

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 28 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE G BARAJAS GOMEZ,

Petitioner - Appellant,

v.

DANIEL W. WHITE, Superintendent,
Monroe Correctional Complex,

Respondent - Appellee.

No. 23-2236

D.C. No.

3:22-cv-05897-MJP

Western District of Washington,
Tacoma

ORDER

Before: FRIEDLAND and MENDOZA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE G BARAJAS GOMEZ,

Petitioner - Appellant,

v.

DANIEL W. WHITE, Superintendent,
Monroe Correctional Complex,

Respondent - Appellee.

No. 23-2236

D.C. No. 3:22-cv-05897-MJP
Western District of Washington,
Tacoma

ORDER

Before: SCHROEDER and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 10) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSE G. BARAJAS GOMEZ,
Petitioner,

v.

DAN WHITE,
Respondent.

CASE NO. C22-5897-MJP-MLP
ORDER ADOPTING REPORT AND
RECOMMENDATION

This matter comes before the Court on Petitioner Jose Barajas Gomez's 28 U.S.C. § 2254 habeas corpus petition (Dkt. No. 5.), United States Magistrate Judge Michelle L. Peterson's Report and Recommendation ("R&R" (Dkt. No. 16)), in which she recommends the Court dismiss Gomez's petition, and Gomez's Objections to the Report and Recommendation (Dkt. No. 17). Having reviewed the petition, the R&R and the Objections, along with all supporting material and documents, the Court ADOPTS the Report and Recommendation, DENIES Gomez's Objection, DISMISSES Gomez's § 2254 habeas corpus petition with prejudice, and DENIES a certificate of appealability.

BACKGROUND

Petitioner Gomez is a state prisoner currently confined at the Monroe Correctional Complex. (R&R at 1.) In 2019, the Washington State Patrol’s (“WSP”) Missing and Exploited Children Task Force conducted a “Net Nanny Operation” in Thurston County, Washington. (Id. at 2.) A Net Nanny Operation is an undercover operation designed to find people online who are interested in having sex with children. (Id.) The Net Nanny Operation conducted in this case involved a WSP detective who adopted an undercover persona as a 13-year-old female named Sam and created a profile for Sam on a dating app called Badoo. (Id.) Gomez began communicating with Sam, initially through the app, but subsequently the two began exchanging text messages. (Id.)

In the early stages of text exchanges, Sam indicated to Gomez that she was 13 years old and that she was staying with a friend in Olympia. (R&R at 2.) Gomez thereafter requested a photograph of Sam, asked her if she liked older guys, and if she had previously had sex with an older guy. (Id.) According to Gomez, he asked Sam for additional photographs and engaged in explicit conversations to confirm that she was not underage. (Objections at 3.) Gomez also asked about the friend Sam was staying with and began texting with the “friend” as well. (R&R at 3.) Eventually, plans were made for Gomez and the two girls to meet at a store close to the friend’s house for sex. (Id.) Gomez was arrested near the vicinity of the store. (Id.)

Gomez was charged with two counts of communication with a minor for immoral purposes and two counts of attempted rape of a child in the second degree. (R&R at 3.) The case proceeded to trial, and lasted three days. (Id.) On the first day of jury deliberations, the jury sent a question asking how to proceed as they reached a decision on two charges, but were “hung” on the other two. (Id. at 3-4.) After discussing the matter with counsel, the court called the presiding

1 juror and asked whether there was “a reasonable probability of the jury reaching an agreement
2 within a reasonable time as to all counts.” (Id. at 4.) The juror responded she was unsure, but if
3 she had to guess, she’d say no. (Id.) The court confirmed with the juror that she was unsure. (Id.)
4 After discussing with counsel, the court advised the jury to continue to deliberate. (Id.) The jury
5 returned to the courtroom and the court read the verdicts, which reflected guilty findings on all
6 four charges. (Id.) But, when the clerk polled the jury, one of the jurors stated that the verdicts
7 reached by the jury were not her verdicts. (Id.) The jury was sent out, the court conferred with
8 counsel, and the jury was then brought back into the courtroom where the court advised that it
9 was returning the instructions and verdict forms to the jury and they should re-read the
10 instructions and deliberate consistent with those instructions. (Id. at 4-5.)

11 Later, the jury sent a question to the court asking again how to proceed if they had
12 reached an agreement on three charges but could not agree on the remaining charge. (R&R at 5.)
13 After conferring with counsel, the court provided the jury with a written response advising the
14 jury to complete the verdict forms for the counts which they agreed upon and write “cannot
15 decide” on the verdict form for the count that they did not agree. (Id.) The jury then returned and
16 read the verdicts, which reflected guilty findings as to one count of attempted rape of a child in
17 the second degree and two counts of communication with a minor for immoral purposes. (Id.)
18 Pursuant to the stipulation of counsel, the trial court declared a mistrial as to the remaining count
19 of attempted rape of a child in the second degree. (Id.) The court imposed a minimum term of
20 109.5 months confinement and a maximum term of life with respect to the attempted rape
21 charge, and 29 months confinement on each of the two remaining charges of communicating
22 with a minor, which were to run concurrently with each other and with the sentence imposed on
23 the more serious charge. (Id.)
24

1 Gomez filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief
2 from his judgment and sentence. (Id.) Gomez identified the following four grounds for relief in
3 his habeas petition:

- 4 1. Trial counsel rendered ineffective assistance when he failed to accept the jury's
5 first verdict and failed to move for a mistrial based on jury misconduct.
- 6 2. The trial court abused its discretion when it failed to declare a mistrial based on
7 juror misconduct and when it interfered with the jury's deliberations and coerced
8 the jury into changing their initial verdict to one which allowed the court to
9 impose a harsher sentence.
- 10 3. Trial counsel rendered ineffective assistance when he coerced Gomez into not
11 testifying, advised Gomez to stop taking his medications prior to trial, and refused
12 to present an entrapment defense.
- 13 4. The trial court erroneously applied a serious level of XI to the offense of
14 attempted rape of a child in the second degree when the appropriate seriousness
15 level was II, as that level more accurately reflected the conduct underlying the
16 offense.

17 (R&R at 7.)

18 With regard to the first and third claims, the R&R rejected Gomez's assertions reasoning
19 that counsel's decision to request the jury continue deliberations, counseling Gomez not to testify
20 and not presenting an entrapment defense, were all strategic decisions, and were reasonable in
21 light of the circumstances. (R&R at 11-16.) As to Gomez's claims that his trial counsel
22 instructed him to stop taking all of his medications prior to trial, the R&R found that Gomez
23 failed to produce any evidence in support of this claim, and that even if he had produced
24 evidence, he does not explain how this affected the outcome of his trial. (Id. at 15.) The R&R
recommends denying Gomez's habeas petition as to his ineffective assistance of counsel claims.

Turning to Gomez's second claim, the R&R found that Gomez offered no evidence to
demonstrate any interference by the trial court. (R&R at 19.) Instead a review of the record and
trial transcripts shows that while the events during jury deliberations were somewhat irregular,

1 the trial court acted properly. (Id. at 19-20.) The R&R recommends denying Gomez's habeas as
2 to this ground for relief.

