to those meetings? Do you think that a person that can’t be trusted with the level of criminal activity occurring amongst these guys is allowed to be at those meetings? He’s an OG.” RP 3736. The prosecutor continued: “OGs ride around in cars looking for law enforcement, looking for targets. They can have children. They can have girlfriends.” RP 3737. The prosecutor’s purpose for misrepresenting Mr.

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<sup>15</sup> Mr. Alvarez was not even an ELS member.

Sandoval an OG was plainly to use the significance of this term to embellish his culpability. Unsupported by evidence and testimony, the prosecutor claimed that Mr. Sandoval was only at the meetings at Mr. Zuniga's house *because* he was an OG, and further, that he was assigned his role on the night of the shooting *because* he was an OG. The fact that the prosecutor felt the need to rely on mischaracterizations in order to persuade the jury of Mr. Sandoval's guilty highlights his remote involvement in the crime.

Yet the evidence of his remote involvement was further undermined when the prosecutor claimed that Mr. Sandoval drove himself to the two meetings before the shooting. This assertion is directly contradicted by the record. *See, e.g.*, RP 2037 (Mr. Gonzalez testifying that he "showed up" with Mr. Sandoval at the second meeting). Further, the prosecutor made improper remarks about Mr. Sandoval, including that he only had a tenth-grade education, an assertion lacking any support in the record.<sup>16</sup>

The State's closing rebuttal argument and its repeated mischaracterizations and exaggerations of Mr. Sandoval's culpability were the last words heard by the jury just before beginning its deliberations at

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<sup>16</sup> The only testimony about any ELS member having a tenth-grade education came from Mr. Gonzalez, who testified that "tenth grade" was the highest level of education he had received. RP 1894.

the end of a months-long trial. Given the timing of these misstatements, there is an especially substantial likelihood that the prosecutor's misconduct affected the jury's verdict and deprived Mr. Sandoval of a fair trial. *See State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). For these reasons, the trial court erred by overruling defense counsel's objections and denying the request for a mistrial. Mr. Sandoval's convictions should be reversed.

**2. The State Made an Improper and Prejudicial Racial Comment During Its Rebuttal Closing Argument**

The prosecutor used Mr. Sandoval's race to exaggerate his level of culpability in the crime. In discussing co-defendants, Mr. Salavea and Mr. Time, who stole the van used to perpetrate the shooting, the prosecutor emphasized: "They're Asian/Pacific Islander descent, and they're not members of the gang." RP 3737.

The obvious inference of this intentionally race-based statement was that Mr. Sandoval, by virtue of being Hispanic and not Asian Pacific Islander, was permitted to carry out ELS gang activities and was somehow more culpable than other non-Hispanic individuals who were indisputably more involved in the shooting. As the prosecutor further emphasized, Mr. Sandoval, as an OG, had to "monitor" the involvement of others by "tak[ing] them up to Federal Way and mak[ing] sure they do what they're

supposed to do, mak[ing] sure that they're tied to this crime." *Id.* Yet, contrary to the assertion that only an OG such as Mr. Sandoval "gets to go to . . . meetings," the evidence at trial shows that Mr. Salavea and Mr. Time were in fact present at the meetings held at Mr. Alvarez's and Mr. Zuniga's houses. RP 938, 947. Such flagrant and intentional appeals to racial bias are per se inappropriate and require reversal "unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict." *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011).

### **3. The Prosecutor's Misconduct Violated Mr. Sandoval's Right To a Fair Trial**

Mr. Sandoval was denied his Sixth and Fourteenth Amendment rights to a fair trial due to the prosecutor's conduct during closing argument. Prosecutorial misconduct in closing argument may violate the federal Constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974); *People v. Hill*, 17 Cal.4th 800, 818 (Cal. 1998). When the State engaged in repeated and escalating misconduct during closing argument—including improper race comments, the repeated and unsubstantiated claim that Mr. Sandoval was an OG, and that he drove himself to the meetings at Mr. Zuniga's house—the trial was rendered fundamentally unfair and violated

Mr. Sandoval's constitutional rights to a fair trial. *See e.g., Floyd v. Meachum*, 907 F.2d 347, 356-57 (2nd Cir. 1990). Here, the State's misconduct during closing argument alone is sufficient grounds for reversal and a new trial.

**C. The Trial Court Abused Its Discretion by Denying Mr. Sandoval's Request for a Jury Instruction on the Lesser-Included Offense of Manslaughter and Violated His Rights to Due Process and a Fair Trial**

Even if the Court finds that accomplice liability is applicable to murder by extreme indifference (which, as argued above in § IV.A.2, it is not), Mr. Sandoval's murder conviction should still be set aside because the trial court improperly denied his request for a jury instruction on the lesser-included offense of manslaughter.

A jury must be instructed on a lesser-included offense if two criteria are met: (1) the elements of the lesser offense are necessary to prove the charged offense; and (2) the evidence presented at trial supports a reasonable inference that the lesser offense was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first criterion is automatically established where the charged offense is first-degree murder by extreme indifference and the lesser-included offense is manslaughter. *Henderson*, 2015 WL 847427, at \*4.

To determine whether the evidence supports a reasonable inference

that the lesser offense was committed, it is “crucial” that all facts must be construed “in the light most favorable to the party who requested the instruction.” *Id.* at \*4, \*6. Although this inquiry is reviewed for abuse of discretion, “[a] court abuses its discretion when its decision is based on the incorrect legal standard.” *Id.* at \*5.

Here, Mr. Sandoval was charged with first-degree murder by extreme indifference, but when he requested a jury instruction on the lesser-included offense of manslaughter, the trial court denied his request. RP 3675. According to the court, Mr. Sandoval was not entitled to an instruction on manslaughter because no reasonable jury could infer that the shooting in this case had been committed with the mens rea of recklessness, as opposed to extreme recklessness. *Id.* In making this determination, the court expressly relied upon the legal standard for recklessness set forth in *State v. Pastrana* and *State v. Pettus*. *See id.* (citing *State v. Pastrana*, 94 Wn. App. 463, 972 P.2d 557 and *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284).

This legal standard relied upon by the trial court, however, had been abrogated years prior to the court’s determination. *Henderson*, 2015 WL 847427, at \*5 (“[B]oth the *Pettus* and *Pastrana* analyses relied on a now outdated definition of recklessness.”). As this Court recently explained, the definition of recklessness contained in both of these

decisions was nullified ten years ago by its decision in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005). *Id.* at \*3, \*5. Both *Pettus* and *Pastrana* incorrectly defined recklessness as “disregard of a substantial risk of causing a wrongful act[.]” *Id.* at \*5 (quoting *Pettus*, 89 Wn. App. at 700 and *Pastrana*, 94 Wn. App. at 471). The correct legal standard for recklessness—which was long since established at the time of the trial court’s decision—is whether “a person knew of and disregarded a *substantial risk that a homicide may occur.*” *Id.* (citing *Gamble*, 154 Wn.2d at 467) (emphasis in original).

Given that the trial court relied on an abrogated definition of recklessness to deny Mr. Sandoval’s request for an instruction on manslaughter, the court applied the “incorrect legal standard,” and thus, abused its discretion. *See Henderson*, 2015 WL 847427, at \*5.

“[T]he proper question under our current case law is whether a rational jury could have found that [the allegedly criminal] actions constituted a *disregard of a substantial risk that a homicide may occur* but *not an extreme indifference that created a grave risk of death.*” *Id.* at \*6 (emphasis in original). As repeatedly emphasized in *Henderson*, this is an extremely close question because the definitions of these two states of mind are nearly identical. *Id.* at \*1 (“[T]he definitions of the lesser . . . and the greater crime . . . are very close to each other—much closer than is

typical.”); *id.* at \*6 (“This is a fairly difficult question because those two definitions are so similar.”); *id.* (“[T]hese standards are quite close together . . . .”); *id.* at \*7 (“[T]he definitions of first degree murder by extreme difference and first degree manslaughter are very similar.”); *id.* (“This is a very close call . . . .”).

Although the Court did not expressly hold that a manslaughter instruction is per se required whenever a defendant is charged with first-degree murder by extreme indifference, the repeated emphasis in *Henderson* on the similarity between recklessness and aggravated recklessness indicates that this may very well be the case. There is hardly any meaningful distinction between (1) the act of consciously disregarding a substantial risk of homicide and (2) the act of creating a grave risk of death through extreme indifference. Considering how close these definitions are, it is questionable whether any set of facts, construed in the light most favorable to the defendant, could lead a court to conclude that *no reasonable jury* could find the latter but not the former.

Even if not per se required, a manslaughter instruction should have been given in Mr. Sandoval’s case for the same reasons it should have been given in *Henderson*. In *Henderson*, this Court concluded that a rational jury could find that a defendant, who killed a security guard by firing six shots from a semi-automatic weapon toward him and at least two

other people, had disregarded a substantial risk of homicide, but had not created a grave risk of death through extreme indifference. 2015 WL 847427, at \*5. Like this case, *Henderson* involved a retaliatory shooting by a gang member who had just learned that a friend had been shot and who believed the shooting was carried out by a rival gang. *See id.* at \*1-3. Also like this case, the victim of the subsequent retaliatory shooting was not a member of the rival gang. *Id.* at \*3.

In concluding that a jury could rationally find the defendant guilty of manslaughter, the requirement of viewing facts in the light most favorable to the defendant was “particularly significant” to the Court because of the ostensibly extreme recklessness of the defendant’s actions. *See id.* at \*6. Indeed, as highlighted by the dissent, the evidence in *Henderson* strongly indicated that the defendant had in fact fired his gun indiscriminately into a “crowd of people.” *Id.* at \*7 (Gordon McCloud, J., dissenting). But, as the majority emphasized, the decisive factor in its decision was the “crucial” necessity of drawing all inferences from the record in favor of the party who requested the instruction. *Id.* at \*6.

Applying the correct legal standard for recklessness, and viewing all facts in the light most favorable to Mr. Sandoval, a jury could rationally infer that the shooters in this case disregarded a substantial risk of homicide when they shot at Ms. Love’s car, but that they did not create

a grave risk of death through extreme indifference. While neither of the shooters testified, the record amply demonstrates that they did not intend to shoot Ms. Love. *See, e.g.*, App. A at 15-16 (Mr. Sandoval explaining that no one from the ELS would ever target women or children). Based on the record, it is also reasonable to conclude that the shooters were targeting the lower part of the car and were not intending to kill. *See* RP 1020 (testimony that shooters aimed at car door, not window).

