SUPREME COURT NO. 103864-0
COURT OF APPEALS NO. 39449-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

URIEL VASQUEZ-MALDONADO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Elisabeth Tutsch

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Uriel Vasquez-Maldonado asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the opinion in State v. Vasquez-Maldonado, COA No. 39449-2-III, filed on January 14, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's exclusion of relevant defense evidence denied petitioner his right to present a defense? Whether this Court should accept review of this significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

2. Whether defense counsel provided ineffective assistance of counsel in failing to clarify the basis for admission of the excluded evidence, ostensibly due to difficulty hearing? Whether this Court should accept

review of this significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

3. Whether the trial court erred in admitting evidence petitioner refused to sign the blood draw paperwork while he was receiving treatment at the hospital, where the reason for the refusal was speculative and unfairly prejudicial suggesting consciousness of guilt? Whether this Court should accept review because the lower court's ruling conflicts with this Court's decision in State v. Slater, 197 Wn.2d 660, 486 P.3d 873 (2021)? RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

Following a jury trial in Yakima County, Vasquez-Maldonado was convicted of vehicular homicide and reckless driving following the death of his girlfriend Taneya Vasquez[1] in a single car crash where the two

[1] Due to the similarity of names, many of the witnesses will be referred to by their first names. No disrespect is intended.

were the sole occupants.[2] CP 1-5, 8-9, 61-63. Uriel's defense at trial was that he was not driving. RP 291, 294.

The night of the accident, the couple spent time socializing with Uriel's half-sister, Huguett Maldonado, and her husband Erick Sandoval. RP 753-54. Everyone had been drinking, except Huguett who was pregnant. RP 755-56.

Huguett testified that when Uriel and Taneya left, Taneya had the keys and promised not to give them to Uriel because he was not licensed. RP 758, 761. Erick testified Taneya was driving when the couple drove away. RP 774.

A couple of hours later, Alexander Zavala witnessed the accident that precipitated Taneya's death but Zavala did not see who was driving. RP 309. Although Taneya

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[2] In addition to driving in a reckless manner as the underlying basis for vehicular homicide, Vasquez-Maldonado was also convicted of driving under the influence and with disregard for the safety of others as bases. CP 61-62.

was on the passenger side of the car when it came to rest, she would have ended up there even if she were driving. RP 305. To Zavala, it was evident neither Taneya nor Uriel were wearing a seatbelt prior to the crash. RP 339, 371.

Sadly, Taneya died from a head injury at the scene. RP 338, 708. The forensic pathologist testified death was immediate. RP 708. Taneya's injuries were more on her left than on the right side of her body. RP 709. The pathologist could not tell if the injuries were indicative of a "contrecoup." RP 714.

The pathologist testified Taneya also had injuries flowing from her right to left side. The pathologist could not tell if she was driving and injured by the center console or if she was the passenger and injured by a window handle. RP 714. Other forensic evidence offered at trial was similarly inconclusive as to who was driving.

Brief of Appellant (BOA) at 8-11 (summarizing evidence at trial).

Taney's half-brother is Gabriel Vasquez. RP 726. They have the same father, Frank Vasquez, who is married to Taneya's mother Patricia Vasquez. RP 728. A few days after Taneya's death, Gabriel was at his father and Patricia's house. Gabriel testified he, Patricia, Frank (and others) were outside talking in the driveway when Uriel came by. RP 731-32, 737-38.

Gabriel testified that when he asked Uriel what happened, Uriel told them Taneya was asleep and that he was driving when the accident happened. RP 732, 737-38. Gabriel testified Uriel made the statement in front of his father and Patricia. RP 7339.

(i) Court's Exclusion of Patricia's Testimony

Patricia testified Uriel asked for her permission to come over that day. RP 785. She, Frank, Gabriel (and others) were outside talking in the driveway when Uriel

came by. RP 786. When defense counsel asked if Uriel said he was driving, Patricia answered, "no." RP 786. The prosecutor's immediate hearsay objection was sustained:

> Q. Did Uriel say that he was driving?
>
> A. No.
>
> MR. WICKES: Object to hearsay.
>
> THE COURT: Isn't that a statement by a party opponent?
>
> MR. WICKES [prosecutor]: It's his client, Your Honor. It would be for me -- it would be for the defense.
>
> THE COURT: Sustained.
>
> MR. CHAMBERS [defense counsel]: I didn't hear that.
>
> THE COURT: Sustained.

RP 786-87. In its instructions to the jury, the court explained that if it had ruled that any evidence was inadmissible, the jury must not consider it. RP 824.

After Patricia was excused, and Uriel expressed he would not testify, the defense indicated it wished to call Frank to rebut Gabriel's testimony. RP 792-93. The state objected it had no notice. The court did not understand why Frank's testimony would not be hearsay, as it had ruled regarding Patricia's. RP 793.

In the ensuing discussion, defense counsel eventually argued Frank's proposed testimony was not hearsay:

> I'm not saying the statement's true or not. It's just whether other people that were standing right there heard that statement or not or heard anything. So it's not for the truth of the statement or for the truth of – it's just what the witness heard.

RP 794-96.

Counsel reiterated, "It's just whether that party heard that [the statement Gabriel attributed to Uriel]." RP 794-96. Defense counsel explained that he hadn't really heard the court's ruling earlier regarding Patricia, because

"the mask really muffles that" and because either the furnace or the fan was on. RP 794-96.

