SUPREME COURT NO. 999597

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOSEPH ZAMORA, Petitioner

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

INTRODUCTION

An officer stopped Joseph Zamora due to a "suspicious person" report in the neighborhood and then claimed he resisted arrest, even though he had committed no crime. More officers arrived, and together they beat, pepper-sprayed, and tazed Zamora due to his alleged lack of cooperation with arrest. At the end of the encounter, hogtied, handcuffed, and held face down in the snow, Zamora had no pulse. The prosecution charged him with third-degree assault against two officers. Zamora defended he acted in reasonable self-defense against excessive, lethal force used against him.

The elected prosecutor began jury selection by repeatedly asked jurors to consider the danger posed by undocumented immigrants to the community. Zamora is not an undocumented immigrant, and immigration had no relevance to the case. The Court of Appeals agreed that illegal immigration and border security had no bearing but discounted the possibility it prejudiced Zamora. The court also barred Zamora from

questioning the officers about their statements during an internal investigation of their conduct, even though these were the only police reports in the case.

Zamora was denied a fair trial by an impartial jury as well as his right to meaningfully cross-examine the witnesses against him.

I. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED

A. A criminal defendant is guaranteed a fair trial before an impartial jury. Where the defendant has a Latino surname, did the prosecutor's extensive discussion about the dangers of undocumented immigrants entering the United States because they commit deadly crimes and bring lethal drugs undermine Zamora’s right to due process of law?

B. Exercise of a criminal defendant's constitutional right of confrontation and cross-examination of his accusers is crucial for the jury to render a just verdict based on the facts. Was Zamora's constitutional right to confront his accusers violated when the court denied the opportunity to cross-examine police witnesses about the circumstances of their statements given as part of an internal investigation into their conduct?

II. STATEMENT OF THE CASE

The State accused Joseph Zamora ("Zamora") of assaulting two police officers. CP 1-2. The incident began when a neighbor saw him walking through a vacant lot near parked cars on his way to his niece's home. RP 287, 736. She told him to leave the area. Although she never saw him look into, touch, or press up against any cars, as he shuffled down the street, she called 911 to report "a suspicious person in our neighborhood…possibly car prowling." RP 289-90,302.

Kevin Hake[1] responded to the call. RP 313-14, 317. He shined his flashlight at Zamora, who by that point was in the yard of his niece's home and called him over. RP 320, 450. Zamora complied, stopping about six or seven feet from Hake. His left hand was in his pocket. Hake speculated Zamora might have had drugs in his pocket. RP 320, 322, 455.

Hake asked Zamora for identification and what he was doing. RP 454, 503. Zamora did not move and remained silent. Hake called out over his radio, "I've got one resisting." RP 451, 499, 503. Hake believed Zamora was "aggressive" by passively resisting interaction with him. RP 323-24, 504-05, 548-49.

As Zamora turned to leave, Hake stuck out his arm and told him he was not free to go. RP 455, 551. Zamora stopped and then turned away. Hake told him he was not under arrest

[1]At the time of the incident, Officer Hake worked for the Moses Lake Police Department. He left their employment four months later. He was introduced at trial as Hake rather than Officer Hake. RP 311-12.

but grabbed him from behind and intentionally put painful pressure on Zamora's elbows. RP 326, 460.

Zamora bowed his shoulders and tried to turn away. RP 458-59. Over the mic, another officer heard Hake say, "Put your hands behind your back, I'll fucking kill you, put your hands behind your back." RP 644. After an unsuccessful leg sweep, Hake shoved Zamora, who flew back six or seven feet and hit his head on a truck bumper. RP 462,464-65,467.

The altercation escalated. Hake used a chokehold until he heard Zamora gasp and go silent. RP 472-73. Hake believed deadly force was authorized. RP 548. Hake shot pepper spray in Zamora's mouth and face and punched him between 75 and 120 times in the face, eyes, ears, nose, and rib cage. RP 358, 506-07, 515. Zamora bucked to get free and not allow himself to be handcuffed. He struck Hake in the shoulder and torso. RP 492-93, 506.