The record further permits a reasonable inference that there was never any specific plan to find and kill a member of the Pirus—rather, the plan was more generally to ride around and potentially retaliate in the same reckless manner that Mr. Toleafoa had been shot. RP 1924-25; App. A at 11 (Mr. Sandoval explaining that “we didn’t plan to go out that night and do something”). Because Mr. Toleafoa was shot while standing in a group of people similar to the crowd targeted in *Henderson*, and because it is reasonable to conclude that the ELS’s plan was to retaliate in the same manner, a reasonable jury could conclude that the shooters in this case disregarded a substantial risk of homicide but did not create a grave risk of death through extreme indifference.

Mr. Sandoval was entitled to his requested jury instruction on the lesser-included offense of manslaughter and, by using the wrong legal standard to deny him this request, the trial court abused its discretion.

Further, the trial's failure to include the requested jury instruction on the lesser-included offense deprived Mr. Sandoval of due process because the lesser-included offense is consistent with his defense theory of the case. *See Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984). Accordingly, Mr. Sandoval's conviction for first-degree murder should be reversed.

**D. The Trial Court Abused Its Discretion by Denying Mr. Sandoval's Request for a Cautionary Instruction on Accomplice Liability and Violated His Rights to Due Process and a Fair Trial**

During trial, the State relied heavily on the testimony of Mr. Sandoval's alleged accomplices, who admitted several times that they lied to the police during questioning in order to protect themselves. This Court has previously held that it is always preferable for the trial court to give a cautionary instruction when accomplice testimony is introduced. *See State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) (overruled on other grounds). Additionally, when the testimony of a purported accomplice is not substantially corroborated by other evidence, the trial court may have committed reversible error by failing to give the requested cautionary instruction. *Id.*; *see also United States v. Daniel*, 459 F.2d 1029, 1039 (9th Cir. 1972) (emphasizing that uncorroborated testimony of an alleged accomplice is only sufficient "if the testimony is not incredible or unsubstantial on its face").

Here, the trial testimony of other ELS members alleged to have acted as Mr. Sandoval's accomplices was not substantially corroborated by other evidence. Accordingly, trial counsel sought to include the following instruction:

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP 253 (Proposed Instruction No. 4). Nevertheless, the court denied this proposed instruction. RP 3660-74.

Mr. Sandoval's purported accomplices admitted that they lied to police in order to protect themselves and testified in exchange for dramatically reduced sentences and their testimony was not substantially corroborated by other evidence. As such, the trial court should have provided the requested cautionary instruction and its failure to do so constitutes reversible error.

**E. Mr. Sandoval Was Denied His Constitutional Right to Effective Assistance of Counsel**

Mr. Sandoval had a right to effective assistance of counsel on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985); *see also Strickland v. Washington*, 466 U.S. 668, 686,

104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on an appellate ineffective assistance of counsel claim, Mr. Sandoval must show that “the legal issue which appellate counsel failed to raise had merit and that [he was] actually prejudiced by the failure to raise or adequately raise the issue.” *In re Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (quoting *In re Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997)).

Here, Mr. Sandoval’s counsel on direct appeal, Ms. Arnold, failed to raise *any* of the issues identified by Mr. Sandoval in support of his notice of appeal. Instead, she raised only an insufficient evidence argument, failed to file a reply brief, and was removed from the case and replaced by substitute counsel. Substitute counsel then failed to object when the case was placed on the calendar for no oral argument, failed to file a supplemental brief addressing the numerous deficiencies of Ms. Arnold’s opening brief, and failed to seek discretionary review of the Court of Appeals decision with this Court.

Furthermore, Mr. Sandoval’s counsel on direct appeal failed to identify the fact that two of his three convictions—accounting for the vast majority of his sentence—*are not even a cognizable offenses*. As discussed above, Mr. Sandoval was found to have committed “conspiracy to commit first-degree murder by extreme indifference.” This, however, is a non-existent crime because one cannot intend for the aggravated

recklessness of another person to result in a homicide. The same is true with respect to his conviction as an accomplice to murder by extreme indifference. Counsel was ineffective in missing these glaring issues.<sup>17</sup> *Cf.* App. B (declaration from Lila Silverstein of the Washington Appellate Project discussing Ms. Arnold’s similar failure to raise dispositive issue in *State v. Henderson*, --- P.3d ---, 2015 WL 847427, at \*4 (Feb. 26, 2015)). Mr. Sandoval has demonstrated that his counsel on direct appeal failed to raise multiple issues with underlying merit, thus meeting the first prong of the ineffective assistance test. *Maxfield*, 133 Wn.2d at 344, 945 P.2d 196.

To meet the second prong of this test, Mr. Sandoval must show actual prejudice by counsel’s failure to adequately raise meritorious issues. *In re Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). Mr. Sandoval must therefore show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052, 80 L.Ed.2d 674.

Absent the failures of counsel on direct appeal, Mr. Sandoval would have prevailed on his appeal. As such, the proper remedy is to

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<sup>17</sup> On these issues, Mr. Sandoval’s trial counsel was also ineffective. Given that conspiracy to commit murder by extreme indifference is not a cognizable offense, trial counsel’s failure to object to the conspiracy instruction was deficient and prejudiced Mr. Sandoval on the conspiracy charge. The same goes for his conviction as an accomplice to murder by extreme indifference.

reverse his convictions. In the alternative, Mr. Sandoval's direct appeal should be reinstated and his case remanded. *See In re Frampton*, 45 Wn. App. 554, 563, 726 P.2d 486 (1986).

**F. Mr. Sandoval's 904-Month Sentence Is Unconstitutionally Disproportionate to the Sentences of His Co-Defendants and Other ELS Members**

The trial court committed reversible error in sentencing Mr. Sandoval to 904 months without providing any reason on the record for the exceptional sentence. Here, the disparity between Mr. Sandoval's sentence and his more culpable codefendants is shocking. "Where such a disparity in sentences suggests that a defendant who pled not guilty was being penalized for exercising his constitutional right to a trial, reasons for the disparity must appear in the record." *United States v. Citro*, 842 F.2d 1149, 11-53-54 (9th Cir. 1988). Here, the Court failed to identify any reason why Mr. Sandoval was being sentenced to more than twice as long as the other more culpable defendants, including the actual shooter, Mr. Mex. RP 3795-98. Remand is required for the trial court to either explain the disparity or ameliorate the sentences. *Id.*; *see also United States v. Hall*, 778 F.2d 1427, 1428-29 (9th Cir. 1985). Here, Mr. Sandoval's disproportionate sentence signifies that he was being punished by exercising his constitutional right to a trial.

Mr. Sandoval was sentenced to 904 months, the maximum under

the sentencing guidelines for all three charges, plus 60 months per charge for a firearm enhancement. In imposing this sentence, the trial court disregarded the State's recommendation that Mr. Sandoval be sentenced at the low range on all three charges. The next highest sentence given by the Court was to the actual shooter, Saul Mex, roughly half the sentence of Mr. Sandoval. Mr. Gonzalez, who drove Mr. Sandoval to the planning meetings and drove him around on the night of the Love murder, was not even charged. Instead, he was sentenced to a mere forty-five months for planning and directly assisting in the murder of Juan Zuniga.

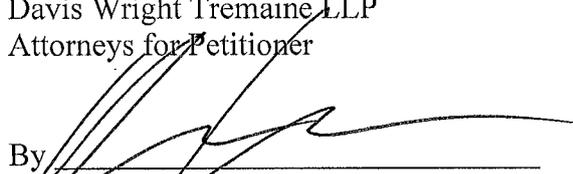
During sentencing, the victim's father asked the Court to give the longest sentence to Mr. Mex because he pulled the trigger, a request that further reflects the inherent unfairness of Mr. Sandoval's grossly disproportionate sentence. No reasonable person could have found Mr. Sandoval the most culpable of the five defendants. Unlike the four others who either pulled the trigger or stole the van used for the shooting, Mr. Sandoval actively sought to avoid any role in the events preceding this crime. Mr. Sandoval's sentence should be remanded.

## **V. CONCLUSION**

For the foregoing reasons, Mr. Sandoval respectfully requests that the Court reverse his convictions and sentences for first-degree murder, first-degree assault, and conspiracy to commit first-degree murder.

RESPECTFULLY SUBMITTED this 16th day of April, 2015.

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# **APPENDIX SECTION A**

**Tacoma Police Department  
Supplemental Report**

**Incident No. 100381104.49**

Page 1 of 20

PDA: **Yes**      Homeland Security:      Subject: **Homicide | Aggravated Assault | 9/22/10 Sandoval Taped**

IBR Disposition: **Active**      Case Management Disposition:

Forensics:      Reporting By/Date: **T17519 - Davis, Daniel 11/2/2010 12:00:53**

Case Report Status: **Approved**      Reviewed By/Date: **T02272 - Maule, Robert 11/30/2010 14:07:33**

Incident No.  
100381104.49

**Related Cases:**

Case Report Number      Agency

**Non-Electronic Attachments**

Attachment Type	Additional Distribution	Count
Location Address: <b>E 59TH St/E Portland Av</b> City, State, Zip: <b>WA</b>	Location Name: Cross Street: City, State, Zip:	
Contact Location: Recovery Location: CB/Grid/RD: <b>475 - Tacoma</b> Occurred From: <b>2/7/2010 22:04:00 Sunday</b> Notes:	City, State, Zip: District/Sector: <b>TA42 - Tacoma</b> Occurred To:	

**Offense Details: 0912 - Homicide - Weapon**

Domestic Violence: <b>No</b>	Child Abuse:	Gang Related: <b>Yes</b>	Juvenile:
Completed: <b>Completed</b>		Crime Against: <b>PE</b>	Hate/Bias: <b>None (No Bias)</b>
Criminal Activity:			Using:
Location Type: <b>Street/Right of Way</b>	Type of Security:		Tools:
Total No. of Units Entered:	Evidence Collected: <b>Photographs</b>		
Entrance Compromised; Entry Method:			
Suspect Description:			
Suspect Actions:			
Notes:			

**Offense Details: 1315 - Assault - Aggravated - Weapon**

Domestic Violence: <b>No</b>	Child Abuse:	Gang Related: <b>Yes</b>	Juvenile:
Completed: <b>Completed</b>		Crime Against: <b>PE</b>	Hate/Bias: <b>None (No Bias)</b>
Criminal Activity:			Using:

Call Source: <b>Dispatched</b>	Assisted By:					
Phone Report:	Notified:					
Insurance Letter:	Entered By: <b>T17519 - Davis, Daniel</b>					
Entered On: <b>11/2/2010 12:00:53</b>	Approved By: <b>E04426 - Voegele, Bonnie</b>					
Approved On: <b>12/1/2010 11:26:16</b>	Exceptional Clearance:					
Adult/ Juvenile Clearance:	Exceptional Clearance Date:					
Additional Distribution:	Other Distribution:					
<b>Validation Processing</b>	Distribution Date:	County Pros. Atty.	Juvenile	Other	CPS	Supervisor:
	By:	City Pros. Atty.	Military	DSHS	PreTrial	

**For Law Enforcement Use Only – No Secondary Dissemination Allowed**  
Records has the authority to ensure correct agency, CB/Grid/RD, and District/Sector are incorporated in the report.