The next day, after the defense rested, the court asked for further argument about the admissibility of Frank's testimony. RP 804. The defense maintained Frank's testimony was not hearsay. RP 808-09. The court reserved ruling, but the defense later indicated it no longer wished to call Frank due to a "another development." RP 816.

(ii) Court's Admission of Uriel's "Refusal" to Acknowledge the Blood Draw

Medics took Uriel to the hospital. RP 337, 408. Detective Brian Mulvaney contacted Uriel at the hospital where he was being treated for injuries. RP 408-10. Mulvaney testified Uriel seemed impaired and obtained a warrant for a blood draw. RP 418-21. Mulvaney testified he read the warrant to Uriel before a phlebotomist drew his blood. RP 422, 440. A toxicologist who later tested

the blood testified it showed a blood alcohol level of .097, plus or minus .008. RP 653, 676.

Phlebotomist Marcie Allen testified generally about her work as a phlebotomist. RP 444-49. However, she did not remember the specifics of Uriel's blood draw. The prosecutor presented her with exhibit 42 (Return of Search Warrant) and exhibit 43 (Receipt of Property Taken). RP 449. When Allen testified they bore her signature, defense counsel objected and the jury was excused. RP 449.

Defense counsel objected the exhibits should not be admitted or should be redacted because they showed Uriel refused to acknowledge the blood draw and sign the documents. RP 449. Defense counsel argued such evidence was not relevant and prejudicial. RP 449-51. After a lengthy exchange, the court refused to redact the exhibits and admitted them as is with Uriel's "refusal." RP 455.

(iii) Court of Appeals Decision

On appeal, Uriel argued the court erred in excluding relevant defense evidence Patricia did not hear Uriel's supposed confession despite being right there when he supposedly made it. BOA at 17-28; Reply Brief of Appellant (RBOA) at 1-16. The error infringed on Uriel's right to present a defense. Id. Division Three of the Court of Appeals agreed with Uriel that Patricia's testimony was not hearsay and therefore not objectionable. Appendix at 7. The court found the error harmless, however, because the testimony was not stricken and because Patricia also testified she did not hear Gabriel ask Uriel any questions. Appendix at 8.

Uriel also argued his attorney provided ineffective assistance of counsel when he failed to clarify the basis for admission during Patricia's testimony, i.e. that it was not hearsay. BOA at 28-31; RBOA at 16-17. The appellate court found that even if defense counsel were

deficient, Uriel was not prejudiced because Patricia's response was not formally stricken. Appendix at 16.

Finally, Uriel argued the court erred in admitting his "refusal" to acknowledge the blood draw because it was not relevant under this Court's opinion under State v. Slater, 197 Wn.2d 660 (2021) and could have been redacted. See e.g. State v. Sykes, noted at 2023 WL 5349278 (2023); GR 14.1. BOA at 31-39; RBOA 17-18. The court of appeal disagreed reasoning the exhibits were relevant to chain of custody. Appendix at 20.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE URIEL WAS DENIED HIS RIGHT TO PRESENT A DEFENSE.

The Sixth and Fourteenth Amendments, as well as article 1, § 2 of the Washington Constitution, guarantee the right to trial by jury and to defend against the state's allegations. These guarantees provide criminal

defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor's case to the crucible of meaningful adversarial testing. Crane v. Kentucky, 476 U.S. 683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

In Washington, State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the scope of a criminal defendant's right to present evidence in his defense. A defendant must be permitted to present even minimally

relevant evidence unless the state can demonstrate a compelling interest for its exclusion. No state interest is sufficiently compelling to preclude evidence of high probative value. Darden, 145 Wn. 2d at 621-22; Hudlow, 99 Wn.2d at 16.

When the court's evidentiary ruling intersects with the defendant's right to present a defense, the courts apply a two-part test. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022) (relying on State v. Arndt, 194 Wn.2d 784, 453 P.3d 696 (2019)). First, the court analyzes the court's ruling for an abuse of discretion. Jennings, at 59. If the court finds no abuse of discretion, it then considers whether the ruling violated the defendant's Sixth Amendment rights. Id. at 59-60.

(i) The Court Abused its Discretion in Excluding Patricia's Testimony

Trial courts determine whether evidence is relevant and admissible, and appellate courts review the lower

court's rulings for an abuse of discretion. State v. Brockbob, 159 Wn.2d 311, 348, 150 P.3d 59 (2006). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wash. 2d 39, 46–47, 940 P.2d 1362, 1366 (1997).

Here, the court of appeals correctly found Patricia's testimony was not hearsay and the trial court abused its discretion when it sustained the state's objection. Appendix at 7. The court nevertheless found the error harmless because the state did not move to strike the testimony, supposedly thereby leaving it for the jury's consideration. Appendix at 8.

In its harmless error analysis, however, the appellate court failed to consider the court's instruction to the jury that if it had ruled that any evidence was inadmissible, the jury must not consider it. RP 824. By

sustaining the state's objection, the court signaled to the jury Patricia's testimony was not admissible.

Moreover, the court failed to consider Uriel's argument regarding judicial estoppel. RBOA at 5-6. When deciding the applicability of judicial estoppel, the court will focus on three factors: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether accepting the new position would create the perception that a court was misled, and (3) whether a party would gain an unfair advantage from the change. State v. Wilkins, 200 Wash. App. 794, 803, 403 P.3d 890, 896 (2017); Miller v. Campbell, 164 Wash.2d 529, 539, 192 P.3d 352 (2008).