3 Lastly, in evaluating Gomez's claim that the trial court applied the wrong seriousness
4 level to his sentence, the R&R reviewed the Washington Court of Appeals analysis of this issue
5 from Gomez's personal restraint proceedings. (Id. at 21.) There, the Court of Appeals found that
6 the seriousness level for second degree rape of a child is a level XI, and that although conviction
7 of this crime reduces the standard sentence range by 25%, it does not change the seriousness
8 level. (Id. at 21-22.) Because federal courts must defer to the state court's interpretation and
9 application of its own law concerning the appropriateness of Gomez's sentence, the R&R
10 recommends denying Gomez's habeas as to his fourth ground for relief. (See R&R at 22.)

11 Gomez timely filed his objection to the R&R and urges the Court to review his personal
12 restraint petition and his habeas petition, and to assist him in obtaining a photo of Sam so he can
13 demonstrate that she looks older than thirteen. (Objections at 11.) He does not address Judge
14 Peterson's recommendation that the Court deny a certificate of appealability. (Id.)

15 ANALYSIS

16 A district court has jurisdiction to review a Magistrate Judge's report and
17 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "A judge of the court may accept,
18 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate
19 judge." 28 U.S.C. § 636(b)(1). "The statute makes it clear that the district judge must review the
20 magistrate judge's findings and recommendations de novo if objection is made, but not
21 otherwise." United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).
22 Because Gomez is proceeding pro se, the court must interpret his § 2254 petition and objections
23 liberally. See Bernhardt v. Los Angeles Cnty., 339 F.3d 920, 925 (9th Cir. 2003).

1 The Court has thoroughly examined the R&R, and Gomez's objections to it. Gomez's
2 objections rehash the arguments he made in his petition, and indeed, refers the Court to his
3 habeas petition for further support. (Objections at 9.) Nothing in Gomez's objections raise any
4 novel issues that were not addressed by Magistrate Judge Peterson in her report and
5 recommendation. On de novo review, the Court finds Judge Peterson's reasoning for
6 recommending the dismissal of Gomez's petition and the denial of a certificate of appealability
7 persuasive. The Court DENIES Gomez's objections for the same reasons Judge Peterson set
8 forth in her report and recommendation and ADOPTS the report and recommendation in full.

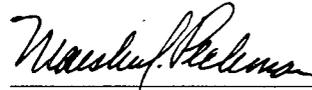
9 **CONCLUSION**

10 For the foregoing reasons, the Court ORDERS as follows:

- 11 (1) The Report and Recommendation (Dkt. No. 16) is ADOPTED in full;
- 12 (2) Gomez's petition for a writ of habeas corpus (Dkt. No. 5) and this action are
13 DISMISED with prejudice;
- 14 (3) In accordance with Rule 11 of the Rules Governing Section 2254 Cases in the
15 United States District Courts, a certificate of appealability is DENIED.

16 The clerk is ordered to provide copies of this order to all counsel.

17 Dated August 30, 2023.

18 

19 Marsha J. Pechman
20 United States Senior District Judge
21
22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSE G. BARAJAS GOMEZ,

Petitioner,

v.

DAN WHITE,

Respondent.

Case No. C22-5897-MJP-MLP

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Jose Barajas Gomez is a state prisoner who is currently confined at the Monroe Correctional Complex – Twin Rivers Unit, in Monroe, Washington. Petitioner has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his 2020 Thurston County Superior Court judgment and sentence. (Pet. (dkt. # 5).) Respondent filed an answer to the petition and submitted relevant portions of the state court record. (Answer (dkt. # 13); State Ct. Rec. I (dkt. # 14-1); State Ct. Rec. II (dkt. # 14-2).) Petitioner filed a response to Respondent’s answer. (Pet.’s Resp. (dkt. # 15).) This Court, having reviewed the petition, all briefing of the parties, and the balance of the record, concludes that Petitioner’s petition for writ of habeas corpus should be denied and this action should be dismissed with prejudice.

1 Petitioner asked for an address to the house, but Sam declined to give it to him, providing an
2 address for a store instead that she indicated was down the street from the house. (*Id.* at 157-58,
3 160-61.) Petitioner indicated he was on his way, but thereafter advised that he had had car
4 trouble and was stuck on the freeway. (*Id.* at 162-66.) The planned meeting therefore never took
5 place, but Petitioner suggested they could meet another time. (*Id.* at 164-66.) Petitioner also
6 asked Sam for the phone number for Audrey, Sam's fictitious 12-year-old friend, but Sam
7 refused to provide it. (*See id.* at 164-65.)

8 Petitioner continued texting with Sam during the ensuing days, exchanging more sexually
9 explicit messages and trying to arrange another time to meet. (*See State Ct. Rec. II, Ex. 17 at*
10 166-79.) Petitioner also persevered in his attempts to obtain Audrey's phone number from Sam,
11 and Sam eventually gave it to him. (*Id.* at 179-81.) Petitioner then began texting Audrey as well,
12 and those conversations were also sexually explicit. (*See id.* at 181-82, 241, 243.) Arrangements
13 were eventually made for Petitioner to meet both of the girls for sex, and he was again given the
14 address of the store that was purportedly near Audrey's house. (*Id.* at 190-92.) Petitioner was
15 arrested in the vicinity of the store. (*See id.* at 222-23.)

16 Petitioner was thereafter charged with two counts of communication with a minor for
17 immoral purposes and two counts of attempted rape of a child in the second degree. (*See State*
18 *Ct. Rec. II, Ex. 16 at 50-51.*) Petitioner proceeded to trial on those charges in late-February 2020.
19 (*See id.*, Ex. 16.) The state presented the testimony of six witnesses over the course of three days
20 and the parties thereafter rested with the defense presenting no witnesses. (*See id.*, Ex. 17 at
21 87-352.) The jury began its deliberations on the morning of March 3, 2020. (*See id.*, Ex. 18.)

22 On the first day of deliberations, the jury sent a question to the court asking how they
23 should proceed as they had reached agreement on two charges but were "hung" on the other two

1 charges. (*See* State Ct. Rec. II, Ex. 18 at 10; *see also* Pet. at 61.) After discussing the matter with
2 counsel, the court called the presiding juror into the courtroom and inquired of her whether there
3 was “a reasonable probability of the jury reaching an agreement within a reasonable time as to all
4 counts.” (State Ct. Rec. II, Ex. 18 at 14.) The juror responded by stating “I’m not sure. If I have
5 to guess, I’d say no.” (*Id.*) The court then confirmed with the juror that she was “not sure.” (*See*
6 *id.*) Once the presiding juror left the courtroom, the court again inquired of counsel. The
7 prosecutor suggested at that time that they could bring the jury back in, accept the verdicts as to
8 the two counts upon which they were able to agree, and declare a mistrial with respect to the
9 remaining two counts. (*Id.* at 15.)