Printed: December 16, 2010 - 11:03 AM  
Printed By: 030 - Schmuck, Monica

000597

Location Type: <b>Street/Right of Way</b>	Type of Security:	Tools:
Total No. of Units Entered: Entrance Compromised; Entry Method:	Evidence Collected:	
Suspect Description:		
Suspect Actions:		
Notes:		

**Weapon 1: Semi-Automatic Pistol**

Offense: <b>0912 - Homicide - Weapon</b>	Serial No:
Offender: <b>S1 - Suspect, Unknown</b>	OAN:
Weapon: <b>Semi-Automatic Pistol</b>	Automatic:
Other Weapon:	Caliber:
Action:	Gauge:
Manufacturer:	Length:
Make:	Finish:
Importer:	Grips:
Model:	Stock:
Weapon Notes:	

**Weapon 2: Semi-Automatic Pistol**

Offense: <b>1315 - Assault - Aggravated - Weapon</b>	Serial No:
Offender: <b>S1 - Suspect, Unknown</b>	OAN:
Weapon: <b>Semi-Automatic Pistol</b>	Automatic:
Other Weapon:	Caliber:
Action:	Gauge:
Manufacturer:	Length:
Make:	Finish:
Importer:	Grips:
Model:	Stock:
Weapon Notes:	

**Investigative Information**

Means:	Motive:
Vehicle Activity:	Direction Vehicle Traveling:

Synopsis:
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Narrative: Davis: Uh, this is Detective Dan Davis with the Tacoma Police Department. We're in a second floor inter room, interview room at TPD Headquarters. The case number is 10-0381104. Today's date is September 22nd and the time is approximately 1855 hours. Present with me is Detective Steve Reopelle and the person that we are interviewing and have been interviewing is Eduardo Sandoval. Eduardo, can you state your uh, date of birth for us?  
Sandoval: 2/14/91.  
Davis: Okay, and Eduardo, we began this conversation with you earlier at approximately 1645 hours, just a little bit before five o'clock.  
Sandoval: Um-huh.  
Davis: And we've been talking with you since then, we've been in and out of the room a little bit, we haven't been going constantly, but Eduardo, before we sat down and talked with you, uh, I read you your rights from this sheet of paper, is that correct?  
Sandoval: That's correct.

Davis: And at the end of that advisement, you said you would talk to us and you signed that. And Eduardo what I'm gonna' do right now is I'm just gonna' advise you of your rights again on tape before we speak with you. Uh, before questioning and the making of any statement, I'm going to advise you of your rights. You have the right to remain silent. Any statement that you do make can be used as evidence against you in a court of law. You have the right at this time to talk to an attorney of your choice and to have that attorney present before and during questioning and the making of any statement. If you cannot afford an attorney, you are entitled to have one appointed for you, without cost to you, and to have the attorney present at any time, during any questioning and the making of any statement. You can stop answering questions and ask for an attorney at any time, during any questioning and the making of any statements. Eduardo, are these the rights I read to you earlier?

Sandoval: Yes you did.

Davis: And do you understand these rights as I've explained them to you?

Sandoval: Yes.

Davis: And do you wish to speak with us now again on tape?

Sandoval: Yes, I'd just like to say that um, well yeah, it doesn't even matter.

Davis: Okay. Eduardo, um, and what I had told you earlier too when I advised you of your rights is, you know, we've worked through some things off tape.

Sandoval: Um-huh.

Davis: But if any time you didn't want to talk anymore or you got mad or got upset or for whatever reason...

Sandoval: Um-huh.

Davis: ...you just got uncomfortable, you could say oh, I'm done talking. You've talked to us before on another occasion and you know from talking to us that we're not gonna' force anything out of you, that's your right.

Sandoval: Yeah. Right, let's get down to it.

Davis: Okay. And Eduardo, we, we have been talking to you about a case that happened in February and, which was actually Super Bowl Sunday.

Sandoval: Um-huh.

Davis: A homicide where a young gal got killed. And what we've been going over with you for the last hour and a half or so, Eduardo, was the fact that the ELS were the, were, was the gang.

Sandoval: Um-huh.

Davis: The gang that you belong to...

Sandoval: My neighborhood.

Davis: ...that's responsible for her death, is that correct?

Sandoval: Um-huh, that's correct, that's what you guys told me.

Davis: Okay, and Eduardo, what I want to do is just back up for a few minutes and go into what happened a couple of days before that, what you told us about. You were over at 32nd and Portland with a number of other ELS gang members when one of your members, Nataali Toleafoa, was shot. Is that correct?

Sandoval: That's correct.

Davis: Tell me, Eduardo, what happened on that situation. What were you guys doing? How did that come to be that he got shot?

Sandoval: Well, the, wait, what has this got to do with the actual murder?

Davis: Well.

Sandoval: Because it's, that's no part of the murder. The murder is something else.

Davis: Okay.

Sandoval: He got shot, we're hanging out outside and he got shot.

Davis: Okay.

Sandoval: And that's it.

Davis: Okay, and obviously, maybe in your world some of these things all, aren't always totally connected up.

Sandoval: Um-huh.

Davis: But we know from talking to you earlier...

Sandoval: Um-huh.

Davis: ...and other people, that when he got shot over there on the eastside, that led to you guys kinda' discussing doing a retaliation, is that right?

Sandoval: Well it wasn't discussed an exact retaliation on anybody or any, anything.

Davis: Okay.

Sandoval: Any ex..exact person, and it wasn't a group retaliation, it was single members that decided they want to retaliate.

Davis: Okay and then... (talk over).

Sandoval: I can't, I can't think of who exactly those people were at this time.

Davis: Okay and Eduardo, what I don't want you to do is, I want you to kind of let me kind of guide you through it, obviously I don't want to put words in your mouth.

Sandoval: Um-huh.

Davis: Or anything like that, but you were pretty honest with us earlier about...

Sandoval: Um-huh.

Davis: ...talking about this shooting that happened at 32nd and Portland.

Sandoval: Yeah.

Davis: And...

Sandoval: Do you want me to go into detail about what happened?

Davis: Right, I, what I want you to do is basically (talk over)...

Sandoval: ...detail, how it happened?

Davis: (talk over) yeah. And what I explained to you earlier, Eduardo, was this...

Sandoval: So this is kinda' confusing.

Davis: ...this taped statement, that's just an opportunity for you...

Sandoval: Um-huh.

Davis: ...to, to have your voice on tape saying it in your words. You know what I mean?

Sandoval: Yeah, I do, I'd rather just, I don't know, okay look man, I'll go through, I don't rea.., I don't feel comfortable with this like this.

Davis: You don't feel comfortable talking on tape?

Sandoval: No this is, no, it's not that, it's just, like I feel better for me just to say it in my own words to the people.

Davis: To what people, the, the people...

Sandoval: The jury, the judge.

Davis: Okay.

Sandoval: The prosecutor.

Davis: You mean to get up there and tell your story in court when the time comes?

Sandoval: Yeah.

Davis: Okay, and uh, Eduardo, we've been clear with you from the beginning of this...

Sandoval: Um-huh.

Davis: ..that, that, you know when we, what happened was we came out and arrested you earlier at the fair.

Sandoval: At the fair with my family.

Davis: Right and so we've been pretty clear with you as we talk about this...

Sandoval: Um-huh.

Davis: ...that you're, that you are under arrest and you are gonna' get charged, probably tomorrow. So that opportunity, down the road in court, will probably, you know, come to be.

Sandoval: Okay.

Davis: And what I...

Sandoval: Well, what happened on the night on the shooting on 32nd was we're hanging out at the bar, I showed up with Juan and we were hanging out and his girlfriend, his wife, baby's mom, showed up, she was mad and she wanted him to go out with her on a date, him and her, and then he asked me if I wanted to go out with my lady and go out on a, on a double date so I, I agreed to him and I said yes and I was outside. I stepped outside to make a phone call and I was trying to get a hold of my girlfriend and he was standing outside with me when everybody walked out and we were just right there conversating. While I was on the phone, I heard a shot, gunshot, I got on the ground and I heard another gunshot and I got back up. When I heard the homey say he was, he got shot, Goofy said he got shot so we all ran up to him, ripped his shirt open, he didn't have no gunshot wounds, you know, that we could visibly see so we thought he was not even shot so we ran, we started running. Well I started running with two friends of mine and um, after I ran, uh, we went around the block, we came back, the cops were there already so we just left, don't remember exactly where we went after that and then, then we got, I got a phone call saying that Goofy got shot.

Davis: Goofy got shot or?

Sandoval: Yeah, Goofy got shot.

Davis: Okay. Okay. So Goofy gets shot at 32nd and Portland Avenue?