The state's position on appeal (adopted by the appellate court) that Patricia's testimony was still available for the jury's consideration is inconsistent with its earlier position that Patricia's testimony was

inadmissible hearsay. The state clearly did not want the jury to consider it.

Accepting the new position creates the perception that the lower court was misled into believing the testimony was inadmissible and not proper evidence for the jury.

This change creates an unfair advantage for the state by allowing it to have its cake and eat it too. The state succeeded in having its objection sustained in front of the jury. The jury was informed not to consider evidence the court ruled was inadmissible. RP 824. But subsequently on appeal, the state claims Patricia's testimony was still before the jury to consider. Even assuming this is true, the fact remains defense counsel was precluded from arguing the point in closing due to the fact the court ruled the testimony was objectionable. As a result, defense counsel was left arguing reasons for the jury to find Gabriel not credible. BOR at 34-36 (quoting

defense closing, arguing "he's got an ax to grind"). Counsel was precluded from arguing there was evidence Uriel did not make the admission attributed to him by Gabriel. In short, accepting the state's position now would give an appearance of partiality toward the state.

This judicial estoppel argument went unaddressed by the appellate court. Moreover, the appellate court's alternative reason for finding harmlessness – that Patricia testified she did not hear Gabriel asking questions of Uriel – doesn't withstand scrutiny. Whether Patricia heard Gabriel ask Uriel what happened does not rebut Gabriel's assertion Uriel admitted he was driving (whether in response to questioning or otherwise). For these reasons, the appellate court's decision is incorrect.

(ii) The Court's Exclusion of the Evidence Denied Uriel his Right to Present a Defense

The appellate court's conclusion Uriel's right to present a defense was not violated is also in error. In

finding to the contrary, the court reasoned, "The portion of Patricia's testimony objected to by the State and sustained by the court was probative, but was not so highly probative that without it, Mr. Vasquez-Maldonado was unable to present a defense." Appendix at 13.

But Uriel's defense he was not the driver would have been stronger had he been able to present his evidence he did not say he was the driver. Without Patricia's testimony concerning the disputed admission, the claim Uriel confessed was left unchallenged before the jury. The court's exclusion of the evidence denied Uriel his right to present a full and fair defense.

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE URIEL WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Both the federal and state Constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney's conduct falls below a

minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A reasonable probability is lower than a preponderance standard. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Counsel's conduct fell below a minimum objective standard of reasonableness when he did not clarify the basis for the court's exclusion of Patricia's testimony or make clear the basis for admission, i.e. that it was not hearsay. Counsel admitted he failed to do so because he could not hear. That is not legitimate strategy.

Had counsel taken the time to clarify/explain, it is likely the court would have allowed Patricia's testimony. During the subsequent discussion of Frank's anticipated testimony, it was clear the court was beginning to back off of its initial interpretation that the testimony was hearsay.

Counsel's deficient performance prejudiced Uriel. As a result of counsel's failings, the state's claim Uriel confessed remained unrebutted – despite the existence of evidence to rebut it. This Court should accept review. RAP 13.4(b)(3).

3. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH THIS COURT'S OPINION IN STATE v. SLATER.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. State v. Acosta, 123 Wash. App. 424, 431, 98 P.3d 503, 507 (2004). Abuse of discretion is "'discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons.'" State v. Tharp, 27 Wn. App. 198, 206, 616 P.2d 693 (1980), aff'd, 96 Wash.2d 591, 637 P.2d 961 (1981) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The court's decision to admit and not redact Exhibits 42 and 43 was manifestly unreasonable. The court recognized the refusal was irrelevant because it could have been for any number of unspecified reasons. RP 451-53. The prosecutor agreed. RP 451-53. Uriel had been in a severe accident and had a laceration on his forehead and other injuries. He likely was in shock.

The lack of relevance is demonstrated by analogy to cases examining the probativeness of so-called "flight" evidence. See e.g. State v. Slater, 197 Wn.2d 660, 486 P.3d 873 (2021). In Slater, this Court held failure to appear is not necessarily "flight" evidence indicative of a consciousness of guilt. Id. at 670-71. That is because there can be many reasons for failure to appear, such as

unreliable transportation or lack of childcare. The reason for the failure therefore is sheer speculation. Id. at 675.

Similarly, the reason for Uriel's "refusal" is sheer speculation. The refusal therefore was not relevant. Only relevant evidence is admissible. The trial court erred in admitting the refusal evidence. And contrary to the trial court's reasoning, exhibits are redacted all the time to prevent the jury from considering inadmissible or irrelevant but prejudicial information. See e.g. State v. Vincent, 131 Wash. App. 147, 154, 120 P.3d 120, 123–24 (2005) (questioning the sufficiency of the redaction to protect the rights of the accused). Thus, the exhibits could have been redacted and still admitted to show chain of custody.

The appellate court's decision affirming the lower court's ruling conflicts with this Court's opinion in Slater. Review should be granted. RAP 13.4(b)(1).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(1), (3).