Hake felt Zamora grab his utility belt and his holstered gun several times. RP 474. His gun had a three-point retention

system, meaning it took three separate and distinct maneuvers to remove the weapon. RP 483-84. Hake admitted that were Zamora trying to get out from underneath him, he would have used the utility belt items as leverage to pull himself up; and it was possible someone would grab the holster without intending to remove the gun. RP 479-80.

The firearm never left the holster until Hake drew his weapon and put it in Zamora's eye, ear and eventually shoved it down his throat. RP 370, 485, 514.

Backup officers arrived within minutes, and they also pepper-sprayed, punched, kicked, and tazed Zamora repeatedly. RP 526, 630-3, 653, 692-93, 828. Hake punched Zamora as hard as he could another 12-20 times. RP 375.

Officers handcuffed Zamora and used a rope to hogtie him. RP 637. While he was handcuffed, hogtied, and held face down in the snow, Zamora stopped breathing. RP 676, 680-81. One officer activated his body camera after Zamora was

hogtied. RP 676. Paramedics restarted Zamora's heart twice before transporting him to the hospital. RP 847-50.

The Investigation and Court Ruling

The Washington State Patrol investigated the charges of assault against Zamora. RP 734-42. No officer prepared a police report, and officers did not participate in any interviews about their role in seizing Zamora. RP 233. Officers had been directed to prepare a *Garrity*[2] statement. RP 233-34. The WSP investigator's report of the incident was limited to a summary of the *Garrity* statements. RP 232.

Defense counsel argued the *Garrity* statement circumstances went directly to witness credibility, seeking to

[2] A Garrity statement is a statement made by a public employee during an internal investigation. The Fifth Amendment prohibits the government from using self-incriminating statements made by a public employee under threat of termination in a subsequent criminal prosecution. Garrity v. New Jersey,385 U.S. 493, 499-500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). The officer's statements were "compelled" and thus inadmissible against them because officers would have been terminated had they remained silent. Id. at 497-98.

ask officers if (1) if they made a Garrity statement as part of the investigation (2) whether they knew what a Garrity statement was (3) if they knew the purpose of making a Garrity statement (4) who told them to make a Garrity statement, and (5) if the officers made themselves available for interview by Sergeant Anderson investigating the case against Zamora. RP 332-33, 338, 401-02, 414-15 419-20.

Over defense objection, the court granted the State's motion barring reference to the investigation into officer misconduct. CP 164; RP 330,338. The court ruled the questions irrelevant, and a waste of time. RP 340, 433-34.

Voir Dire

The elected prosecutor began voir dire:

> let's just take a general topic that seems to be in the media every day, and I'll ask you a general question, and that is some people say today in our society we have -- we don't have enough border security. Some people say we have too much or we don't need that. So, the question is which one do you feel like you're closer to?

RP 71-72.

One juror responded not just immigrants committed crimes. RP 75. The prosecutor responded by asking whether venire members could make room for the possibility that others had loved ones killed or problems with someone "previously deported or criminally is wrong in the country, that that happens to them, and that they feel like we need more border security…." RP 75.

Juror Talbot pointed out,

> I feel like people are focusing more on the race aspect instead of like white illegal immigrants coming in.

RP 76.

The prosecutor responded:

> If you don't believe a wall would help, do you lock your door?

RP 76.

> DANO: Can you make room for the idea that when they hear that 100,000 people come across illegally a month, and of those we've got people from countries that -- countries on our list that aren't even allowed in the country are part of that group?

JUROR TALBOT: Yes.

DANO: That they feel that we've got a big problem and a porous border, meaning people are just coming across and we don't know who is here, that a lot of people have some fear about that. Can you make room for that?

RP 77.

The prosecutor asked jurors about border security at least four more times. RP 88,92,97,160. Later, the prosecutor continued the line of questioning by asking if a juror was concerned with the methamphetamine problem and followed up with:

> How many people on the jury… heard about the recent drug bust down at Nogales, Arizona where they picked up enough what's called Fentanyl that would have killed 65 million Americans.

RP 139.

Defense counsel questioned whether jurors believed Zamora must be guilty because he had been charged with a crime. One juror responded:

> I'm married to a Mexican, have a Mexican daughter, something about a wall, I really don't know. But police and my family, and grandpa. I'm not really sure….

RP 190.