10 After a break was taken to allow defense counsel to confer with Petitioner, counsel
11 represented to the court that they would prefer the jury continue to deliberate. (*See* State Ct. Rec.
12 II, Ex. 18 at 16-17.) The prosecutor thereafter indicated to the court that she agreed with defense
13 counsel that deliberations should continue. (*Id.* at 17.) The court then provided the jury with a
14 written response advising that they should leave for the day and begin again the following day by
15 re-reading the instructions and then continuing to deliberate. (*See id.* at 17-18; *see also* Pet. at
16 61.)

17 On the second day of deliberations, the jury advised the court that it had reached verdicts
18 in the case. (State Ct. Rec. II, Ex. 18 at 22.) The jury returned to the courtroom and the court read
19 the verdicts, which reflected guilty findings on all four charges. (*See id.* at 22-23.) However,
20 when the clerk polled the jury, one of the jurors advised that the verdicts reached by the jury
21 were not her verdicts. (*See id.* at 24-26.) The jury was sent out, the court conferred with counsel,
22 and the jury was then brought back into the courtroom at which time the court advised that it was
23

1 returning the instructions and verdict forms to them and that they should re-read the court's
2 instructions and deliberate consistent with those instructions. (*Id.* at 26-34.)

3 Later that afternoon, the jury sent a question to the court asking again how they should
4 proceed as they had reached agreement on three charges but did not have agreement on the
5 remaining charge. (*See* State Ct. Rec. II, Ex. 18 at 36; *see also* Pet. at 63.) After conferring with
6 counsel, the court provided the jury with a written response advising that they should complete
7 the verdict forms for the counts upon which they agreed and write "cannot decide" on the verdict
8 form for the count upon which they did not unanimously agree. (*See* State Ct. Rec. II, Ex. 18 at
9 37-39; *see also* Pet. at 63.) The jury thereafter returned to the courtroom and the verdicts were
10 read. (*See* State Ct. Rec. II, Ex. 18 at 41-42.) The verdicts reflected guilty findings as to one
11 count of attempted rape of a child in the second degree and two counts of communication with a
12 minor for immoral purposes. (*See id.*) Pursuant to the stipulation of counsel, the trial court
13 declared a mistrial as to the remaining count of attempted rape of a child in the second degree.
14 (*See id.*)

15 On May 28, 2020, Petitioner appeared for sentencing at which time the court imposed a
16 minimum term of 109.5 months confinement and a maximum term of life with respect to the
17 charge of attempted rape of a child in the second degree. (*See* State Ct. Rec. I, Ex. 1 at 5; State
18 Ct. Rec. II, Ex. 18 at 70-71.) The court also imposed terms of 29 months confinement on each of
19 the two charges of communicating with a minor for immoral purposes, which were to run
20 concurrently with each other and with the sentence imposed on the more serious charge. (*See id.*)
21 Finally, the court dismissed the count upon which it had previously declared a mistrial. (*See*
22 State Ct. Rec. I, Ex. 1 at 4; State Ct. Rec. II, Ex. 18 at 70.)
23

1 **B. Procedural Background**

2 Petitioner appealed his sentence to the Washington Court of Appeals, but he challenged
3 on appeal only one of the conditions of community custody imposed by the trial court. (*See State*
4 *Ct. Rec. I, Exs. 2-4.*) The state conceded the error, and the Court of Appeals reversed with
5 respect to the challenged condition and remanded the matter to the trial court to modify that
6 condition. (*See id.*, Ex. 2.). The Court of Appeals issued a mandate terminating direct review on
7 July 1, 2021. (*Id.*, Ex 5.)

8 On January 10, 2022, Petitioner filed a personal restraint petition in the Washington
9 Court of Appeals. (*See State Ct. Rec. I, Ex. 8.*) Petitioner asserted therein various ineffective
10 assistance of trial counsel claims. (*See id.*) Petitioner also asserted that the trial court erred when
11 it limited the jury's review of evidence during deliberations, and when it impermissibly
12 interfered with the verdict and coerced the jury into reaching a verdict on a more serious charge.
13 (*See id.*) Finally, Petitioner asserted that the trial court applied the wrong seriousness level in
14 imposing sentence for his conviction on the charge of attempted rape of a child in the second
15 degree. (*See id.*)

16 On June 9, 2022, the Court of Appeals issued an Order dismissing Petitioner's personal
17 restraint petition as frivolous. (*See State Ct. Rec. II, Ex. 10.*) Petitioner thereafter filed a motion
18 for reconsideration, which was treated as a motion for discretionary review by the Washington
19 Supreme Court. (*Id.*, Ex. 11.) On August 26, 2022, the Supreme Court Commissioner issued a
20 ruling denying review. (*Id.*, Ex. 12.) Petitioner filed an objection to the Commissioner's ruling,
21 which was treated as a motion to modify that ruling and was denied on November 9, 2022. (*See*
22 *id.*, Exs. 13-14.) The Court of Appeals issued a certificate of finality in Petitioner's personal
23

1 restraint proceedings on December 9, 2022. (*Id.*, Ex. 15.) Petitioner now seeks federal habeas
2 review of his state court convictions and sentence.

3 III. GROUNDS FOR RELIEF

4 Petitioner identifies four grounds for relief in his federal habeas petition, which the Court
5 has summarized as follows:

- 6 1. Trial counsel rendered ineffective assistance when he failed to accept
7 the jury's first verdict and failed to move for a mistrial based on jury
8 misconduct. (*See Pet.* at 5-41.)
- 9 2. The trial court abused its discretion when it failed to declare a mistrial
10 based on juror misconduct and when it interfered with the jury's
11 deliberations and coerced the jury into changing their initial verdict to one
12 which allowed the court to impose a harsher sentence. (*See id.* at 43.)
- 13 3. Trial counsel rendered ineffective assistance when he coerced
14 Petitioner into not testifying, advised Petitioner to stop taking his
15 medications prior to trial, and refused to present an entrapment defense.
16 (*See id.* at 44-50.)
- 17 4. The trial court erroneously applied a seriousness level of XI to the offense
18 of attempted rape of a child in the second degree when the appropriate
19 seriousness level was III, as that level more accurately reflected the
20 conduct underlying the offense. (*See id.* at 52-56.)

21 IV. DISCUSSION

22 Respondent concedes that Petitioner has properly exhausted his federal habeas claims by
23 fairly presenting them to the Washington Supreme Court as federal claims. (*See Answer* at 5.)
Respondent argues, however, that Petitioner is not entitled to relief with respect to any of his
asserted claims. (*See id.* at 6-24.)

24 A. Federal Habeas Standard, 28 U.S.C. § 2254

25 Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a habeas corpus
petition may be granted with respect to any claim adjudicated on the merits in state court only if

1 (1) the state court's decision was contrary to, or involved an unreasonable application of, clearly
2 established federal law, as determined by the United States Supreme Court, or (2) the decision
3 was based on an unreasonable determination of the facts in light of the evidence presented. 28
4 U.S.C. § 2254(d). In considering claims pursuant to § 2254(d), the Court is limited to the record
5 before the state court that adjudicated the claim on the merits, and the petitioner carries the
6 burden of proof. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

7 Under § 2254(d)(1)'s "contrary to" clause, a federal court may grant the habeas petition
8 only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a
9 question of law, or if the state court decides a case differently than the Supreme Court has on a
10 set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

11 Under the "unreasonable application" clause, a federal habeas court may grant the writ only if
12 the state court identifies the correct governing legal principle from the Supreme Court's
13 decisions, but unreasonably applies that principle to the facts of the prisoner's case. *See id.* at
14 407-09.