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Dated this 12th day of February, 2025.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. URIEL VASQUEZ-MALDONADO, Appellant.	)	No. 39449-2-III UNPUBLISHED OPINION

COONEY, J. — This appeal follows Uriel Vasquez-Maldonado's convictions for vehicular homicide and reckless driving. On appeal, Mr. Vasquez-Maldonado argues: (1) the trial court abused its discretion when it excluded testimony from two witnesses and admitted two irrelevant exhibits; (2) he was denied the right to present a defense; (3) he was afforded ineffective assistance from his trial counsel; and (4) certain legal financial obligations were improperly ordered against him.

We affirm Mr. Vasquez-Maldonado's convictions but remand for the limited purpose of striking the community custody supervision fees from his judgment and sentence.

BACKGROUND

In April 2019, Tanyea Vasquez rented a Nissan Altima and drove to Vancouver, Washington, to spend the weekend with her boyfriend, Mr. Vasquez-Maldonado. On the evening of April 21, 2019, Tanyea[1] and Mr. Vasquez-Maldonado visited Mr. Vasquez-Maldonado's sister, Huguett Maldonado, and her partner, Erick Sandoval. All but Huguett consumed alcohol throughout the evening. At approximately 11:00 p.m., Tanyea stated she and Mr. Vasquez-Maldonado were going to drive to Othello, Washington. Both Huguett and Mr. Sandoval were unsuccessful in encouraging the couple to stay. Although Huguett did not see who drove the Nissan away, she noticed Tanyea remove keys to the Nissan from her pocket before they left. Mr. Sandoval witnessed Tanyea drive the vehicle away with Mr. Vasquez-Maldonado in the passenger seat.

A few hours later, at approximately 1:30 a.m., Alexander Zavala was driving on Highway 97 near Goldendale, Washington, when he noticed a vehicle rapidly approach from behind. He estimated the vehicle was traveling between 80 to 100 miles per hour.

[1] For clarity, we refer to Tanyea Vasquez, and others, by their first names. No disrespect is intended.

The approaching vehicle nearly struck the rear bumper of his vehicle, drove into the ditch, appeared to go "airborne," and then hit something. Rep. of Proc. (RP)[2] at 303. Mr. Zavala stopped to render assistance and encountered Mr. Vasquez-Maldonado outside of the vehicle with "blood all over his face." RP at 303. Mr. Zavala observed the Nissan lying on its passenger side, with Tanyea also on the passenger side.

Tanyea was pronounced dead at the scene. Mr. Vasquez-Maldonado was transported to the hospital where he was treated for his injuries. Law enforcement secured a warrant to seize a sample of Mr. Vasquez-Maldonado's blood. A subsequent toxicology report revealed Mr. Vasquez-Maldonado's blood ethanol content was "anywhere from 0.089 to 0.105" grams per 100 milliliters. RP at 677; Ex. 80. His blood also tested positive for Carboxy-THC[3] and THC.[4]

Through an additional search warrant, law enforcement searched for, and seized, evidence from the Nissan. Several opened and closed alcoholic containers were found inside the vehicle. Law enforcement noted smeared blood and blood pooling near Tanyea's head. They also noted that neither the steering wheel nor dashboard airbags had deployed, however, "the airbags that drop down from the top of the roof along the front

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[2] Unless otherwise referenced, "RP" refers to the report of proceedings prepared by court reporter Jodi Moore spanning pretrial, voir dire, and the jury trial.

[3] Carboxy Tetrahydrocannabinol.

[4] Tetrahydrocannabinol.

and back windows" did deploy. RP at 341. Law enforcement seized samples from within the Nissan for forensic testing.

Mr. Vasquez-Maldonado was later charged with vehicular homicide and reckless driving. The case proceeded to a jury trial. Among other witnesses, the State presented the testimony of Tanyea's brother, Gabriel Vasquez. Gabriel testified that he spoke with Mr. Vasquez-Maldonado a few days after Tanyea's death. The conversation occurred in the driveway of the home of his father, Frank Vasquez. Also present was Gabriel's step-mother, Patricia Vasquez, and his sister. There, Gabriel asked Mr. Vasquez-Maldonado what happened. Gabriel testified that Mr. Vasquez-Maldonado responded that Tanyea "was asleep and that he was driving and then the accident happened." RP at 732.

After the State rested its case in chief, Mr. Vasquez-Maldonado called Patricia as a witness. Patricia testified that she and Frank were present when Gabriel spoke with Mr. Vasquez-Maldonado in the driveway. Defense counsel inquired of Patricia, "Did [Mr. Vasquez-Maldonado] say that he was driving?" RP at 786. Patricia responded, "No." RP at 786. The State made a belated objection, arguing the question called for inadmissible hearsay. The court sustained the objection, but did not strike Patricia's response. Defense counsel then asked Patricia if she heard Gabriel ask Mr. Vasquez-Maldonado any questions. Patricia responded, "No." RP at 786.

During closing argument, defense counsel argued the jury should not find Gabriel's testimony credible:

> You also heard Gabriel say that there were four other people present, including relatives of his. But you didn't hear from any of them. You only heard from Gabriel because he's angry and he's livid. And he's got an ax to grind. He's got a motive. And he's telling you something that he didn't even tell the police. He called the police four or five times, talked to them about something else, and then made this statement attributed to my client two years and two months later. How reasonable is that? How believable is that? I'm going to ask you to find that his statements are not believable and not credible.