The following day the trial court addressed defense counsel:

> [w]as there a strategic or tactical reason that you didn't object about the plaintiff's questions and comments on voir dire about crimes being committed by what was described as illegal immigrants passing through the United States/Mexico border?

RP 220-221. Counsel said he thought about objecting, adding "I have heard similar comments in voir dire." Counsel thought he could use the comments to his advantage. RP 221,224. Concerned about its responsibility to be proactive, the court referenced case law and ER 413. RP 227. The court asked:

> …does this jury think that with a Latino last name that he's here illegally? Why else would the questions be asked? Why else would there be reference to drug busts in Nogales, a number of illegal immigrants crossing over the border 100,000 a month, unless he was, why else would the questions be relevant? That's what the jurors might think.

RP 223.

The elected prosecutor denied he had brought “up the specific points” and then explained he was just curious about how people felt about border security. RP 224-25. He denied having raised the issues, saying he responded to the venire. RP 226. That was followed by stating he was “troubled” by “this overarching complete political correctness about what people have to say and concerns.” RP 226.

In response to the court’s concerns about being proactive, the elected prosecutor cited to Justice Thomas asking a defense attorney if she had struck all the white jurors in a case involving a black defendant. The prosecutor opined that judges, who may lack experience as trial attorneys, should let lawyers try the case "unless we're doing something that's prejudicial to the other side" or "engaging in something that's improper.” RP 229-30.

III. ARGUMENT

A. The Elected Prosecutor Violated Zamora's Constitutional Right To An Impartial Jury And Fair Proceedings By Repeatedly Encouraging Racially Based Stereotypes And Bias During Voir Dire.

Criminal defendants have a constitutional right to a fair and impartial jury. U.S.Const. Amend. 6, U.S. Const. Amend. 14; Wash. Const. Art.1 §§ 3, 22; *State v. Davis,*141 Wn.2d 798, 824 10 P.3d 977 (2000). An impartial jury means "an unbiased and unprejudiced jury," which is the defendant's "fundamental protection of life and liberty against race or color prejudice." *McClesky v. Kemp,* 481 U.S. 279, 310, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *State v. Berhe,* 193 Wn.2d 647, 658, 444 P3d 1172 (2019).

A prosecutor violates the fundamental right to a fair trial and undermines faith in the justice system when he appeals to racist stereotypes and bias. *State v. Monday,* 171 Wn.2d 667, 678, 257 P.3d 551 (2011). "Theories and arguments based upon

racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *Id.*

"The Equal Protection clause was central to the Fourteenth Amendment's prohibition of discriminatory action…discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 555-56, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Racial bias implicates historical, constitutional, and institutional concerns, with the goal being to ensure the legal system remains capable of realizing the promise of equal treatment under the law. *Pena-Rodriguez v. Colorado,* 137 S.Ct. 855, 868, 197 L.Ed.2d 107 (2017).

Washington Courts have condemned racism and stereotypes injected into criminal proceedings. The persistence of "racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable." *State v. Saintcalle*, 178 Wn.2d 34, 54, 309 P.3d 326 (2013), (*abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398

P.3d 1124 (2017)) quoting *Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System 1* (2011).

Finding it offends "society's standards of decency" and "fundamental fairness" to permit application of the death penalty when racial bias plays a role in determining upon whom it is imposed, this Court invalidated the death penalty. *State v. Gregory,* 192 Wn.2d 1, 427 P.3d 621 (2018). Statistical evidence showed jurors significantly more likely to impose the death penalty on black defendants than similarly situated white defendants.

In *Jefferson,* this Court understood the need and adopted a new *Batson* framework to challenge racial discrimination in the justice system. This Court identified the relevant question as whether a reasonable person who is aware of the history of explicit racial discrimination in America and how it impacts our current decision making in nonexplicit or implicit, unstated ways, could view race or ethnicity as a factor in the use of

peremptory challenge. *State v. Jefferson,* 192 Wn.2d 225, 249-50, 429 P.3d 467 (2018). "The evil of racial discrimination is still the evil this rule seeks to eradicate." *Id.*

This same rigor must be applied to voir dire. "Voir dire is where racial stereotypes and inflammatory history can be planted like a mustard seed at the infancy of a case, tainting all that follows." *State v. Ellis,* 2021 WL 3910557 (August 21, 2021).[3] "Prosecutorial misconduct of this ilk has a similar effect on the court system as a whole. One occurrence hurts the credibility of the entirety; for this reason, such conduct is taken seriously." *Id.*n.4.