15 The Supreme Court has made clear that a state court's decision may be overturned only if
16 the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

17 The Supreme Court has further explained that "[a] state court's determination that a claim lacks
18 merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the
19 correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

20 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

21 Clearly established federal law, for purposes of AEDPA, means "the governing legal
22 principle or principles set forth by the Supreme Court at the time the state court render[ed] its
23 decision." *Lockyer*, 538 U.S. at 71-72. This includes the Supreme Court's holdings, not its dicta.

1 *Id.* at 71. “If no Supreme Court precedent creates clearly established federal law relating to the
2 legal issue the habeas petitioner raised in state court, the state court’s decision cannot be contrary
3 to or an unreasonable application of clearly established federal law.” *Brewer v. Hall*, 378 F.3d
4 952, 955 (9th Cir. 2004) (citing *Dows v. Wood*, 211 F.3d 480, 485-86 (9th Cir. 2000)).

5 With respect to § 2254(d)(2), a petitioner may only obtain relief by showing that the state
6 court’s conclusion was based on “an unreasonable determination of the facts in light of the
7 evidence presented in the state court proceeding.” *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)
8 (quoting 28 U.S.C. § 2254(d)(2)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (“[A]
9 decision adjudicated on the merits in a state court and based on a factual determination will not
10 be overturned on factual grounds unless objectively unreasonable in light of the evidence
11 presented in the state-court proceeding[.]”). The federal habeas court presumes the state court’s
12 factual findings to be sound unless the petitioner rebuts the “presumption of correctness by clear
13 and convincing evidence.” *Dretke*, 545 U.S. at 240 (quoting 28 U.S.C. § 2254(e)(1)).

14 **B. Analysis**

15 *1. Ineffective Assistance of Counsel*

16 Petitioner asserts claims of ineffective assistance of counsel in both his first and third
17 grounds for relief. (*See* Pet. at 5-41, 44-50.) In his first ground for relief, Petitioner asserts that he
18 was denied effective assistance of counsel when his trial counsel failed to heed his instruction to
19 “accept” the jury’s first verdict, which he characterizes as having “offer[ed]” guilty verdicts on
20 the two lesser charges and “hung” verdicts on the remaining two more serious charges. (*See id.* at
21 5.) Petitioner also asserts that counsel rendered ineffective assistance when he failed to move for
22 a mistrial after the presiding juror lied to the court and presented false verdict forms. (*Id.*) In his
23 third ground for relief, Petitioner asserts that he was denied effective assistance of counsel when

1 trial counsel coerced him into not testifying, instructed him to stop taking his medications prior
2 to trial, and refused to present an entrapment defense. (*See* Pet. at 44.)

3 The Sixth Amendment guarantees a criminal defendant the right to effective assistance of
4 counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). “The essence of an ineffective-
5 assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between
6 defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.”
7 *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Claims of ineffective assistance of counsel
8 are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant must
9 prove (1) that counsel’s performance was deficient, and (2) that the deficient performance
10 prejudiced the defense. *Strickland*, 466 U.S. at 687.

11 With respect to the first prong of the *Strickland* test, a petitioner must show that counsel’s
12 performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.
13 This requires “showing that counsel made errors so serious that counsel was not functioning as
14 the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Judicial scrutiny of
15 counsel’s performance must be highly deferential. *Id.* at 689. “A fair assessment of attorney
16 performance requires that every effort be made to eliminate the distorting effects of hindsight, to
17 reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from
18 counsel’s perspective at the time.” *Id.* There is a strong presumption that counsel’s performance
19 fell within the wide range of reasonably effective assistance. *Id.* In order to prevail on an
20 ineffective assistance of counsel claim, a petitioner must overcome the presumption that
21 counsel’s challenged actions might be considered sound strategy. *Id.*

22 The second prong of the *Strickland* test requires a showing of actual prejudice related to
23 counsel’s performance. In order to establish prejudice, a petitioner “must show that there is a

1 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
2 would have been different. A reasonable probability is a probability sufficient to undermine
3 confidence in the outcome.” *Strickland*, 466 U.S. at 694. The reviewing court need not address
4 both components of the inquiry if an insufficient showing is made on one component. *Id.* at 697.

5 While the Supreme Court established in *Strickland* the legal principles that govern claims
6 of ineffective assistance of counsel, it is not the role of the federal habeas court to evaluate
7 whether defense counsel’s performance fell below the *Strickland* standard. *Harrington*, 562 U.S.
8 at 101. Rather, when considering an ineffective assistance of counsel claim on federal habeas
9 review, “[t]he pivotal question is whether the state court’s application of the *Strickland* standard
10 was unreasonable.” *Id.* As the Supreme Court explained in *Harrington*, “[a] state court must be
11 granted a deference and latitude that are not in operation when the case involves review under
12 the *Strickland* standard itself.” *Id.*

13 The Washington appellate courts evaluated Petitioner’s ineffective assistance of counsel
14 claims on collateral review in accordance with the *Strickland* standard and rejected all such
15 claims. (*See* State Ct. Rec. II, Exs. 10, 12.) This Court addresses each of Petitioner’s ineffective
16 assistance claims individually below.

17 a. Jury Deliberations

18 Petitioner’s first ineffective assistance claim concerns his trial counsel’s conduct in
19 relation to jury deliberations. (*See* Pet. at 5-41.) In particular, Petitioner complains that counsel
20 failed to heed his instruction to “accept” the jury’s first verdict and failed to move for a mistrial
21 when the presiding juror erroneously reported to the court that the jury had reached a verdict on
22 all counts. (*Id.*) These claims are intertwined with Petitioner’s claims, asserted in ground two of
23 his petition, that the trial court interfered with jury deliberations and coerced the jury into finding

1 him guilty on more serious charges, and that it failed to declare a mistrial when the presiding
2 juror lied to the court. (*See id.* at 43.) As will be explained in greater detail below in the Court's
3 discussion of ground two, Petitioner's claim that the trial court effectively coerced the jury into
4 finding Petitioner guilty on more serious charges that carried a lengthier sentence is without
5 merit. Petitioner's related ineffective assistance of counsel claim likewise fails.

6 The Washington Court of Appeals, in rejecting this portion of Petitioner's ineffective
7 assistance of counsel claim, concluded that counsel's actions in relation to the jury deliberations
8 constituted a strategic decision and therefore did not amount to ineffective assistance. (*See State*
9 *Ct. Rec. II, Ex. 10 at 3 n.2.*) The Court of Appeals' conclusion was eminently reasonable.