RP at 872-73.

Defense counsel further argued:

> Gabriel testified that he arrived at his dad's house . . . Gabriel identified Patty Vasquez, Tanyea's mother being there, Frank Vasquez, his father and Tanyea's father being there, I believe his aunt one other person.
> . . . .
> Gabriel's the only one that you heard of that made that statement about what my client allegedly said. *I asked [Patricia], did you hear Gabriel ask [Mr. Vasquez-Maldonado] a question? She said no.*

RP at 888 (emphasis added). The State objected to defense counsel arguing facts not in evidence. The court overruled the State's objection, ruling, "The jury heard what they heard." RP at 888-89.

Ultimately, the jury found Mr. Vasquez-Maldonado guilty of both counts. The court later sentenced Mr. Vasquez-Maldonado to a total of 135 months of confinement. In imposing the sentence, the court commented that it was persuaded by Tanyea's father's request for leniency. Although Mr. Vasquez-Maldonado was found to be indigent, the court ordered a $500 victim penalty assessment (VPA), $3,628.45 in

restitution, and community custody supervision fees. The court ordered that interest be paid on the restitution.

Mr. Vasquez-Maldonado timely appeals.

ANALYSIS

EXCLUSION OF PATRICIA'S AND FRANK'S TESTIMONY

Mr. Vasquez-Maldonado claims the trial court abused its discretion in prohibiting Frank from testifying and when it sustained the State's tardy objection to defense counsel's question of Patricia: "Did [Mr. Vasquez-Maldonado] say that he was driving?" RP at 786. We agree the trial court abused its discretion when it sustained the State's objection to the question, "Did [Mr. Vasquez-Maldonado] say that he was driving?" *Id.* We disagree the trial court precluded Frank from testifying.

"We review the admission of evidence under an abuse of discretion standard." *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Discretion is abused if a decision is "manifestly unreasonable, exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court is usually in the best position to decide the admissibility of evidence. *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). Therefore, "we give great deference to the trial court's determination: even if we disagree with the trial court's ultimate decision, we do not reverse that decision unless it falls outside the range of acceptable choices because it is manifestly unreasonable, rests on facts unsupported by

the record, or was reached by applying the wrong legal standard." *State v. Curry*, 191 Wn.2d 475, 484, 423 P.3d 179 (2018).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." ER 801(c). A "statement" is an "oral or written assertion" or the "nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a)(2). However, "[i]f a witness testifies on the basis of her . . . own observation, that statement is not hearsay." *State v. Powell*, 126 Wn.2d 244, 265, 893 P.2d 615 (1995).

Patricia was asked, "Did [Mr. Vasquez-Maldonado] say that he was driving?" RP at 786. Because Patricia answered in the negative, defense counsel's question called for her observation, not for a "statement." *Id.* Thus, Patricia's response of "No" was not hearsay. *Id.* The trial court abused its discretion when it sustained the State's objection.

Albeit the trial court improperly sustained the objection, the error is harmless. A timely objection serves a dual purpose. First, it provides the trial judge an opportunity to address an issue before the issue becomes an error. Secondly, a timely objection preserves the alleged error for appeal. *See Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017). Here, we address the first purpose.

Juries are often presented with inadmissible evidence before an objection can be lodged. In such an event, the purpose of objecting is utterly defeated as the trial judge is deprived of the opportunity to shield the jury from the questionable evidence. A motion

to strike following a successful objection, but after the jury has heard the improper evidence, restores the purpose of a timely objection.

Moreover, we have long held a motion to strike is the appropriate remedy to cure inadmissible testimony entered into the record. *State v. Rushworth*, 12 Wn. App. 2d 466, 472, 458 P.3d 1192 (2020); *see also Elster v. City of Seattle*, 18 Wash. 304, 308, 51 P. 394 (1897) (motion to strike a cure for hearsay testimony in the record). A motion to strike becomes necessary when a party successfully objects to an answer already provided by a witness. *Rushworth*, 12 Wn. App. 2d at 472. In granting a motion to strike, the court informs the jury that it cannot rely on the evidence in question, thereby eliminating the evidence from the jury's consideration. *Id.* Stated otherwise, absent a successful motion to strike, the objectionable evidence remains for the jury's consideration.

Here, the defense called Patricia as a witness to rebut Gabriel's claim that Mr. Vasquez-Maldonado admitted to being the driver. The trial court's erroneous evidentiary ruling related to Patricia's testimony was harmless for two reasons. First, the State did not move to strike Patricia's response, leaving her testimony for the jury's consideration. Second, without objection from the State, Patricia testified she never heard Gabriel ask Mr. Vasquez-Maldonado any questions. Indeed, Gabriel testified it was his question that prompted Mr. Vasquez-Maldonado's purported admission. Because the defense presented the evidence that Gabriel never asked the question, the jury may have doubted

whether Mr. Vasquez-Maldonado gave an incriminating answer to a nonexistent question. Consequently, the trial court's erroneous evidentiary ruling was harmless.