Sandoval: Um-huh.  
Davis: And at some point, you and other members go over to another person's apartment and his name is Byron Alvarez, is that correct.  
Sandoval: That's correct.  
Davis: Okay and when you get over there, was there some discussion that you guys, as a group, or part, members of the group, believed that it was Pirus that had shot Goofy?  
Sandoval: There was one person in the group that thought it was the Pirus and that was Juan Zuniga. He thought that it was the Pirus that did it.  
Davis: Okay and, and Eduardo, was there particular reason why he thought that? Just, I mean did he see something that made him think that?  
Sandoval: Um, not exactly, just um, I think before, something uh, some homies had confrontations with uh, Pirus, something, uh, and not necessarily a Piru, it could have been any Blood.  
Davis: Okay.  
Sandoval: Any set of Blood, but they had a confrontation that might believe that's them.  
Davis: Do you know what that was about?  
Sandoval: No, I don't.  
Davis: Okay.  
Sandoval: And I don't know what it happened either.  
Davis: Do you know how much before this shooting happened, that that confrontation might have happened?  
Sandoval: No, I wasn't aware of that either.  
Davis: Okay so, you guys, some of you, including yourself...  
Sandoval: Um-huh.  
Davis: ...go over to Byron Alvarez's apartment?  
Sandoval: The reason I went to Byron Alvarez's apartment is because he gave me a call and said that he had got shot at and so I believed that maybe there was some kind of connection between his shooter and the shooter that shot at us.  
Davis: Okay.  
Sandoval: So we went there and it was a complete different person.  
Davis: Okay, when you got there, did Byron tell you hey, this guy that, that my wife has been messing around with shot at me?  
Sandoval: He said it was some guy that his girl's talking to, he never actually really got into details about how it all went down or everything, but pretty much.  
Davis: Okay, so when you guys get over there, some of the members of your group, you, you determined or, or people determined that oh, okay, he got shot at by somebody different than, that shot at us, is that right?  
Sandoval: Yeah, well, it was um, well he knew who shot at him so...  
Davis: Okay.  
Sandoval: And he knew the situation with him so we knew it wasn't the same situation.  
Davis: Okay, so now Goofy is the person who got shot, and at that day, when you were at, that, that evening when you were at Byron's...  
Sandoval: Um-huh.  
Davis: What's discussed? You said people were angry, people were upset.  
Sandoval: It wasn't, at, we were never at his apartment.  
Davis: Okay.  
Sandoval: Because we showed up and he was in the parking lot.  
Davis: Okay.  
Sandoval: Then we, and then we discussed in the parking lot. We asked him what happened, he told us the details and then we all hopped into uh, his brother's, (unintelligible) he's got (yawning) not a, too young of a brother, but one in between. He, he gave us a, well, he, we hopped in his car and the we were kinda' like just discussing about he got shot and this and that. We weren't actually, not even at that time, we weren't aware that Goofy had got shot yet.  
Davis: Okay, when did you become aware that he was in the hospital?  
Sandoval: Um, it was uh, after they let some of the homies go, I think they let Little Blackie go, I think, or somebody, and that's when they said that he got shot in his arm, but in the back of his arm.  
Davis: Okay.  
Sandoval: And then that's, that's when he realized he did get shot and...  
Davis: Okay, and, and Eduardo, I want you to correct me if I get something wrong.

Sandoval: Um-huh.  
Davis: It sounds like you and Juan Zuniga and some of the other group that was over there when Goofy got shot...  
Sandoval: Um-huh.  
Davis: ...took off before the police get there?  
Sandoval: Yeah.  
Davis: But some of 'em stayed behind.  
Sandoval: Some of 'em got caught.  
Davis: Okay.  
Sandoval: Yeah.  
Davis: And they, they, they obviously learned then that oh, okay, Goofy really did get shot.  
Sandoval: Yeah, 'cause...  
Davis: And they come over later and tell you hey, he got hit.  
Sandoval: Yeah, 'cause we weren't aware that he had actually got hit 'cause when we ripped his shirt open, he didn't have no wounds nowhere in his chest and, that was visible.  
Davis: Okay.  
Sandoval: No visible wounds.  
Davis: And I had asked you if, if, maybe Conejo or, had tried to return fire.  
Sandoval: Yeah.  
Davis: And you, what did, what was your response to that?  
Sandoval: I'm not aware he did or didn't, honestly.  
Davis: Okay.  
Sandoval: Because...  
Davis: You...  
Sandoval: Everybody ducked down, so...  
Davis: Okay.  
Sandoval: ...I don't think, I didn't see nobody standing up.  
Davis: Okay.  
Sandoval: Nobody was standing up when I, when I went down, everybody was on the ground, crawling.  
Davis: Okay and so Goofy is actually a cousin of Dean Salavea and Time Time?  
Sandoval: Yes.  
Davis: And obviously, they were there and they, they were upset seeing their cou.., when they learned their cousin gets shot?  
Sandoval: Yeah.  
Davis: Okay. So...  
Sandoval: This was af.., this was when, once we were already at Byron's house.  
Davis: Okay, right, so Juan Zuniga feels like it was Blood gang members?  
Sandoval: Um-huh.  
Davis: What's discussed there at that point?  
Sandoval: Um, well, nothing was really discussed at the point, at that time, we was just, had a, well, he had a feeling that it could have been some Slobs.  
Davis: Okay and you had, you had said earlier that he was talking well, we can't let this go.  
Sandoval: Yeah.  
Davis: We gotta' do something about it.  
Sandoval: Yeah.  
Davis: And you mentioned that he mentioned a murder that happened several years ago; the Dream, when Dreamer got killed?  
Sandoval: Yeah.  
Davis: Okay and that again was believed to be Bloods?  
Sandoval: Yeah.  
Davis: Several years ago?  
Sandoval: Yeah.  
Davis: What did, what did he say about this? About this deal?  
Sandoval: Well he said, he said that nothing like this, that (yawning) no homey had ever got hit, well he, that no homey has got hit since Dreamer.  
Davis: Okay. You had said earlier, Eduardo...  
Sandoval: Um-huh.

Davis: ...that as a member, members of, of the ELS gang...

Sandoval: Um-huh.

Davis: ...that that is something that you would obviously be very upset about happening in your hood?

Sandoval: Oh yeah. I mean it's like that happening to a friend, cousin, whatever.

Davis: Okay.

Sandoval: Good friend of yours, you know, when that happens, you know, you're upset.

Davis: Is there a feeling, is there a feeling that, was there a feeling that hey, we have to kind of stand up for ourselves?

Sandoval: Um, on their part, yes. On my part, no, because I feel it was senseless to think it was them because we weren't really sure who did it, we didn't see who did it, they never said anything.

Davis: Okay.

Sandoval: So me, I didn't believe they did it. I didn't even think they had anything to do with it.

Davis: You would, you didn't feel like you had enough proof that it was Bloods?

Sandoval: I didn't feel there was enough proof to even blame anybody.'

Davis: Okay.

Sandoval: To point a finger at anybody, at anybody.

Davis: Now with your position in the group...

Sandoval: Um-huh.

Davis: ...Eduardo, would you be able to challenge Juan Zuniga and say no, listen, everybody, stop, we're not gonna' do anything 'til we know for sure? Is, would you be able to say that?

Sandoval: No, I wouldn't.

Davis: Okay.

Sandoval: I'm not, it's not in my authority to even go against his word.

Davis: Okay. So...

Sandoval: Or his judgment.

Davis: Okay. So at some point you said that, at some point, Juan Zuniga mentioned get.., getting a G-ride, to go out and do something that would be a retaliation?

Sandoval: No, he just said that we, we would need G-rides.

Davis: Okay.

Sandoval: And, and um, wait, yeah, okay, go ahead.

Davis: And, and to you that means to steal a car to go...

Sandoval: Steal a car, well, that's what it's, that's what it is, is, a G-ride is to steal a car.

Davis: Who volunteered to do that?

Sandoval: Um, Time-Time.

Davis: Okay.

Sandoval: But I mean I'm not sure if they got it or not.

Davis: Okay.

Sandoval: You know I just want to say that they were the ones who volunteered.

Davis: Okay and you say they were the ones, do you mean Time-Time and Dean Salavea?

Sandoval: Yeah, they're the cousins for Goofy.

Davis: And you had said earlier, Eduardo, and again, correct me if I get anything wrong.

Sandoval: Um-huh.

Davis: You had said earlier that they were real upset.

Sandoval: Yeah.

Davis: Obviously it was their family and they were real mad about it.

Sandoval: Yeah, and this is their little cousin and, yeah, they were really upset.

Davis: Okay. Now Goofy was shot on a Friday night.

Sandoval: Um-huh.

Davis: Did you, when was it that you guys met at Juan Zuniga's home?

Sandoval: Um.

Davis: To the best of your memory?

Sandoval: I think the next day probably.

Davis: Okay and what, what happened at Juan Zuniga's home? What was, there was some further discussion about retaliating, tell us...

Sandoval: Well it wasn't our full, it wasn't a full scale retaliation, it wasn't just said that we were going to retaliate, they were just upset and they said we need to retaliate on whoever did it.

Davis: Okay.

Sandoval: But it was never stated like directly retaliation on somebody or even directly going out and doing something to somebody at that time.

Davis: (Talk over). And Eduardo, let's just pause here for a moment and just kind of sum up what you're side of this is. You have maintained that even though there was discussion to do a retaliation, you...

Sandoval: But it wasn't like, I mean the discussion wasn't like, well, yeah, you could say it was retaliation, they discussed about retaliation, but I mean it was never discussed upon who at that point in time because no one was a..., no one was sure who exactly it was.

Davis: Right.

Sandoval: So it wasn't no, like, you know?

Davis: And, and...

Sandoval: They just, they were talking they had to, that something had to be done 'cause it's not cool the homey got shot.

Davis: Okay and one thing that you've been up front about, Eduardo, you know, when you learned that this girl was killed, was, you've said to us off tape, and you've been, you got upset about it too, is hey, I never, we never, or I never intended, or would have gone along if I had been able to know that a girl was gonna' get killed.

Sandoval: I would have never went along for any reason at all.

Davis: Okay.

Sandoval: Not even if it wasn't a female because like I said, I got a kid.

Davis: Okay.

Sandoval: You know, I'm not, you know I'm not trying to be, I thought that um, I'm trying to raise my son and to the best of my ability, you know?

Davis: So...

Sandoval: I mean I know a gang member dad...

Davis: Okay.

Sandoval: ...doesn't sound right, but, you know, I'm, I wasn't a...

Davis: So, you when you guys got over to Juan Zuniga's home.

Sandoval: Um-huh.

Davis: And they said, you know, there was basically, what you told us he was saying was okay, everybody go out, look for some Slobs and shoot on sight, ride on somebody, those are terms, you know...

Sandoval: Yeah.

Davis: ...that you knew something was going on?

Sandoval: Yeah.

Davis: And what you had told us was you weren't chosen to be the, the shooter?

Sandoval: No, well, I was never told that I had to actually inflict myself in any kind of situations or anything, I was just, I was never told nothing, you know so..

Davis: Okay.

Sandoval: I, I just got...

Davis: Nobody.

Sandoval: I took it upon myself just not to get involved in all that situation, you know, especially 'cause I wasn't even sure who did it so...

Davis: Right.