10 Petitioner faults counsel for indicating that the defense would prefer to have the jury
11 continue to deliberate after they reported that they had agreed on two counts and were hung on
12 two counts, rather than accepting what Petitioner believes was an "offer" from the judge and the
13 prosecutor to accept a mistrial on the two more serious counts and a verdict of guilty on the two
14 less serious counts. (*See Pet.* at 8-10.) However, though the trial transcript confirms that the
15 prosecutor and the judge acknowledged the possibility of accepting the jury's initial findings (*see*
16 *State Ct. Rec. II, Ex. 18 at 14-16*), Petitioner's suggestion that this was an "offer" that would
17 have permitted him to resolve the case with less prison time had it been accepted – something
18 akin to a plea agreement – misconstrues the circumstances. When the jury first indicated that
19 they had reached agreement on two counts, they did not identify which counts those were nor did
20 they reveal what the agreement was. In other words, while deliberations were ongoing there was
21 simply no way to know that the jury was hung on the two more serious counts and had reached
22 guilty verdicts on the two less serious counts as Petitioner posits. Thus, the suggestion that there
23

1 was some sort of concrete offer that Petitioner could have accepted or rejected to his benefit is
2 simply misguided.

3 Moreover, even if, with the benefit of hindsight, it were reasonable to assume that the
4 jury's initial findings were as Petitioner suggests, *i.e.*, guilty on the two lesser counts and
5 undecided on the two more serious counts, had the jury returned such a verdict, and had a
6 mistrial been declared on the two more serious counts, this would not have terminated
7 Petitioner's potential jeopardy with respect to those more serious counts. A mistrial is not an
8 acquittal, and the prosecutor could therefore have elected to retry Petitioner on the more serious
9 charges, which would not have necessarily been advantageous to Petitioner. Agreeing that the
10 jury should continue to deliberate until it appeared clear that the jury was going to be unable to
11 reach a verdict on all counts was a reasonable strategic choice and, in fact, left open the
12 possibility that Plaintiff might actually be acquitted on some of the charges. Thus, the state
13 courts reasonably rejected this claim. Petitioner's federal habeas petition should therefore be
14 denied with respect to this part of the ineffective assistance of counsel claim asserted in his first
15 ground for relief.

16 Petitioner also contends that counsel rendered ineffective assistance of counsel when he
17 failed to move for a mistrial after the presiding juror deliberately lied to the trial court about
18 having reached a verdict and presented false verdict forms to the court. (*See* Pet. at 5, 21-26, 31.)
19 However, Petitioner offers no evidence of deliberate misconduct on the part of the presiding
20 juror nor any evidence that the error in returning non-unanimous verdicts was attributable to a
21 lack of impartiality on the part of the presiding juror. Absent some evidence of misconduct
22 and/or bias on the part of the presiding juror, this Court cannot reasonably conclude that counsel
23 rendered ineffective assistance by failing to move for a mistrial on these grounds. Thus,

1 Petitioner's federal habeas petition should also be denied with respect to this part of the
2 ineffective assistance of counsel claim asserted in his first ground for relief.

3 b. Trial Testimony

4 Petitioner asserts that defense counsel also rendered ineffective assistance when he
5 coerced Petitioner into not testifying at trial. (*See* Pet. at 44-47.) Petitioner claims that he
6 repeatedly advised counsel he wanted to testify, and counsel repeatedly advised him that trial
7 could "go bad" for him if he testified, and that he would likely be found guilty. (*Id.* at 45-46.)
8 Petitioner maintains that counsel, through his "fear mongering," coerced Petitioner into believing
9 he had better not testify. (*Id.* at 46-47.)

10 The Washington Court of Appeals rejected this portion of Petitioner's ineffective
11 assistance of counsel claim, and explained its conclusion as follows:

12 Gomez argues that his trial counsel provided ineffective assistance of counsel in
13 advising him not to testify on his own behalf. Even if this advice is true, the trial
14 court informed Gomez of his right to testify in his own behalf and Gomez
affirmatively waived that right during a colloquy with the court. Gomez does not
show ineffective assistance of counsel.

15 (State Ct. Rec. II, Ex. 10 at 3.)

16 Petitioner fails to demonstrate that this decision of the Court of Appeals constitutes an
17 unreasonable application of *Strickland*. The trial transcript confirms that Petitioner was advised
18 by the trial court of his right to testify in his own behalf, and that he waived that right in open
19 court. (*See* State Ct. Rec. II, Ex. 17 at 345-46.) Petitioner suggests that counsel coached him on
20 how to appropriately respond to the court's inquiry regarding his decision not to testify, though
21 the record is devoid of any evidence that counsel acted improperly. Even assuming counsel did
22 pressure Petitioner not to testify, Petitioner does not identify with any specificity what he would
23 have testified to had he taken the stand at trial and, given the evidence presented at trial of his

1 extensive and sexually explicit communications with the 12 and 13-year-old personas, any
2 suggestion that Petitioner's testimony would have altered the outcome of the trial is speculative
3 at best. Accordingly, Petitioner's federal habeas petition should be denied with respect to this
4 part of the ineffective assistance of counsel claim asserted in his third ground for relief.

5 c. Medication

6 Petitioner further asserts that counsel rendered ineffective assistance when he instructed
7 Petitioner to stop taking all of his medications prior to the beginning of trial, including
8 medication for depression. (*See* Pet. at 44, 48.) According to Petitioner, counsel misled him into
9 believing that being on medication during trial would "make him look bad to the jury." (*Id.* at
10 48.) The Washington Court of Appeals rejected this portion of Petitioner's ineffective assistance
11 claim, explaining that Plaintiff had provided no evidence of such advice from counsel, and
12 therefore, no evidence of ineffective assistance of counsel. (State Ct. Rec. II, Ex. 10 at 3.)

13 The record before this Court is likewise devoid of any evidence that Petitioner's trial
14 counsel instructed Petitioner to stop taking his medications. The Court observes as well that
15 Petitioner does not specifically identify in his materials the "5 or 6" medications he suggests he
16 stopped taking upon counsel's advice (*see* Pet. at 48), nor does he explain how this affected the
17 outcome of his trial. The Court of Appeals reasonably rejected this claim and, thus, Petitioner's
18 federal habeas petition should also be denied with respect to this part of the ineffective assistance
19 of counsel claim asserted in his third ground for relief.

20 d. Entrapment

21 Finally, Petitioner asserts that counsel rendered ineffective assistance when he refused to
22 present Petitioner's preferred defense of entrapment. (Pet. at 44, 49-50.) Petitioner claims that
23 counsel led him to believe that an entrapment defense was going to be a part of the trial when

1 counsel did not actually intend to present any such defense. (*Id.* at 49-50.) Petitioner maintains
2 that a viable entrapment defense was available. (*See id.* at 50.)