Mr. Vasquez-Maldonado next asserts the evidentiary error related to Patricia's testimony influenced his attorney's decision not to call Frank as a witness. Before the defense rested, Frank was offered as a witness. Similar to Patricia, defense counsel anticipated Frank's testimony would be used to impeach Gabriel's assertion that Mr. Vasquez-Maldonado admitted to driving the Nissan. Defense counsel stated, "I was under the impression that I would be able to *call* [*Frank*] *as a rebuttal witness to Gabriel Vasquez's testimony*. And so that's really what my original intent was." RP at 793-94 (emphasis added). The court responded that if Frank were to testify that Mr. Vasquez-Maldonado did not make the statement, "it still seems like hearsay to me." RP at 796. Rather than exclude Frank's testimony based on inadmissible hearsay, the court excluded Frank from testifying because he had not been properly disclosed.

The next day, the court reconsidered its decision and offered Mr. Vasquez-Maldonado the opportunity to call Frank as a witness. The court asked whether Frank was present. Defense counsel responded:

> Well, Judge, I might make this a little easier. I believe we're going to—we're going to just stand on our position of resting at this point and not call [Frank].
>
> There's been another development. And I believe that it's probably trial strategy not to do so.

RP at 816.

The trial court's erroneous evidentiary ruling related to Patricia's testimony did not induce Mr. Vasquez-Maldonado to not call Frank as a witness. Rather, defense counsel respectfully declined the court's invitation to call Frank for strategic reasons.

Although the trial court abused its discretion in ruling Patricia's testimony was hearsay, the error was harmless because Patricia's testimony remained in the record for the jury's consideration. The error is further deemed harmless based on Patricia's testimony that she did not hear Gabriel ask Mr. Vasquez-Maldonado any questions. Lastly, the court did not preclude the defense from calling Frank as a witness; defense counsel made a strategic decision to not call him.

RIGHT TO PRESENT A DEFENSE

Mr. Vasquez-Maldonado contends the trial court deprived him of the right to present a defense when it sustained the State's objection to Patricia's testimony and when it "excluded Frank's testimony based on a lack of notice (in addition to hearsay)." Br. of Appellant at 28. We disagree.

A criminal defendant's right to present a defense is guaranteed by both the federal and state constitutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). When determining whether an evidentiary decision violated a defendant's due process "right to present a defense," we apply a two-

step standard of review. *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). First, we determine whether the court abused its discretion in making the evidentiary determination. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). If the evidentiary ruling constituted an abuse of discretion that resulted in prejudice, we need not address the constitutional question. *Id.* at 59. However, if the ruling was either within the trial court's discretion or was an abuse of discretion but harmless, we proceed to the second step and review the constitutional claim. *Id.*

Mr. Vasquez-Maldonado has met the first step of the standard of review—the trial court abused its discretion, but the error was harmless. As addressed above, the trial court abused its discretion when it sustained the State's objection to Patricia's testimony. However, because her testimony was not struck, and therefore available for the jury's consideration, the error was harmless. Thus, we address the constitutional claim.

Under the second step, we engage in a de novo review of "whether the exclusion of evidence violated the defendant's constitutional right to present a defense." *Id.* at 58. This constitutional right is not absolute. *See, e.g.*, *Jones*, 168 Wn.2d at 720. Any State interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted. *Jennings*, 199 Wn.2d at 59. In weighing whether a defendant's right to present a defense has been violated, we consider whether the excluded evidence constitutes the defendant's "entire defense." *Arndt*, 194 Wn.2d at

812-13. Evidence of "extremely high probative value . . . cannot be barred without violating the Sixth Amendment." *Jones*, 168 Wn.2d at 724.

Neither Patricia's nor Frank's testimony constituted Mr. Vasquez-Maldonado's entire defense, nor was their testimony of a highly probative value.

Patricia Vasquez

Mr. Vasquez-Maldonado's defense was that, "The state[ ] failed to meet its burden of proving that [Mr. Vasquez-Maldonado] was driving this automobile." RP at 854. Among other evidence, the State presented the testimony of Gabriel, who was admittedly distraught over Tanyea's death. Gabriel testified that Mr. Vasquez-Maldonado admitted to being the driver. However, Patricia's testimony, which was available for the jury's consideration, rebutted Gabriel's assertion. Patricia further rebutted Gabriel's statement that he had asked Mr. Vasquez-Maldonado any questions regarding that night.

Even if the jury understood the court's delayed ruling of "Sustained" to be a directive to disregard Patricia's response, Mr. Vasquez-Maldonado's entire defense was not premised on her testimony. RP at 786. Mr. Vasquez-Maldonado's stated defense was that the State was unable to prove beyond a reasonable doubt that he was the driver. In support of his defense, Mr. Vasquez-Maldonado attacked the "incomplete and selective police investigation," challenged the credibility of nearly every witness called by the State, and argued the lack of physical evidence and inconclusiveness of forensic testing. RP at 878.

Mr. Vasquez-Maldonado successfully attacked Gabriel's credibility:

> You also heard Gabriel say that there were four other people present, including relatives of his. But you didn't hear from any of them. You only heard from Gabriel because he's angry and he's livid. And he's got an ax to grind. He's got a motive. And he's telling you something that he didn't even tell the police. He called the police four or five times, talked to them about something else, and then made this statement attributed to my client two years and two months later. How reasonable is that? How believable is that? I'm going to ask you to find that his statements are not believable and not credible.

RP at 872-73. The defense further argued that Patricia never heard Gabriel ask the question that led to Mr. Vasquez-Maldonado's purported admission: "I asked [Patricia], did you hear Gabriel ask [Mr. Vasquez-Maldonado] a question? She said no." RP at 889. Indeed, it was this question, that Patricia said she did not hear, that elicited Mr. Vasquez-Maldonado's alleged admission.