Sandoval: ...why am I gonna' get all wound up about, how are you gonna' get mad at someone who, you don't even know if they did it, you know?

Davis: Right. And so Eduardo, what you told us off tape was as the plan is to go out and look for some Slobs, you decided to jump in the car with Antonio Gonzalez.

Sandoval: Yes.

Davis: Because he had his children with him, right?

Sandoval: Yes.

Davis: And did you feel that by going with Antonio that you could remove yourself a little bit from...

Sandoval: Well, I knew I could because I knew he wouldn't put his kids, he would never ever put his kids in any kind of situation, you know? I mean he's a very good father.

Davis: Okay. (Talk over). So you obviously, you know when you get in that car and the children are in there, that you and him aren't gonna' be shooting anybody?

Sandoval: We're not gonna' be doing nothing.

Davis: What were you guys supposed to do (talk over)?

Sandoval: All, all uh, all, I wasn't, all I was told is, you know, if, if you see any cops, let the homies know and if you see any Slobs, let the homies know.

Davis: How were you supposed to let 'em know? Were you, did you guys have walkie-talkies?  
Sandoval: No.  
Davis: Were you talking on cell phones?  
Sandoval: Communicate, cell phones.  
Davis: Okay, so you and Antonio were riding together and who else had that assignment, to go out, look for Slobs or look for the police and call if they saw it?  
Sandoval: Nobody. Because we weren't actually supposed to even do anything, but Juan Zuniga didn't want us just to not do nothing, not especially being part of the neighborhood, we're all supposed to be involved, that's what he said.  
Davis: Right.  
Sandoval: We all needed to be involved some way, some how. And I know my friend Antonio, he wasn't trying to be involved and I know that's why he brought his kids, I mean he always had his kids regardless, you know, but I know that's why, I'm not gonna' say that's why he had 'em there at that time...  
Davis: Right.  
Sandoval: ...but I feel like, like he knew him having his kids wouldn't get him involved in anything, you know?  
Davis: Right, it would maybe insulate or remove you a little bit.  
Sandoval: It would, you know, it would insulate him. And so..  
Davis: Who was...  
Sandoval: ...since I was never told to do anything, at that point in time, I volunteered to be with him 'cause I didn't want to do anything myself, you know?  
Davis: Okay, so you guys meet at Juan Zuniga's house?  
Sandoval: Um-huh.  
Davis: And that's the, the same day that you meet at his house, is that the same day that you said you and Antonio were at the McDonald's at 72nd and, and Pacific Avenue?  
Sandoval: Yes.  
Davis: When this happened?  
Sandoval: Yeah.  
Davis: Okay, um, what, who all was at Juan Zuniga's? Obviously you were there, Juan Zuniga was there, and Antonio were there. Who else did you say were there, was there?  
Sandoval: There's, I don't know, I gave you a list of names.  
Davis: You did.  
Sandoval: They're all...  
Davis: And let me ask you something, okay?  
Sandoval: There was um, um, that's 'cause, I wanted to say everyone in general, because I'm pretty sure everybody was there so uh, everybody that, that could have been there at that time, I'm, I'm gonna' name.  
Davis: Okay.  
Sandoval: And I'm gonna' name, you know, I'm gonna' name uh, nah, Goofy wasn't there, I wanna' name uh...  
Davis: And what we want you to do, Eduardo, look at me.  
Sandoval: Um-huh.  
Davis: What we want you to do, is we want you to stop and think for a minute. We don't want you to throw out everybody's name because we don't want people that you, you know, we don't you to throw in a name of somebody that's totally innocent...  
Sandoval: That's why I don't want to...  
Davis: ...at this particular...  
Sandoval: ...that's why I, I, I'd rather not get into that because...  
Davis: Okay.  
Sandoval: ...I, like I said, I can't remember who was all there.  
Davis: Okay.  
Sandoval: I don't remember who was all there.  
Davis: But you remember you were there with Antonio?  
Sandoval: Yeah, and his kids.  
Davis: And you, you did provide some names earlier and we're gonna' write 'em down when we write our report.  
Sandoval: Yeah. But I mean the names that I told you are people that I felt probably were there.  
Davis: Okay.

Sandoval: Or might have not been there, you know, or not?  
Davis: Okay, and Antonio, listen...  
Sandoval: That's 'cause, that's 'cause I'm...  
Davis: We, we're not gonna' force you to say anything.  
Sandoval: No, I know, but...  
Davis: What happens is, no...  
Sandoval: ...the thing is, no, because you're asking me, you know, you're asking me about the names, right, and you're telling me you don't want me to tell you anybody's name, well like, I'm not sure exactly who was all there at that day because I don't really remember. I just remember maybe T was there; Juan, Dean, and Time-Time, and then me and Antonio, and Casper and I think Santiago was there, maybe, and maybe even Saul, yeah, Saul I think was there too. That's about it.  
Davis: And you had said earlier that Jarrod was there.  
Sandoval: Oh yeah, I think Jaraad was there, I know, but I think he might have been at work, but I think he was there too, and then uh...  
Davis: Well he can't be in both places.  
Sandoval: No, why, I don't know, well okay, I'm just gonna' say he was there, and then um, um, that's, oh and Use.  
Davis: Use, that's Lorenzo Villagomez?  
Sandoval: Yeah.  
Davis: Was, was uh, Alfredo Villagomez?  
Sandoval: Oh and Little Blackie's there too, yeah.  
Davis: That's Alfredo?  
Sandoval: Yeah.  
Davis: Okay. Is it hard for you, on tape, to say people's names?  
Sandoval: Well because I'm not trying to incriminate nobody, you know, the way I feel...  
Davis: You're not incriminating (talk over)...  
Sandoval: The way I feel...  
Davis: You're just telling...  
Sandoval: ... (talk over) but what I want to say on tape is I don't feel that anybody knew what was gonna' happen, you know, I know some people were upset, more than others, and other people weren't even upset at all. You know, some people don't even care.  
Davis: But Eduardo.  
Sandoval: You know?  
Davis: Okay.  
Sandoval: And, and, and like I'm saying, like, I'm not, I'm not saying these names so it'll get these people in trouble. I'm saying these names 'cause you're asking me who was there.  
Davis: Right, right. That's, uh, you're not getting in trouble. What we, you know, you have to let what, you have to let the chips fall where they will. I'm asking you a, a question of who do you remember who was there and that's all I'm asking you. I'm not asking you to make any judgment on 'em or what they did, I'm only asking you to report to me what you saw and what you heard. So that, that's it, I mean I think I remember Detective Reopelle telling you earlier in the interview, we don't want you to say what we want to hear, we want to hear the truth from you. That's what, in the end, will be the best thing to try and help you, you know.  
Sandoval: Yeah.  
Davis: So you get in the car with Antonio and you leave and you go over to, over to the eastside and even if you don't see all these other people leave in cars, you know they show up over there, right? Because you're talking to 'em on a cell phone, throughout the night, is that right?  
Sandoval: Yeah.  
Davis: What...  
Sandoval: But um, butt I wanna' say to's like, like it wasn't settled that, not necessarily that night, not, nothing had to happen that night.  
Davis: Right.  
Sandoval: You know what I'm saying? These guys are just talking about retaliating. Nothing's being said it's gonna' be done that night, you know?  
Davis: Right. I mean obviously if you guys go over there and you don't find a target and you don't do a shooting, it doesn't happen.  
Sandoval: Yeah.  
Davis: Okay. So...

Sandoval: That's uh, so that's why I wanted everybody, that's what I want to say right now, you know what I'm saying, like if one thing I want to say no one knew something could happen that day. Right?

Davis: Right.

Sandoval: It was just said let's go out, it was never planned that anything was supposed to happen.

Davis: Right. But what was planned at Juan Zuniga's was you were gonna' go out and look for a Slob that would be a target and you guys were gonna' be in separate cars to look for police and for Slobs and they, they were mad and they were gonna' do a retaliation if everything fell into place. Is that right?

Sandoval: Um-huh (positive).

Davis: Okay, what you're saying is, well, it may not have happened if we didn't see the right target?

Sandoval: Um-huh.

Davis: Okay, I understand that.

Sandoval: No, no, no, yeah, but, but at the same time I'm trying say is nothing that was officially said like something had to happen that night, nothing was ever said like that, it was never, and what I'm trying to say was, we, we didn't plan to go out that night and do something, you now? It was just some homies were mad and they're like you know what, let's go ride around, and so like alright, whatever, you know, and then, and he, we were planning, honestly, I was planning on just going home, you know...

Davis: But, I think, but Eduardo..

Sandoval: ...but we were kind of inflicted into, you know, well the homey was inflicted and uh, we were all together in a group so we all had to go out and roll around and stuff like that and...

Davis: Now let me ask you something.

Sandoval: Um-huh.

Davis: Because you, you keep saying that and I, I, I believe that, I believe that, you know, there is, to you, to me and Detective Reopelle...

Sandoval: Um-huh.

Davis: ...that, that really in a nutshell sums up what gang life is.

Sandoval: Um-huh.

Davis: You don't really wanna' go, you'd rather be home sitting on the couch with your girlfriend watching a movie.

Sandoval: Or my son.

Davis: Right. But you kind of have to go, don't you?

Sandoval: Yeah.

Davis: I mean let ask you what, what are your options?

Sandoval: (Talk over) it really, it really, like, just, just actions, you now, that you go, and, or you know, you have to deal with whatever consequence, you know, and comes after that, you know, whatever they feel they need to do to you to, you know, sign of weakness, that's a no-no, you know, you don't, you don't show a sign of weakness and, you know, and some people it's not weakness, you know?

Davis: Right.

Sandoval: It's not weakness, it's just they got things to lose, they got families, you know?

Davis: Right.

Sandoval: Some of these guys, they got families and you know, they, this isn't their shit. Ain't their game. You know? Some people are in it for the fame, some people are in it for the kills and the thrills, you know, but...

Davis: And, and you had said..

Sandoval: Me? I got in this 'cause I was dumb, young and stupid. I didn't know what I, I was getting myself into, you know I knew it was something more, deeper than middle school and high school shit but I didn't feel that at the time that it was something that could keep me trapped.

Davis: Right.

Sandoval: You know? As I got older I noticed, you know, I realized, there's no way out. No matter what you do, there's no way out.

Davis: Right.

Sandoval: Only way out is in a box, you know?

Davis: Is that really kind of what the message is? Hey you need to be down for this or there's gonna' be some consequences?