3 The Court of Appeals addressed this claim only briefly, concluding that “Presenting a
4 defense of general denial rather than the affirmative defense of entrapment was a legitimate
5 strategic decision, and as such, cannot constitute ineffective assistance of counsel.” (State Ct.
6 Rec. II, Ex. 10 at 2.) The Washington Supreme Court Commissioner, in considering the claim in
7 relation to Petitioner’s request for discretionary review of the Court of Appeals’ decision, offered
8 a more detailed explanation as to why Petitioner was not entitled to relief with respect to this
9 claim:

10 The Court of Appeals sustainably held that defense counsel’s decision to present a
11 defense other than an affirmative defense of entrapment was a legitimate strategic
12 decision. Because entrapment is an affirmative defense, the defendant has a burden
13 to show some evidence in support of the defense. *State v. Arbogast*, 199 Wn.2d
14 356, 371, 506 P.3d 1238 (2022). For entrapment, the defendant must show evidence
15 of inducement and predisposition. *Id.* at 374. Inducement goes beyond simply
16 providing a defendant with the opportunity to commit the offense and is shown by
17 persuasion, fraudulent representations, threats, coercion, harassment, promises of
18 reward, pleas based on need, and sympathy or friendship. *Id.* at 375. Predisposition
19 is shown by evidence establishing that the defendant had no predisposition to
20 commit the crime until the intent was implanted by police. *Id.* at 379.

21 In light of these burdens, defense counsel’s strategy to forgo an entrapment defense
22 was reasonable and should not be second guessed by the courts. The trial evidence
23 showed that the police created an undercover persona on a dating app, Baddo,
posing as a 13-year-old girl named Sam. The app profile included a photograph.
The chat log showed that Barajas-Gomez contacted Sam posing as “Jesus,” and
when Sam said she was 13 years old “Jesus” asked for another photograph. The
first suggestion of a romantic interest was initiated by “Jesus” after learning that
Sam was only 13, when Jesus twice asked Sam whether she liked older guys. Jesus
asked Sam whether she liked to have oral sex and then proceeded to send sexually
explicit messages to Sam and asked whether Sam and her 12-year-old friend wanted
to have sex. Jesus agreed to meet with Sam at a gas station and Barajas-Gomez was
arrested when he arrived at the station and sent Sam a message with a photograph
showing that he was at the station. Under these facts, an entrapment defense would
have been futile and defense counsel’s strategy was reasonable.

(*Id.*, Ex. 12 at 2-3.)

1 Petitioner fails to demonstrate that the conclusions of the state courts with respect to
2 counsel's alleged refusal to present an entrapment defense constitute an unreasonable application
3 of *Strickland*. The decision not to present an entrapment defense was clearly a strategic decision,
4 and Petitioner fails to overcome the presumption that this decision constituted sound trial
5 strategy under the circumstances of his case. Petitioner's federal habeas petition should therefore
6 also be denied with respect to this part of the ineffective assistance of counsel claim asserted in
7 his third ground for relief.

8 2. *Jury Coercion*

9 Petitioner asserts in his second ground for relief that the trial judge deliberately interfered
10 with the jury's deliberations in order to coerce the jury into changing their initial verdict to one
11 that would enable the court to impose a harsher sentence. (Pet. at 43.) Petitioner also asserts that
12 the trial court abused its discretion when it failed to declare a mistrial after the presiding juror
13 deliberately lied to the court and presented a false verdict form. (*Id.*)

14 The Supreme Court has made clear that "[a]ny criminal defendant . . . being tried by a
15 jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241
16 (1988). However, the Supreme Court has also sanctioned the use of a supplemental charge in
17 instances where a jury appears to be deadlocked to encourage further deliberation, a so-called
18 "Allen charge." *See id.* at 237. An *Allen* charge is one which "urge[s] the minority to consider the
19 views of the majority, and ask themselves whether their own views [are] reasonable under the
20 circumstances. *See id.*² A reviewing court considering a claim that a jury was improperly coerced

21
22 ² In *Allen v. United States*, 164 U.S. 492, 501-02 (1896), the Supreme Court upheld a conviction and
23 sentence against the defendant's claim of jury coercion, explaining that: "The very object of the jury
system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.
It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a
distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case
from what he does himself. It cannot be that each juror should go to the jury room with a blind

1 must consider a trial court's supplemental charge "in its context and under all the
2 circumstances." *Id.* (quoting *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam)).

3 The Washington Court of Appeals rejected Petitioner's claim that the trial court had
4 impermissibly interfered with the jury's verdict, concluding that Petitioner had demonstrated no
5 such interference. (*See* State Ct. Rec. II, Ex. 10 at 3-4.) While the facts set forth in the Court of
6 Appeals' decision are not entirely accurate, those inaccuracies do not undermine the court's
7 ultimate conclusion and Petitioner does not demonstrate that that conclusion was contrary to
8 clearly established federal law.

9 As described above, on the first day of deliberations the presiding juror sent a question to
10 the court advising that the jury had reached agreement on two of the four charges, but was hung
11 on the remaining two charges, and asking for direction on how they should proceed. (State Ct.
12 Rec. II, Ex. 18 at 10.) The court discussed the matter with counsel and inquired of the presiding
13 juror whether there a reasonable probability of the jury reaching agreement as to all counts
14 within a reasonable time. (*See id.* at 10-14.) The presiding juror expressed some uncertainty as to
15 that prospect but speculated they would not be able to do so. (*Id.* at 14.) The prosecutor thereafter
16 suggested that they could accept the verdicts on the two counts upon which there was agreement
17 and declare a mistrial as to the other two counts, and the court acknowledged that was one
18 possibility. (*Id.* at 15-16.) The court noted that the other possibility was that they could advise
19 the jury to re-read the instructions and continue to deliberate. (*Id.* at 16.) Petitioner's counsel
20 thereafter discussed the options with Petitioner and then indicated that their preference was that
21 the jury continue to deliberate. (*See id.* at 16-17.) The prosecutor agreed and the court advised

22
23

determination that the verdict shall represent his opinion of the case at that moment, or that he should
close his ears to the arguments of men who are equally honest and intelligent as himself."

1 the jury to return the following morning, re-read the instructions, and continue their
2 deliberations. (*Id.* at 17-18.)

3 Following further deliberations the next morning, the court was advised that the jury had
4 reached verdicts on all counts. (State Ct. Rec. II, Ex. 18 at 22.) Though the verdicts forms
5 indicated that the jury had found Petitioner guilty on all four counts, subsequent polling of the
6 jurors revealed that the verdicts were not unanimous. (*See id.* at 22-24.) After discussing the
7 matter with counsel, the trial court again instructed the jury to re-read the instructions and
8 continue deliberations. (*See id.* at 26-34.) Later that afternoon, the presiding juror advised the
9 court that the jury had reached agreement on three counts, but not on the fourth count, and again
10 requested the court's direction. (*Id.* at 36.) The court again discussed the matter with counsel and
11 concluded that after almost two full days of deliberations it appeared unlikely the jury would be
12 able to reach a verdict on the remaining charge. (*See id.* at 37-39.) The court therefore instructed
13 the jury to complete the verdict forms, indicating on the form pertaining to the count upon which
14 they could not reach agreement, that they could not decide. (*See id.* at 38-39.) After returning the
15 verdicts, the court declared a mistrial as to that charge. (*Id.* at 41-42.)