Had the trial court correctly overruled the State's objection, Patricia's response of "No" still represented but a minor aspect of Mr. Vasquez-Maldonado's defense. RP at 786. The portion of Patricia's testimony objected to by the State and sustained by the court was probative, but was not so highly probative that without it, Mr. Vasquez-Maldonado was unable to present a defense.

Frank Vasquez

Likewise, Frank's testimony did not constitute Mr. Vasquez-Maldonado's entire defense, nor was it so highly probative that without it, Mr. Vasquez-Maldonado was unable to present a defense. Contrary to Mr. Vasquez-Maldonado's argument, the trial

court did not "exclude[ ] Frank's testimony based on a lack of notice (in addition to hearsay)." Br. of Appellant at 28. Rather, the court reversed its earlier ruling, allowed the defense to call Frank as a witness, only to have defense counsel make a strategic decision not to call him.

Mr. Vasquez-Maldonado was not denied the right to present a defense.

EFFECTIVENESS OF COUNSEL

Mr. Vasquez-Maldonado contends his trial counsel was ineffective "by not clarifying the basis for admission during Patricia's testimony" and "in not disclosing Frank as a potential witness." Br. of Appellant at 29. We disagree.

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

To succeed on a claim of ineffective assistance of counsel, an appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, there is a reasonable probability that but for counsel's poor performance the outcome of the

proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation. *Id.* "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863.

Even if we were to find trial counsel's performance was deficient, to succeed on a claim on ineffective of counsel, the appellant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). An appellant establishes prejudice by demonstrating the proceedings would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337. If an appellant fails to satisfy either prong, a court need not inquire further. *Thomas*, 109 Wn.2d at 225-26.

Patricia Vasquez

Mr. Vasquez-Maldonado contends his trial counsel was ineffective "by not clarifying the basis for admission during Patricia's testimony." Br. of Appellant at 29. We disagree.

As previously discussed, the trial court improperly sustained the State's hearsay objection to defense counsel's question to Patricia, "Did [Mr. Vasquez-Maldonado] say that he was driving?" RP at 786. Even if defense counsel was deficient because "he did not clarify the basis for the court's exclusion of Patricia's testimony or make clear the basis for admission," Mr. Vasquez-Maldonado is unable to show prejudice because the State did not move to strike Patricia's testimony, and it was therefore available for the jury's consideration. Br. of Appellant at 30.

As previously addressed, when the trial court strikes evidence, it properly eliminates the evidence from the jury's consideration. *Rushworth*, 12 Wn. App. 2d at 472. Conversely, a trial court's failure to strike evidence it ruled to be inadmissible, leaves the evidence before the finder of fact.

Because Patricia's testimony was available for the jury's consideration, Mr. Vasquez-Maldonado was not prejudiced by his trial counsel's failure to clarify the basis for admitting Patricia's testimony.

Frank Vasquez

Mr. Vasquez-Maldonado claims his trial counsel was ineffective "in not disclosing Frank as a potential witness." Br. of Appellant at 29. We disagree.

As previously discussed, the State objected to the defense calling Frank as a witness because he was not properly disclosed. The court agreed with the State, ruling that Frank "has not been disclosed as a witness as part of the case in chief. I think he could have been disclosed. I'm just not going to allow it." RP at 797. However, the court reconsidered its decision the next day. Thereafter, the court asked defense counsel whether Frank was present. Defense counsel responded that, for strategic reasons, they would not be calling Frank as a witness.

The trial court did not preclude Frank from testifying due to trial counsel failing to disclose him as a trial witness. Rather, defense counsel made a strategic decision not to call Frank. Because the court did not prohibit Frank from testifying and defense counsel's decision can be characterized as legitimate trial strategy, his performance was not deficient.

Mr. Vasquez-Maldonado was not afforded ineffective assistance from his trial counsel.

EVIDENTIARY RULINGS

Mr. Vasquez-Maldonado contends the trial court abused its discretion when it admitted exhibits 42 and 43 into evidence. Alternatively, he asserts the exhibits should have been redacted prior to being admitted. We disagree.

As a preliminary matter, Mr. Vasquez-Maldonado advanced one argument before the trial court—the exhibits were irrelevant and therefore inadmissible. For the first time on appeal, Mr. Vasquez-Maldonado claims the exhibits were highly prejudicial. We will generally "not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial." *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). Notwithstanding this general prohibition, we exercise our discretion and address both relevance and prejudice.

"We review the admission of evidence under an abuse of discretion standard." *Lane*, 125 Wn.2d at 831. Discretion is abused if a decision is "manifestly unreasonable, exercised on untenable grounds, or for untenable reasons." *Carroll*, 79 Wn.2d at 26. The trial court is usually in the best position to decide the admissibility of evidence. *Dye*, 178 Wn.2d at 547-48. Therefore, "we give great deference to the trial court's determination: even if we disagree with the trial court's ultimate decision, we do not reverse that decision unless it falls outside the range of acceptable choices because it is

manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying the wrong legal standard." *Curry*, 191 Wn.2d at 484.