Sandoval: Yeah, you know, and they have, you know, people have weird punishments, you know? There's all kind of weird punishments, you know, it could be anything. Never know, it could be your own mother, you know, that they're going after.

Davis: Right.

Sandoval: You know, you know.  
Davis: Let me, Eduardo, let's, let's go back to this for a minute. You said that earlier, and again...  
Sandoval: Um-huh.  
Davis: ...correct me if I get anything wrong, I'm...  
Sandoval: Um-huh.  
Davis: ...you said that um, you thought you guys went over to Juan Zuniga's about seven or eight o'clock at night.  
Sandoval: Possibly.  
Davis: Okay and you said that then, you know, people drove over to the eastside. You said you and Antonio did drive around, uh, you did at one point have a conversation with Juan Zuniga and you said hey, I see police at 72nd and Portland or something.  
Sandoval: No.  
Davis: Okay you...  
Sandoval: ...never did that.  
Davis: You did not have a...  
Sandoval: No, I never, I never talked to him about seeing cops or nothing.  
Davis: Did you, but you talked to him on the phone.  
Sandoval: I talked to him on the phone but I never told 'em, I never told him that I seen police, going to Portland or anything, I never called him to tell him that or anything.  
Davis: Okay. Now at some point in the evening, after you've been driving around for awhile, do you and Antonio make a stop somewhere?  
Sandoval: A stop somewhere, how?  
Davis: At the McDonald's?  
Sandoval: Yeah, we went to McDonald's and we got some food and then when we were, when we had left McDonald's, we were driving.  
Davis: Which McDonald's was it?  
Sandoval: Pacific, 72nd.  
Davis: At 72nd? Okay. And what did, what, what did you see when you were at the McDonald's?  
Sandoval: I just seen a bunch of police flying by, heading towards Portland.  
Davis: Okay.  
Sandoval: So I felt, I, I mean I, I had a good idea something probably happened, but I wasn't gonna' ask nobody what happened or if anything did happen, you know?  
Davis: Okay.  
Sandoval: It just, (unintelligible) on us. You know?  
Davis: Okay, what, what did you and Antonio do at that point?  
Sandoval: Nothing, we just kept driving around.  
Davis: Okay, at what point did you get a phone call and say go home or...  
Sandoval: No, nobody ever told me to go home, they just, I got a phone call sayng that some friends had already gone home and that uh, Juan Zuniga said he'd be going home so I mean I was...  
Davis: Was the phone call from Juan Zuniga?  
Sandoval: Yeah.  
Davis: Okay.  
Sandoval: So I was like I'm going home.  
Davis: Okay. So in that phone call, Juan Zuniga didn't say somebody got shot?  
Sandoval: No.  
Davis: Get outta' here, leave.  
Sandoval: Never.  
Davis: Okay.  
Sandoval: Especially not over the phone.  
Davis: Okay, he would be careful to say that kind of thing over the phone?  
Sandoval: Yeah.  
Davis: Okay, um, so Eduardo, when is it, do you see it on the news, when is it that you realize that uh, this young gal was killed and you guys were out there the same time?  
Sandoval: It was actually the next day, next days. I, I heard about it, I don't remember who I heard it from, but I heard something then I seen it on the news, you know, but when I heard it and I seen it on the news, I didn't, I honestly didn't feel that my friends had anything to do with it.  
Davis: Okay.  
Sandoval: Ask my reason why?

Davis: Yeah.  
Sandoval: My reason why, it's not our style.  
Davis: Okay, now you had told us earlier that, you know, some of you guys that have a little bit more upper status wouldn't be asked to do this kind of thing.  
Sandoval: Um-huh.  
Davis: And you had named some names of people that would; the younger guys.  
Sandoval: Um-huh.  
Davis: Who are those people that were there that would be.  
Sandoval: Well just all the younger guys, I don't, I mean I can't say, I don't want to say no names because I don't want to say exactly, I don't want to say names that make it seem like they were the ones that had to do things, you know, but...  
Davis: Okay. And you know, that's not, I'm not, you're saying hey, I have no idea who shot and who drove.  
Sandoval: Yeah.  
Davis: Tonight, we're, we're, we're...  
Sandoval: I know 'cause I don't want it seem like I'm getting people in trouble because I don't know what their role was in the whole thing.  
Davis: Right, but you..  
Sandoval: That's all.  
Davis: And uh, so, let's, let's just say that then, we're talking in general terms.  
Sandoval: Right, general terms, anybody's that's younger, that don't got kids, would be the ones to go, you know.  
Davis: Okay and we had said earlier that would be, and you had named names. That would Jarred Messer and Saul and Santiago Mederos and Conejo.  
Sandoval: Well I didn't say 'em in that order but yeah, I said them.  
Davis: Okay, I might have got 'em order and if I did...  
Sandoval: Yeah.  
Davis: ...I'm not trying to trick you or anything.  
Sandoval: No, no, but I just feel like you're, you're pinpointing people, you know?  
Davis: Right and, and let's be clear, I'm not saying those were the people in the, in the G-ride that did this, I'm just...  
Sandoval: Okay, alright, alright, so, okay. So the, on clearest terms, I was a little homey, just a, you know, when it was (unintelligible) Little Snapper, Saul was there maybe, um, like, Santiago, you know, but no, I'm not gonna' say who was there, I'm just gonna' say the people that could have...  
Davis: Right. Because they were at Juan Zuniga's earlier.  
Sandoval: Yeah, so if you look (unintelligible) basically the people you named and Use, Conejo, uh, and maybe even Little Blackie.  
Davis: Okay and um, Eduardo, after this happened.  
Sandoval: Um-huh.  
Davis: The next day you hear some on the news and this is where Detective Reopelle and I really had, said hey, we, we've got a problem with what you're saying.  
Sandoval: Um-huh.  
Davis: And hey, let's...  
Sandoval: I understand. I know and I understood.  
Davis: And we didn't, we don't, you know, like I said, we didn't um, we don't jump up and down and start screaming and all that, but I mean we, we said hey, after this happened, the next few days or that whatever, we believe that there would have been discussion that you would have heard about oh yeah, keep your mouth shut, um, don't say anything and you're basically saying that didn't happen.  
Sandoval: No, not on those terms, it didn't happen like, it wasn't actually discussed what happened, you know, it was just like you know, shit's hot, you know and it was, I don't wanna' say none of, I don't, I never really was aware of exactly how, what went down, you know? Exactly what went down.  
Davis: Was there some...  
Sandoval: 'Til like, um, was later then I heard you know, what they basically didn't tell me but I kind of got the picture, you know, that they did it, yeah.  
Davis: And tell me what came, how that came about.  
Sandoval: Just the news and how they were acting all funny and stuff like that, you know, they didn't have to tell me, I kind of already had a clear picture but I didn't wanna' believe that was true.  
Davis: Okay. Nobody really discussed it specifically with you but you came to start to think...

Sandoval: Yeah.

Davis: ...oh yeah, we, that must have been the night we were out there driving around.

Sandoval: Yeah.

Davis: Okay.

Sandoval: But I mean after the, oh no yeah, yeah, that's, that's uh, that's right.

Davis: Okay and again, Eduardo, you change it if I get it wrong. I, I, you know you could do that. I don't want to put words in your mouth.

Sandoval: Um-huh.

Davis: We want to hear. And we also understand that you're talking about things that are difficult for you because you are talking about kind of the ELS and, and that kind of thing. But you know, you also said to us earlier oh I'm really upset that a young gal got killed that had her whole life ahead of (talk over).

Sandoval: Yeah, I'm sure everyone is, you know, because I'm sure none of my homies planned on that to happen and I don't feel like it's their fault that it went down like that because every man speaks for himself and they do their own decisions, you know. And I, I feel terrible that it went down like and that all my friends, you know, now, especially now, you know, they're all basically involved, you know, it's what you're saying, you know. That's what basically was going down but I don't feel like, I don't feel like they played a role in what happened.

Davis: Okay, just because of, just because, what, what you've kind of said to us, Eduardo, and I wanna' try to clarify it, is just, you feel like these people that were in the G-ride that, that drove and that did the shooting are the people responsible for this.

Sandoval: Yeah.

Davis: Okay, you're saying I don't feel I'm in that group because I was just driving around...

Sandoval: That and everyone else that my friends were there, you know, 'cause I really honestly don't feel that all the peo... obviously, that's prepared were the ones with the full intention of doing something.

Davis: That had guns and they were...

Sandoval: Yeah, they were the ones with the full intention.

Davis: Okay.

Sandoval: The other guys, I don't feel they were, had that intentioning.

Davis: Okay.

Sandoval: I don't feel they were intending to do anything.

Davis: Okay.

Sandoval: You know.

Davis: They weren't, they couldn't foresee what was gonna' happen?

Sandoval: Yeah.

Davis: Okay.

Sandoval: You know, so I just want to clear it up, you know, I don't want to make it seem like, you know, like my friends were all involved in this 'cause I know that's what it seems like but I just wanted everyone to know that my friends weren't all involved in this and the way it went down.

Davis: Okay.

Sandoval: You know, it was a tragedy, you know, I couldn't imagine losing my son.

Davis: Eduardo, now I want to ask you about something. You had said there wasn't a lot of direct conversation about it afterwards. At least none to you.

Sandoval: Yeah.

Davis: But you did say that at some point after it, Juan Zuniga said that Jarrod is hot.

Sandoval: Um, he'd never said it, it was just there that he didn't want him around for some reason and I didn't know for what reason and I still don't know for what reason, you know.

Davis: Okay.

Sandoval: You guys are saying that you feel that he left 'cause of this but I don't think...

Davis: You...

Sandoval: I don't feel like he was...

Davis: Okay.

Sandoval: You know.

Davis: You...

Sandoval: I don't feel like he play a role.

Davis: Okay.

Sandoval: What I want to say.

Davis: You're saying that Juan Zuniga just for whatever reason didn't want him around?