16 Petitioner does not identify anything obviously coercive in the court's supplemental
17 charges to the jury. Petitioner appears to primarily take issue with the fact that the court allowed
18 deliberations to continue after the jury initially indicated it was hung on two counts and he
19 suggests that the court, in allowing deliberations to continue, was attempting to coerce the jury
20 into returning a verdict on the more serious charges. Petitioner's speculation does not suffice to
21 demonstrate that the trial court acted impermissibly, and the trial transcript is devoid of any
22 evidence from which this Court could reasonably conclude that the trial court's actions in
23

1 relation to jury deliberations were even remotely coercive. Accordingly, Petitioner's federal
2 habeas petition should be denied with respect to this part of his second ground for relief.

3 Petitioner also alleges that the presiding juror engaged in misconduct when she
4 represented to the court that the jury had reached a verdict on all charges, and presented verdict
5 forms reflecting those purported verdicts, only for it to be revealed that the verdicts were not
6 unanimous. (*See* Pet. at 20-21, 31, 43.) Petitioner suggests that there were nefarious motives
7 behind the presiding juror's actions that warranted either further inquiry or a mistrial. (*See id.* at
8 24-26, 31, 43.) The state appellate courts did not directly address this aspect of Petitioner's
9 claim, but it warrants brief discussion by this Court.

10 It is without question that trial by an impartial jury is fundamental to the fair
11 administration of criminal justice. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Irvin v.*
12 *Dowd*, 366 U.S. 717, 722 (1961). An impartial jury is one that is composed of "jurors who will
13 conscientiously apply the law and find the facts." *Lockhart v. McCree*, 470 U.S. 162, 178 (1986)
14 (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)). A juror is considered impartial if the
15 juror can set aside any opinion he or she might hold and decide the case solely on the evidence
16 presented at trial. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984); *see also Smith v. Phillips*, 455
17 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely
18 on the evidence before it."). The burden rests on the defendant to prove a juror was biased
19 resulting in the denial of the right to trial by an impartial jury. *See Wainwright*, 469 U.S. at 423.

20 While the events that unfolded during jury deliberations were somewhat irregular,
21 nothing in the state court record suggests that those irregularities were attributable to misconduct
22 on the part of the presiding juror, nor does the record demonstrate that the presiding juror was
23 not impartial. Moreover, Petitioner offers no evidence in this proceeding demonstrating that the

1 presiding juror was, in fact, biased. As it is Petitioner's burden to demonstrate that a juror was
2 biased resulting in an unfair trial, and as Petitioner fails to meet this burden, his federal habeas
3 petition should also be denied with respect to this part of his second ground for relief.

4 3. *Unlawful Sentence*

5 Petitioner alleges in his fourth ground for relief that his constitutional rights were violated
6 when the state courts misapplied state law in imposing sentence. (Pet. at 52-56.) In particular,
7 Petitioner complains that the trial court erroneously applied a seriousness level of XI in imposing
8 sentence with respect to the attempted rape of a child in the second degree charge. (*See id.*)
9 Petitioner contends that because he was convicted of *attempted* second degree rape of a child, it
10 was improper for the trial court to use the seriousness level for the crime of second degree rape
11 of a child to calculate his sentencing range. (*See id.*) Petitioner argues that he was effectively
12 sentenced for a crime he never committed, and that application of a seriousness level of III
13 would have more accurately reflected the conduct underlying the offense. (*See id.*)

14 Federal habeas relief is available only if a petitioner demonstrates he is "in custody in
15 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(c)(3); *see*
16 *also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). A challenge to the state court's application
17 of state sentencing laws does not create a federal question cognizable on federal habeas review.
18 *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). To state a cognizable federal habeas claim based
19 on an alleged sentencing error by a state court, a habeas petitioner must show that the asserted
20 sentencing error was "so arbitrary or capricious as to constitute an independent due process"
21 violation. *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (citation omitted).

22 The Washington Court of Appeals rejected Petitioner's sentencing claim in his personal
23 restraint proceedings, and explained its conclusion as follows:

1 Gomez argues that because his crime was that of attempted second degree rape of
2 a child, the trial court sentenced him under the wrong seriousness level. Second
3 degree rape of a child has a seriousness level of XI. RCW 9.94A.515. Although the
4 fact that the conviction was for attempted second degree rape of a child reduces his
5 standard sentence range by 25%, under RCW 9.94A.595, it does not change his
6 seriousness level.

7 (State Court Rec. II, Ex. 10 at 4.)

8 Although Petitioner couches his claim of sentencing error in federal constitutional terms,
9 the claim involves solely the interpretation and application of state sentencing law. Petitioner
10 claims the trial court erred in imposing sentence, but the Court of Appeals made clear that
11 Petitioner was properly sentenced in accordance with Washington law and, thus, that there was
12 no error. This Court must defer to the state courts' interpretation and application of its own law
13 concerning the appropriateness of Petitioner's sentence. *See Bradshaw v. Richey*, 546 U.S. 74, 76
14 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one
15 announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas
16 corpus."). Accordingly, Petitioner's federal habeas petition should be denied with respect to his
17 fourth ground for relief.

18 4. *Additional Grounds*

19 Petitioner appears to reference in the lengthy narrative portions of his petition additional
20 potential grounds for relief, including additional claims of ineffective assistance of counsel and
21 trial court error, as well as claims of ineffective assistance of appellate counsel and prosecutorial
22 misconduct. (*See* Pet. at 5-56.) Pursuant to Rule 2(c) of the Rules Governing Section 2254 Cases,
23 a federal habeas petition must clearly specify each ground for relief, the facts supporting the
ground for relief, and the relief requested. Petitioner has identified only four specific grounds for
relief in his petition, some with clearly identified sub-parts, and the Court has addressed those

1 grounds herein. To the extent Petitioner attempts to raise additional grounds for relief in the
2 narrative portions of his petition, those additional grounds are improperly pled and should
3 therefore be denied. *See Vrh v. Ndoh*, 2020 WL 2489464, at *1 (E.D. Cal. May 14, 2020) (“Rule
4 2(c) requires that each ground for relief be clearly stated, along with providing specific factual
5 allegations that support the grounds for relief.”).

6 C. Certificate of Appealability

7 A petitioner seeking post-conviction relief under § 2254 may appeal a district court’s
8 dismissal of his federal habeas petition only after obtaining a certificate of appealability from a
9 district or circuit judge. A certificate of appealability may issue only where a petitioner has made
10 “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A
11 petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the
12 district court’s resolution of his constitutional claims or that jurists could conclude the issues
13 presented are adequate to deserve encouragement to proceed further.” *Cockrell*, 537 U.S. at 327.
14 Under this standard, this Court concludes that Petitioner is not entitled to a certificate of
15 appealability with respect to any of the claims asserted in his petition.

16 V. CONCLUSION

17 For the reasons set forth above, this Court recommends that Petitioner’s petition for writ
18 of habeas corpus be denied, and that this action be dismissed with prejudice. This Court further
19 recommends that a certificate of appealability be denied. A proposed Order accompanies this
20 Report and Recommendation.