The State offered, and the court admitted into evidence, Exhibit 42 and Exhibit 43. Exhibit 42 is a return of a search warrant. Exhibit 43 is a receipt for property taken from Mr. Vasquez-Maldonado. Both exhibits include a signature line prefaced by "Acknowledged by Person from whom blood was extracted." Exs. 42, 43. In the signature line of both exhibits is a handwritten notation, "X REFUSED." *Id.* Both exhibits are signed by Marcie Allen, the phlebotomist who extracted Mr. Vasquez-Maldonado's blood. *Id.*

Mr. Vasquez-Maldonado objected to the State's motion to admit the exhibits into evidence. Defense counsel argued, "But there's additional information about Mr. Maldonado that I don't think is appropriate. I think he refused to sign or some other information on there that—I don't see any purpose, relevance to the jury for that." RP at 450. Should the court decide to admit the exhibits, defense counsel made a request: "I'd at least ask for a redaction if nothing else." RP at 451.

The State countered that the exhibits were relevant to show Ms. Allen extracted Mr. Vasquez-Maldonado's blood because Ms. Allen did not recall doing so. The State also contended it would be helpful for the jury to see Ms. Allen's signature because "we're going to spend a lot of time talking about [it.]" RP at 451. The court ruled:

> I'm going to allow the exhibits to be admitted. I think a foundation has been set. I think the chain of custody is probative. The jury does need to be able to evaluate that.
>
> As far as the redactions, I'm not going to redact it. I think that changes the exhibit in a significant way.
>
> However, the basis for the refusal is certainly not relevant, so any argument or any testimony about the refusal isn't relevant, it's speculation. I won't allow you any questioning of this witness. If there's another witness who can provide more light on it who has a little more information, I'll reserve on that. But for this witness I wouldn't allow it.

RP at 453-54.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Generally, relevant evidence is admissible. ER 402. Relevant evidence may, however, "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Under ER 403, "there is a presumption favoring admissibility, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics." *Atkerson v. State*, 29 Wn. App. 2d 711, 729, 542 P.3d 593 (2024), *review granted sub nom. Atkerson v. Dep't of Children, Youth & Families*, 549 P.3d 113 (Wash. 2024).

Here, exhibits 42 and 43 were relevant to show that blood was taken from Mr. Vasquez-Maldonado's body, and that Ms. Allen was the phlebotomist who extracted the blood. These facts were necessary to establish a chain of custody. The exhibits were also

relevant in memorializing the date and time the State obtained the blood sample. The trial court did not abuse it discretion in finding the exhibits were relevant.

Next, Mr. Vasquez-Maldonado argues Exhibits 42 and 43 were highly prejudicial because they created an inference of guilt. We disagree. First, the exhibits merely show that Mr. Vasquez-Maldonado refused to sign the forms. Evidence was not presented that Mr. Vasquez-Maldonado refused to provide a sample of blood, nor that he overtly failed to acknowledge that blood had been withdraw from his body. Second, the court minimized the notation "REFUSED" by prohibiting the State from presenting any testimony or argument about the refusal. Exs. 42, 43

Although Mr. Vasquez-Maldonado did not invite the trial court to weigh the exhibits' probative value against their prejudicial effect, the court's decision was not manifestly unreasonable. Mr. Vasquez-Maldonado has failed to overcome ER 404's presumption favoring admissibility.

Lastly, Mr. Vasquez-Maldonado argues the trial court should have redacted the exhibits. We disagree. In response to Mr. Vasquez-Maldonado's request to redact the exhibits, the court found that "it would be very difficult to have a blank spot there and still have an accurate exhibit" and that redaction "changes the exhibit[s] in a significant way." RP at 452-53. In granting the trial court broad discretion to make evidentiary rulings, we decline to upset these important findings.

The trial court did not abuse its discretion in admitting Exhibits 42 and 43.

VPA, INTEREST ON RESTITUTION, AND COMMUNITY CUSTODY SUPERVISION FEES

Mr. Vasquez-Maldonado argues the VPA, interest on restitution, and community custody supervision fees should be struck from his judgment and sentence.

After sentencing, the trial court ordered the Yakima County Clerk to "write off" the VPA and any interest that had accrued on the restitution. Clerk's Papers at 104. The trial court's order renders Mr. Vasquez-Maldonado's VPA and restitution arguments moot. "As a general rule, we do not consider questions that are moot" and decline to do so here. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

The State concedes that the community custody supervision fees should be struck due to a recent change in the law. We accept the State's concession.

Former RCW 9.94A.703(2)(d) (2021) provided, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." However, effective July 1, 2022, the legislature amended the statute to remove the supervision fees provision. *See* Second Substitute H.B. 1818, 67th Leg., Reg. Sess. (Wash. 2022); RCW 9.94A.703. As we held in *State v. Wemhoff*, "Former RCW 9.94A.703(2)(d) involved a cost imposed by the trial court, and that cost was not finalized until the termination of all appeals." 24 Wn. App. 2d 198, 202, 519 P.3d 297 (2022). Mr. Vasquez-Maldonado is entitled to the benefit of the amended statute because his case is pending on direct review.

CONCLUSION

We affirm Mr. Vasquez-Maldonado's convictions but remand for the limited purpose of striking the community custody supervision fees from his judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

February 12, 2025 - 3:37 PM

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Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39449-2
Appellate Court Case Title:	State of Washington v. Uriel Vasquez-Maldonado
Superior Court Case Number:	19-1-00687-6

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