Sandoval: Yeah.  
Davis: Okay, and then you also said that Juan Zuniga then drove him to Mexico?  
Sandoval: No, I never said that, I don't know who drove him to Mexico. That's what's you, you guys told me that he drove him to Mexico but I honestly don't know how he got to Mexico.  
Davis: Okay, well earlier I had say didn't Juan Zuniga drive him to Mexico?  
Sandoval: Yeah, that's what you, well, that's what you said, but...  
Davis: Okay and then...  
Sandoval: I don't...  
Davis: ...but then after that you said yeah, he did.  
Sandoval: Well, I honestly, I really don't know if he did or didn't.  
Davis: Okay.  
Sandoval: I mean now that I'm on tape, you know, honestly, don't know if he did or didn't and I would tell you if he did or didn't, you know, but I honestly don't know if he did or didn't. I don't know how he got to Mexico or how he got to wherever he was at.  
Davis: Okay.  
Sandoval: And I don't know the reasons behind that, why he, he did leave.  
Davis: Okay and again, these are some of the scenarios I guess, Eduardo...  
Sandoval: Um-huh.  
Davis: ...where Detective Reopelle and I have, have said to you know, hey we, we feel like you're not being totally honest with us.  
Sandoval: But I am because I'm telling you I don't know how he got there.  
Davis: Okay. When was the first time you learned that he, that he, did he call you from Mexico?  
Sandoval: No, I just knew that he, I just, I just knew that the homies that had, the homies, Juanello didn't want him around and I asked a couple friends why and they said 'cause he's hot and I was like why's he hot for and it was like, I don't know, homey just thinks he hot, so he doesn't want him around.  
Davis: Okay.  
Sandoval: I said okay.  
Davis: Okay, so it wasn't Juanello who said he was hot to you.  
Sandoval: Huh-uh. No.  
Davis: It was other homies who, when you asked them, they said the homey, meaning Juan Zuniga...  
Sandoval: Um-huh.  
Davis: ...thinks he's hot.  
Sandoval: Um-huh.  
Davis: Okay. Okay. And then when, to your knowledge, Eduardo, did Jarrod come back to Tacoma?  
Sandoval: Like three months ago.  
Davis: Okay, you had said two or three months ago.  
Sandoval: (Talk over)  
Davis: Can you pin it at all or...  
Sandoval: Like, no, I can't.  
Davis: ...do you know, was it by, was it, did you guys hang out at the 4th of July or?  
Sandoval: Huh-uh (negative). (Yawning) It was probably like July.  
Davis: July.  
Sandoval: Aft..., like after the 4th maybe.  
Davis: Okay, alright. Um, Steve, did you have some questions then?  
Reopelle: Yeah, just a, a couple things, Eduardo, um, you had mentioned earlier and you said that this homicide that occurred with the young lady was not your style.  
Sandoval: Um-huh.  
Reopelle: Can you explain that a little bit more to me?  
Sandoval: Okay, because to me, I'm against women being hurt and children, why, my reasons why is 'cause I have a mother, I have sisters, you know, and I have a son, so that's not my style.  
Reopelle: And you had, you had used the word earlier that it was kind of against the code.  
Sandoval: Yeah.  
Reopelle: Is that, is that kind of all (talk over) rules...  
Sandoval: No women, no children.  
Reopelle: Okay.

Sandoval: No, that's just, I mean that's just street code. Knowledge of street code, you know, I'm, that's not our rule or nothing, that's just what everybody goes up on.

Reopelle: Okay.

Sandoval: Everybody goes on that, you know.

Davis: Now, let me ask you something. Why didn't you guys just go to, I'm sure, being familiar with the eastside, you knew where like Bloods live, why not just go shoot up their house?

Sandoval: I, well that's the thing, I, like I said, I don't feel like he was, I didn't feel like it was taken, I didn't feel like people were taking it like, like serious like they should, you know? And I, like I said I don't think none of my friends really had a clue what was gonna' happen or how it was all gonna' go down, you know?

Davis: Okay, but obviously, what you're saying though is some of your friends, because somebody's got guns, somebody's driving the van, so somebody knows what's gonna' happen.

Sandoval: Oh yeah, like I said...

Davis: Okay.

Sandoval: ...the, the people that, that were involved, obviously they were a few steps ahead of us 'cause they already had a car and they were already, they were already having their plan, you know, so I mean, we were rolling in a legit car, so you know, we weren't on, on their page, you know, they were on, they were on a whole 'nother page, you know.

Davis: Right.

Sandoval: But I just wanna' say, you know, my friends over there, they didn't all, nobody knew what was gonna' happen and nobody knew that anything would happen that night, you know, I just want to say that.

Reopelle: Okay. Eduardo, I want to back you up a little bit.

Sandoval: Um-huh.

Reopelle: To the night that Goofy got shot.

Sandoval: Um-huh.

Reopelle: Um, and you gave us a list of people that were there at the bar drinking and hanging out.

Sandoval: Um-huh.

Reopelle: Was Antonio there?

Sandoval: No, he was at work.

Reopelle: Okay, but...

Sandoval: And neither was Jarrod.

Reopelle: Okay and they both work together?

Sandoval: Yeah.

Reopelle: And or at the time, they worked together?

Sandoval: Yeah.

Reopelle: Okay and so neither one of them was there...

Sandoval: No.

Reopelle: ...at that time? Alright. Um, now I understand, you know, that, that you, you knew that this was this talk about the retaliation, correct. But you, you jumped in with Antonio, because his kids were there and you wanted to specifically kind of distance yourself from things, is that right?

Sandoval: Yeah, that's right.

Reopelle: Okay, what, what car were you guys driving in?

Sandoval: A black Tahoe.

Reopelle: And you aware of what the other people that were there were driving when they left?

Sandoval: Not necessari..not, not, I'm gonna' say no because I'm not really aware how everybody was riding, what cars they all hopped in, how many cars were there.

Reopelle: Okay.

Sandoval: I don't want, I don't want to get into that because I don't really remember all the, those details.

Reopelle: Okay, and so what the, what the word was, and, and earlier we had used the, the term, kind of, your role, but what you guys were supposed to do was kind of head over to the eastside, look for Slobs, look for cops, that kind of thing, correct?

Sandoval: Um-huh.

Reopelle: Okay, where'd you guys go after you left Juan's house, Juan Zuniga's house?

Sandoval: Um, I don't remember. Like I said we were just driving around, I mean, I didn't go nowhere directly, I just, just driving around.

Reopelle: Okay and did you wind up at the park for a little bit?  
Sandoval: (Yawning) We stopped at the park, we hopped out the car, we're smoking a little bit, start driving around, you know, we'll pull up in different parking lots and just, you know, hop out, smoke a tote, you know, and talk about how everybody's going crazy over this shit and...  
Reopelle: Okay and we're talking about the park that you stopped at, we're talking about 43rd and McKinley?  
Sandoval: Yeah, we stopped there and we stopped on the one on 84th, over there kind of in Lakewood, kinda, by the...  
Reopelle: I'm not, I'm not sure which one you're talking about.  
Sandoval: ...by the (unintelligible).  
Reopelle: Oh, okay. Okay. And then when you see all the cars go racing by, all the police cars, I think you described to us earlier.  
Sandoval: Um-huh.  
Reopelle: You were, you guys were getting some food.  
Sandoval: Um-huh.  
Reopelle: Um, for your selves and the kids...  
Sandoval: Um-huh.  
Reopelle: ...at 72nd and Pacific at that McDonald's right there? Okay.  
Davis: Um, Eduardo, you had said earlier, you know, that you've been kind of part of this group since you were about...  
Sandoval: Thirteen years old.  
Davis: Thirteen. Okay, so not middle school? How did you get, how did it kind of get started for you?  
Sandoval: Well, it's kind of a long story but see, you know, you were growing up as a kid, you know, my story and why I did this and why I'm here now is, you know, my, my brother, he got stabbed twenty-seven times here in Lakewood, you know and I have been through it, and I was little, I was like nine or eight years old. You know, and to see my mother cry, to see him in a coma, you know, to go to the hospital and see him all opened up in his stomach, well, that changed my life. That changed my life a lot. I always told myself I wanted to be a person that no one will ever hurt my family. I'm there for my family 'cause this again.  
Davis: Right.  
Sandoval: You know, I wanted to become someone that, that's feared and loved, you know.  
Davis: Right.  
Sandoval: And, and fear that they're not gonna' do nothing to my family 'cause they're afraid I'm gonna' do something to them, you know.  
Davis: Right.  
Sandoval: That's what I wanted. You know so the time I had that mentality in my head that I just wanted to become someone and no one could even touch.  
Davis: Right.  
Sandoval: So growing up, you know, you grow up, you look up to the dudes, you know, and dudes are on the block, and dudes are really doing it and when I went on to school, I ran into a lot of little school gangs but I knew that none of them were real.  
Davis: Right.  
Sandoval: So I, I went after the real thing, you know? And that's how I'm in this mess now.  
Davis: And then, and then eventually it becomes a thing where you just can't really cut loose from it.  
Sandoval: Yeah.  
Davis: Okay. Okay. Is it pretty common in your gang, group, whatever you want to call it, that you guys don't really ask too many questions after the fact about what's happened?  
Sandoval: Yeah, that's always been a fact.  
Davis: Okay.  
Sandoval: We don't ever question, we don't talk about nothing.  
Davis: Now...  
Sandoval: And so I honestly don't, wouldn't know who was all involved or...  
Davis: Okay.  
Sandoval: ...who did what, or what was done.  
Davis: And, and obviously, you know...  
Sandoval: Or who was in the area.

Davis: ...we're not gonna' keep rehashing that. We, we feel, you know, Antonio, that you, that you're keeping some information from us. We feel that, you know, and that, that's man to man, I'm telling you that.

Sandoval: Um-huh.

Davis: And you know, but we're not gonna', we're gonna' leave at that today.

Sandoval: Um-huh.

Davis: And we'll see, maybe we'll talk again, you know, but um, you had said that, that at some point after all this happened and after things settled that there was a newscast and maybe I was on it or something.

Sandoval: Um-huh.

Davis: You, you and Juan Zuniga saw it.

Sandoval: Um-huh.

Davis: What, tell me again what he said after that and what you said that you saw that he was nervous and worried. What, what was going on there?

Sandoval: He just got nervous. He said it's hot, you know, he just said it's hot and I was like, uh, what, and just, I mean I kind of had a, I kind of wanted to just get it out of him. I wanted him to tell me but I knew he wouldn't and I knew it was not good to ask.

Davis: Okay.

Sandoval: So I just left it at that.

Davis: Okay.

Sandoval: You know?

Davis: And...

Sandoval: Mind my P's and Q's.

Davis: Okay, and Eduardo, in the, at the end of March, uh, there another homicide that involved some ELS members and what happened was, did, that was the first time Detective Reopelle and I met with you and we talked to you. You, you were in a car, uh, you ended up getting arrested on a DOC violation.