Implicit biases are pervasive[4]. Studies have provided insight into the substantial effect of racial bias jurors have about

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[3] GR 14.1: This unpublished opinion has no precedential value and is not binding on the Court. It may be accorded such persuasive value as the Court deems appropriate.

[4] Research Working Group & Task Force on Race, the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System,* 35 Seattle U.L.Rev. 623, 664-65 (2012).

the criminal propensity of Hispanic men. *The Sentencing Project, Race and Punishment; Racial Perceptions and Crime and Support for Punitive Penalties,* 13-14 (2014).[5] Implicit bias tests demonstrate the general public holds negative associations of Latinos and suspects them of criminality. *Id.* at 13-14. Persistent implicit racial bias exists even among individuals who explicitly disavow prejudice because it lies at the unconscious level. *Id.; State v. Berhe,* 193 Wn.2d at 657.

Jury selection is to discover biases in prospective jurors and excuse those who cannot follow instructions on the law. *State v. Davis,* 141 Wn.2d at 825-25. "Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *State v. Behre,* 193 Wn.2d

[5] https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/. (last visited 11/30/21).

at 659 (quoting *Rosales-Lopez v. United States,* 451 U.S. 182, 195, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981)(Rehnquist, J. concurring in result).

"[R]esearch suggests that ... [c]alling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make." Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 846 (2015). However, race must be made salient without at the same time triggering detrimental associations or stereotype threats. *Id*. at 846-47.

A prosecutor's invocation of racial and ethnic stereotypes is not always blatant. "Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." *State v. Monda*y, 171 Wn.2d at 678.

Here, in the prosecution of a Latino man, the elected prosecutor singled out Latinos in his first sentences to the jury

venire without ever saying Latino. He used voir dire to inflame stereotypes, conjuring images of Latinos coming over the border at 100,000 per month, bringing crime and drugs. For jurors who did not believe a border wall was necessary, the prosecutor wanted to know if they locked their doors at night to keep unwanted people from entering their home.

In other words, "they" are coming over the border with crime and drugs to do you harm, and if you don't stop them at the border, will you stop them at your front door? The line of questioning was not only a profoundly inflammatory and offensive racial stereotype, but it effectively and improperly linked Zamora, a Latino, to crime and a border wall. When asked if the defendant was guilty because he had been charged, one juror answered:

> I'm married to a Mexican, have a Mexican daughter, something about a wall, I really don't know. But police and my family, and grandpa. I'm not really sure….

RP 190.

She had gotten the message: Mexican. Wall. Police. Family.

Understanding the scientifically documented implicit bias linking Latinos and crime, the prosecutor's questioning exacerbated whatever prejudice might exist, encouraging potential jurors to "make room" for the idea that undocumented immigrants commit crimes against people's loved ones.

In *Loughbom*, this Court found it deeply troubling where the prosecutor created a thematic narrative prism to view the defendant's prosecution: the war on drugs. *State v. Loughbom,* 196 Wn.2d 64, 77, 470 P.3d 488 (2020). During jury selection, the prosecutor connected the "war on drugs" to the "drug problem in Lincoln County" during jury selection. *Id.* The prosecutor committed flagrant and ill-intentioned misconduct because the questions were designed to arouse passion and prejudice and inflame the jurors' emotions, resulting in an unfair trial. *Id.* at 77-78.

Here, the misconduct is far more egregious. 100,000 immigrants illegally entering the United States, a border wall,

illegal importation of Fentanyl, or loved ones killed by undocumented immigrants had nothing to do with the facts.

Even had defense counsel objected to the improper questioning, the bell rung by intentionally returning to the irrelevant theme could not be unrung. Scientists have found "the amygdala activity (a part of the brain previously identified in emotional, fear and threat assessment) is triggered when implicit biases take hold in response to racialized images. Consequently, neuroscience confirms the validity of implicit associations tests that demonstrate the attitudes underlying America's racial hierarchy."[6]

Anyone watching even one day of the national news between 2016 and 2019 understood the imagery and the emotion.