Sandoval: Um-huh.

Davis: You came down here, we, we ended up talking to you for awhile.

Sandoval: Um-huh.

Davis: Um, after that happened, and we briefly asked you about this murder that we're talking about today.

Sandoval: Um-huh.

Davis: And, and you had basically said no, I don't know anything about it. After that happened and, and you left, did you have a conversation with Juan Zuniga where he asked you?

Sandoval: I, well actually I told him, I was like how you guys know about that uh, murder that happened, and over there on, over on the eastside on Portland and he's like oh yeah, no, the cops asked me about that. He's like oh yeah, what they asking, I don't know, they're just asking, you said it might be, do you think it might be gang related and they asked me if I knew anything about it, you know, and I just like, shh, I don't know. He's are you sure, I'm like yeah, he's like well, that's weird, and I'm like I know, and I'm like I, I don't know.

Davis: Okay.

Reopelle: Eduardo, talk to me a little bit about, 'cause I think this is important, okay?

Sandoval: Um-huh.

Reopelle: Is you, you know you have kind of alluded to the fact that you're kind of in this gang thing and you can't get out, you're kind of trapped.'

Sandoval: Um-huh.

Reopelle: What happens if you try to get out?

Sandoval: I don't know, anything that happen. I'm not gonna' say I know what's gonna' happen 'cause I don't know, that's what I'm scared of.

Reopelle: What, what are the kind of things that you're afraid of, that would happen?

Sandoval: Anything can happen, you know, hurt my family, hurt my son, you know?

Reopelle: And that would be other gang members that...

Sandoval: No, my, my own hood.

Reopelle: Right.

Sandoval: You know? I mean I don't know, it's like everything, you know, you can't, you can't just back off things. You wish you could, if you, if you could make that wish you would make it.

Reopelle: Did anybody ever try to get out, that, that you know of?

Sandoval: Um-huh.

Reopelle: And, and what happened to them?

Sandoval: They're just running. Nothing hasn't really happened to 'em, they're the exact people you know, but they're just all running, running.

Reopelle: When you say things would happen to like your family, to you, I mean do you...

Sandoval: I don't know that could happen but I just, I'm, I'm in fear of that, I'm in fear that you know, they might want to hurt my mom or something, you know, I'm not saying it will happen or they, they'll think about doing that, you know, I'm not sure, like I said, the punishments are weird, you know, they could think of anything, you know, so I'm not, I'm not aware of exactly what could happen but I'm, I'm thinking of a possibility, you know, they're gonna' hit you where it hurts.

Reopelle: Who would it be that would make those kind of decisions?

Sandoval: He's dead.

Reopelle: You're talking about Juan Zuniga?

Sandoval: Um-huh, but he's not the only one, they're others. There's, there's evil people, you know? But I'm not gonna' say that, some names or anything 'cause I'm, I wouldn't think that they, they'd actually inflict anything on me or try to do anything to me, you know, but I just, you know, you never know, you never know what can happen.

Reopelle: Are these, are these people that you're talking about, are they kind of higher up than, than Zuniga?

Sandoval: Huh-uh (negative). But it just...

Reopelle: Equal, are they equal to him?

Sandoval: Yeah, nuh, it's just, you know, you just don't know. I'm just tryin' to tell you stuff, I don't know what could happen, anything could happen, but uh, I'm in fear of what could happen, you know? I'm in fear of not knowing what, what can happen and what's gonna' happen. That's what I'm in fear of now.

Davis: I mean obviously that sure, that probably really shook up your group, when Juan Zuniga gets killed?

Sandoval: Yeah, but...

Davis: I mean here's a guy that basically was your leader and these two guys kill him.

Sandoval: Um-huh.

Davis: But, and some others that help, you know, but I mean what did, what kind of message does that send to you?

Sandoval: You can't trust nobody.

Davis: And, and Eduardo, it seems a little bit strange that two of the young guys, like Juan Ortiz and Goofy, Nataali Toleafoa, would be the guys behind that.

Sandoval: I know. It's all fucked up. It's all, it's all messed up, you know, I mean that's, that's what happens, there's so much pressure, you know, so much pressure on everybody and just, I don't know man, I don't even know how you get into that, 'cause that's not what we're talking about.

Davis: Okay and we, we wo..., we won't go down there, you know, maybe, maybe...

Sandoval: Um-huh.

Davis: Like I said, we, we've talked to you now, this is our second time, we wanted to take a taped statement so your voice could be heard, you know.

Sandoval: Um-huh.

Davis: That, that's something you have to be okay with. I think there are times on tape that there are things you're nervous about talking about. You, you clearly get, want to back away from saying names of people that you've said before...

Sandoval: Um-huh.

Davis: When we weren't on tape. And that's, that's okay, you know, I mean, but uh, the only, the, the one thing we want to impress to you, Eduardo, is..

Sandoval: I know (unintelligible).

Davis: ...is to tell the truth all the way, you know (talk over).

Sandoval: I know, that's why, that's why I'm saying like, I said the names, you know, but I don't want, I don't want this to be something that is used against them because I don't, I'm, I'm not naming no one specifically, you know what I'm saying.

Davis: Right.

Sandoval: I'm just saying names of who I think could have been there and everything.

Davis: Right.

Sandoval: ...but...

Davis: And the other thing that I want to kind of touch on is uh, what, what we discussed is you know, you know from talking to Detective Reopelle and I today that we have a good sense about what happened here.

Sandoval: Um-huh.  
Davis: On this case.  
Sandoval: Well, you guys know what happened.  
Davis: Right. And you...  
Sandoval: (Unintelligible) told.  
Davis: And you know that obviously other people have shared some information with us, but, Antonio, then you know, obviously in this setting here, we share some uh, information with you too. We say well what about this and what about this and you start to figure out, oh these guys do know some stuff, is that what happened here today?  
Sandoval: Yeah.  
Davis: Okay, but we never want you to say oh well, if that's what you say. That's, that's not what we're about, we ask you things because we want to hear in your own words.  
Sandoval: I know but like, like I said I know, I, I've told you what I know, you know and I can't you tell you more, you know.  
Davis: Right.  
Sandoval: And um, you know, I don't know, I just, I don't know what to do no more, you know, I mean the way I look at it, my life is screwed up now. My kid's gotta' grow up without me, and my girl.  
Davis: Right.  
Sandoval: She's gotta' move on, my, my nephews, my nieces are gonna' grow up.  
Davis: Okay. Steve, did you have any other questions?  
Reopelle: No.  
Davis: Okay. Eduardo, if you're okay, we'll go ahead and turn off the tape at this time. The time is now approximately 1955 hours and uh, thank you.  
End of Interview  
/pmp

Reviewed By:

Reviewed Date:

# **APPENDIX SECTION B**

SUPREME COURT OF WASHINGTON

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In re the Personal Restraint of  
Eduardo Sandoval

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

DECLARATION OF LILA  
SILVERSTEIN

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1. I have been an appellate public defender with the Washington Appellate Project since the fall of 2006.

2. In the summer of 2013, the Court of Appeals removed attorney Sheri Arnold from all of her pending appeals. The Washington Appellate Project was appointed on a subset of these cases, which were at various stages of the appellate process.

3. I was assigned to take over the appeal in *State v. Marsele Henderson*, no. 42603-0-II. Mr. Henderson had been convicted of first-degree murder and sentenced to 608 months' incarceration. Both Ms. Arnold and the State had filed their respective briefs, and the case was on the oral argument calendar for September of 2013.

4. In her brief, Ms. Arnold argued that the trial court abused its discretion in admitting gang-related evidence. No other issues were raised.

5. I read the record in the case, which consisted of over 1,300 pages of transcripts and 180 pages of clerk's papers.

6. I discovered that trial counsel had requested jury instructions on the lesser-included offenses of first and second-degree manslaughter, and that the trial court had denied these requests based on caselaw which relied on an outdated definition of the mens rea for manslaughter.

7. I moved to strike oral argument and for leave to file a supplemental brief on the above issue. The motion was based on the rights to appeal and to the effective assistance of appellate counsel. *See, e.g., In re the Personal Restraint of Netherton*, 177 Wn.2d 798, 306 P.3d 918 (2013); *In re the Personal Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (If appellate attorney failed to raise an issue with underlying merit, deficient performance is established).

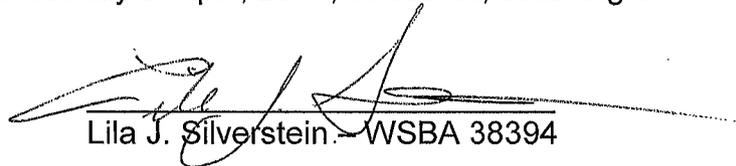
8. The Court of Appeals granted the motion. I filed a supplemental brief arguing that the trial court erred in refusing to instruct the jury on manslaughter.

9. The Court of Appeals agreed that the trial court erred in refusing to instruct the jury on first-degree manslaughter. The Court reversed the conviction and remanded for a new trial. See *State v. Henderson*, 180 Wn. App. 138, 321 P.3d 298 (2014).

10. This Court affirmed the Court of Appeals and held that Mr. Henderson is entitled to a new trial because the court erred in refusing to instruct the jury on first-degree manslaughter. See *State v. Henderson*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (No. 90154-6, filed February 26, 2015). The mandate was issued on March 24, 2015.

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

Signed this 9th day of April, 2015, in Seattle, Washington.

  
Lila J. Silverstein - WSBA 38394

# SUPREME COURT

April 20, 2015 - 10:58 AM

## Transmittal Letter

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Case Name: Personal Restraint Petition of Eduardo Sandoval

County Cause Number:

Court of Appeals Case Number:

Personal Restraint Petition (PRP) Transfer Order

Notice of Appeal/Notice of Discretionary Review

(Check All Included Documents)

Judgment & Sentence/Order/Judgment

Signing Judge: \_\_\_\_\_

Motion To Seek Review at Public Expense

Order of Indigency

Filing Fee Paid - Invoice No: \_\_\_\_

Affidavit of Service

Clerk's Papers - Confidential Sealed

Supplemental Clerk's Papers

Exhibits - Confidential Sealed

Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Administrative Record - Pages: \_\_\_\_ Volumes: \_\_\_\_

Other: Pet.'s Opening Brief, Mtn. to Transfer

Co-Defendant Information:

No Co-Defendant information was entered.

### Comments:

No Comments were entered.

Sender Name: Melissa S Perez