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[6] Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 Case W. Res. L. Rev. 299, 325–26 (2018)

The verdict depended on the jury's perception of Zamora and whether it believed he fought back in self-defense. Conjuring up images of Latinos as dangerous trespassers who brought crime and drugs to the United States undermined his credibility and the presumption of innocence.

As quasi-judicial officers, prosecutors are held to a higher standard than other attorneys. *State v. Monday,* 171 Wn.2d at 676; Rules of Professional Conduct 3.8. Justice inevitably falls prey to prejudice when the prosecutor invokes racist stereotypes to the venire.

Where "a prosecutor flagrantly or apparently appeals to racial bias so it undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict." *Id.* at 680. The Court assigns the burden to the State to show the race-based misconduct was harmless beyond a reasonable doubt. *In re Gentry,* 170 Wn.2d 614, 623, 316 P.3d 1020 (2014).

Because it is almost impossible to quantify the effect of racially or ethnically based bias, the Court has even condemned language that was not overtly derogatory. In *Torres,* the prosecutor referred to the defendants as Mexicans or Mexican Americans. The Court held the proceedings unfair because the effect may have been to impugn the standing of the defendants and intimate they were more likely than those of other races to commit the crimes charged. *State v.* Torres, 16 Wn.App. 254, 257, 554 P.2d 1069 (1976). Discrimination is not "any less pernicious" if it is not documented by outright slurs. *Saintcalle,* 178 Wn.2d at 48-49.

In this case, the pernicious nature of the questioning and theme had an expansive potential for triggering implicit bias. In *Monday,* this Court found that even in the face of overwhelming evidence of guilt, the State could not show the jury's verdict was not affected by the misconduct beyond a reasonable doubt. *Monday,* 171 Wn.2d at 681.

Here, the evidence was not overwhelming. This Court should come to the same conclusion in this matter. Because the flagrant and repeated appeals to racial bias undermined Zamora's presumption of innocence and right to a fair trial, and the State cannot show otherwise, this Court should vacate the convictions.

The Trial Court Abused Its Discretion

Voir dire is a critical stage of criminal proceedings, and the trial court maintains inherent authority and discretion in determining how to conduct it. *State v. Davis,* 141 Wn.2d at 826; CR 6.4(b). "A trial court's exercise of discretion is limited only when the record reveals the court abused its discretion and thus prejudiced the defendant's right to a fair trial by an impartial jury." *Davis,* 141 Wn.2d at 826. "The question becomes one of determining at what point the risk of racial prejudice becomes constitutionally unacceptable." *Id.* at 828.

Here, the court knew the dangers of the prosecutor's questioning. The court cited *State v. Avendano-Lopez,* 79

Wn.App. 706, 718, 904 P.2d 324 (1995), (prosecutor's question was grossly improper when he asked the defendant whether he was legally in the United States) and *State v. Belgarde,* 110 Wn.2d 504, 508,755 P.2d 174 (1988)("a prosecutor has no right to call to the attention of the jury matters of considerations which the jurors have no right to consider."). It was keenly aware that even if Zamora were an undocumented immigrant, ER 413 provided specific guard rails for precluding undocumented status from being made known to jurors.

The appeal to implicit or explicit racial bias can influence decisions without our being aware of it "because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." *State v. Saintcalle,* 178 Wn.2d at 46.

Defense counsel's statement "I have heard similar comments in voir dire" demonstrates the appeal to racial bias in voir dire questioning is not unusual in Grant County. Where justice may turn on the innuendo that the color of a man's skin,

or his country of origin, or his primary language, or the status of his citizenship should determine his fate as a criminal defendant, the court necessarily abuses its discretion when it does not curtail the improper questioning.

B. Zamora's Right To Confront His Accusers Was Violated When He Was Denied A Full and Fair Cross-Examination of Witnesses Against Him.

The State and Federal Constitutions guarantee the right to confront and cross-examine an adverse witness. U.S. Const. Amend.6, Wash. Const. art. I §22. Confrontation clause violations are reviewed de novo. *State v. Jasper,* 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The right to confront grants criminal defendants extra-wide latitude in cross-examination to probe motive or credibility. *Davis v. Alaska,* 415 U.S. 308. 316-17, 94 S.Ct. 1105, 399 L.Ed.2d 347 (1974). If exclusion of evidence violates constitutional protections, the State bears the burden of proving

beyond a reasonable doubt the constitutional error was harmless. *State v. Orn,* 197 Wn.2d 343, 482 P.3d 913 (2021).

The heart of this case was whether the police used excessive force. The circumstances of the investigation bore directly on officer credibility. The officers had been directed to prepare a *Garrity* statement, explaining their conduct as part of an internal investigation. Public employees who choose not to prepare a statement may be terminated from employment. *Garrity v. New Jersey,*385 U.S. 493, 497-98, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). They were guaranteed the State would not criminally prosecute officers based on their statement. *Id.* at 499-500

The prosecution of Zamora stemmed from the *Garrity* statements. No officer filed a police report. No officer was interviewed by the State Patrol officer, who used the written *Garrity* statements to investigate Zamora. The jury did not learn these facts because the court found the information irrelevant.

In a jury trial, the jury determines whether to believe any witnesses and which witnesses to believe. It is the sole and exclusive judge of credibility. *State v. Coryell,* 197 Wn.2d 397, 414, 483 P.3d 98 (2021)

For purposes of witness credibility, the test of relevancy is not whether the answer will expound any of the main issues but whether it will aid the jury in appraising the witness's credibility and assessing the probative value of his testimony. *Davis v. Alaska,* 415 U.S. at 316.

Police officers are routinely questioned on their police reports as part of credibility inquiry: whether they had training in writing reports, whether they wrote a report on the day of the incident, whether they worked with a partner who wrote a report, and whether their report reflected verbatim conversations with witnesses.

Here, the trial court improperly resolved the credibility issue by not allowing the jury to learn that the officers had not filed a police report in the regular custom but had been the

subjects of an investigation for their conduct. By precluding questions that would give the jury the benefit of a complete picture of the alarming seriousness of the police conduct, the court prevented the jury from having the issue fully presented allowing a fair rendering of a verdict based on all the facts.

In *Robinson v. State of Maryland,* 354 Md.287, 730 A.2d 181(1999) the trial judge informed the jury an internal affairs investigation had occurred after officers fired their weapons. The defendant stated he never had a gun, was not involved in a robbery, and when he got out of the car with his hands up, the officers shot him anyway. *Id.* at 315. The judge told the jury an investigation cleared the officers of wrongdoing, and there was nothing exculpatory for the defendant in their statements, and for that reason, neither the investigation nor the statements would be admitted. *Id.*

In reversing the conviction, the Court found error in the trial judge's refusal to allow the defendant to review the prior statements of the officers, and even more significantly, in

commenting on the credibility of the witnesses, i.e., that the officers were cleared of wrongdoing. *Id.* at 318.

Here, the Court of Appeals relied on the State's argument that since all the officers were cleared of wrongdoing, it was irrelevant there had been an investigation.

The trial court here did what the trial court in *Robinson* did: it just determined credibility by omission rather than commission.

In the context of officers owing a duty to exercise reasonable care when serving a search warrant, this Court held that "police, just like other people, must exercise ordinary reasonable care 'to refrain from causing foreseeable harm in interactions with others'…This duty 'applies in the context of law enforcement and encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance." *Mancini v City of Tacoma,* 196 Wn.2d 864, 886, 479 P.3d 656 (2021). The Court held: "But the jury is the sole judge of the credibility of witnesses, and whether the overall

conduct of the police was reasonable was an ultimate fact to be decided by the jury." *Id.*at 887.

Zamora was denied the right to conduct a full cross-examination on the central issue in this case: whether police used such excessive force that Zamora was in fear for his life and entitled to defend himself. A reasonable jury, hearing all the facts, could have reasonably concluded that Zamora was justified in protecting himself and acquitted him on all charges.

IV. CONCLUSION

Based on the preceding facts and authorities, Zamora respectfully asks this Court to reverse his convictions.

Per RAP 18.17 this document contains 4862 words.

Respectfully submitted this 3rd day of December 2021.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Joseph Zamora, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington that a true and correct copy of the Supplemental Brief was sent by electronic service on December 3, 2021, to:
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