21 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
22 served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report
23 and Recommendation is signed. Failure to file objections within the specified time may affect your

1 right to appeal. Objections should be noted for consideration on the District Judge's motions
2 calendar for the third Friday after they are filed. Responses to objections may be filed within
3 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be
4 ready for consideration by the District Judge on **July 7, 2023**.

5 DATED this 13th day of June, 2023.

6
7 

8 MICHELLE L. PETERSON
9 United States Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23

APPENDIX D

THURSDAY, JULY 11, 2024

Ninth Circuit Court of Appeals

P.O. Box 193939

San Francisco, CA, 94119

Jose G. Barajas-Gomez

422638, TRU, A321

P.O. Box 888

Menroe, WA, 98272

RE: No. 23-2236; Notice of Filing Motion for Reconsideration En Banc

Court Clerk,

I'm writing to give you Notice that I will be filing a Motion for Reconsideration En Banc, Fed. R. App. P. 59(e), within 28 days of this Court's decision, which I did not get by mail until Friday, July 5, 2024. Currently 28 days would be July 26, 2024. Or if 28 days from when I actually received it would be 8/2/2024, under the Federal Mailbox Rule of Houston v Lack I'll be mailing it by July 26, 2024, so, I was writing to let you know you should have it probably a week later. I'm writing to give notice I am filing.

Respectfully,

cc: Copy

Jose G. Barajas-Gomez

Appellant, Pro Se

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JOSE G. BARAJAS-GOMEZ,)
)
Appellant)
)
v.)
)
DANIEL WHITE,)
)
Respondent)

NO. 23-2236

**CERTIFICATE OF SERVICE
BY MAILING**

I, Jose G. Barajas-Gomez, certify that on the below date, I caused to be placed in the U.S. Mail, first class, postage prepaid, 2 envelope(s) addressed to the below-listed individual(s):

1. Ninth Circuit Court of Appeals
% Court Clerk
P.O. Box 193939
San Francisco, CA. 94119-3939

2. Washington Attorney General
% Corrections Division
P.O. Box 41128
Olympia, WA. 98504

1 I am a prisoner confined at the Washington State Department of Corrections ("DOC"),
2 housed at the Monroe Correctional Complex ("MCC"), P.O. Box 888, Monroe, WA
3 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100
4 and 590.500. The said mailing was witnessed by one or more correctional staff. The
5 envelope(s) contained a true and correct copy of the below-listed documents:

- 6 1. Motion for Reconsideration En Banc
7 _____
8 2. _____
9 3. _____
10 4. _____
11 5. _____
12 6. _____

13 I hereby invoke the "Mail Box Rule". See *Houston v. Lack*, 487 U.S. 266, 273-76, 108
14 S.Ct. 2379 (1988); FRAP 25(a)(2)(C); and Washington Court Rule GR 3.1 (a) — the above
15 listed documents are considered filed on the date that I deposited them into DOC's legal mail
16 system.

17 DATED this 25 day of July, 2024.

18 Jose Gomez
19 (Print) Jose G. Barajas-Gomez
20 Appellant, Pro se.
21 DOC# 422638, Unit A321
22 Monroe Correctional Complex
23 (Street address) _____
24 P.O. Box 888
25 Monroe, WA 98272
26

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOSE G. BARAJAS-GOMEZ,

Appellant,

v,

DANIEL WHITE, Superintendent,

Respondent,

No. 23-2236

MOTION FOR RECONSIDERATION EN

BANC, Fed. R. App. P. 59(e); Fed. R. App. P.

28; 9th CIR. RULE 28-2

I. STATEMENT OF JURISDICTION (9th Cir. Rule 28-2.2)

The statutory basis of jurisdiction, and subject matter jurisdiction for this Certificate of Appealability, is 28 U.S.C. § 2253.

II. BAIL / DETENTION STATUS (9th Cir. Rule 28-2.4)

Barajas-Gomez is currently in custody with a current ERD Earned Release Date of May 18, 2028.

III. REVIEWABILITY AND STANDARD OF REVIEW (9th Cir. Rule 28-2.5)

I. INEFFECTIVE ASSISTANCE OF COUNSEL-STANDARD OF REVIEW

A criminal defendant has a right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, Barajas-Gomez must show deficient performance and that the deficient performance resulted in prejudice.

Washington V. Shin, 46 F.4d 915, 937 (9th Cir. 2022) (citing Bobby V. Van Hook, 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009)). To establish deficient performance, Barajas-Gomez has the "heavy burden" of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. McGill V. Shinn, 16 F.4d 666, 680 (9th Cir. 2021) (citing Strickland, 466 U.S., at 687).

Barajas-Gomez can meet this standard by establishing that his attorney's conduct failed to meet an objective standard of reasonableness. Strickland, 466 U.S., at 488.

The two-part test set out in Strickland governs Barajas-Gomez's claims of ineffective assistance of counsel. *Id.* This test requires a petitioner to show: (1) the defense attorney's performance was deficient, meaning "unreasonable under prevailing professional standards; and (2) that there is a 'reasonable probability that but for counsel's unprofessional errors, the result would have been different.'" U.S. V. Flaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (citing Strickland, 466 U.S., at 687-91, 694)).

To determine whether conduct was objectively unreasonable, courts consider "the rules of contemporary assessment," which evaluates the performance at the time without considering the benefit of hindsight. Maryland V. Kulbicki, 577 U.S. 1, 14, 136 S.Ct. 2, 193 L.Ed.2d 1 (2015). A lawyer's conduct falls below the standard of objective reasonableness if, viewed without the benefit of hindsight, it falls "under prevailing professional norms."

Strickland, 466 U.S., at 688.

Barajas-Gomez must also show that deficient performance resulted from his attorney's performance. *Id.* Reviewing prejudice *de novo*, therefore, this Court should conclude that the prejudice prong of Strickland is satisfied herein Barajas-Gomez's case. May v. Ryan, 766 Fed. Appx. 505, 509 (4th Cir. 2019).

1. IAC - Refusing To Follow My Instructions, Failed To Accept The Hung Jury, And Failed To Move For Mistrial.

This issue was raised in the Habeas Petition Ground One Pages 5-36, in Respondent's Answer Pages 9-16, and the R&R Pages 11-14.

STANDARD OF REVIEW FOR THIS SUB-GROUND

Given the trial record of this particular case counsel's failure to object to permitting the jury to resume its deliberations after the trial judge declared a mistrial and discharged the jury constituted objectively deficient performance. It was "not sound trial strategy"; see Strickland, 466 U.S., at 689 [quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)], for May's lawyer not even to attempt to preserve the mistrial based on a hung jury, because a mistrial here would have been a clearly advantageous result for May. A hung jury is never a desirable outcome in a criminal trial; Williams v. Cavazos, 646 F.3d 626, 652 (4th Cir. 2011). The sacrifice of efficiency for the preservation of liberty is central, however, to the safeguards the constitution affords criminal defendants. Rock Island, Ark. & La. R.R. v. U.S., 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188, (1920). This deprived Barajas-Gomez of his right to a fair trial by jury.

B. IAC- Advised To Not Testify On My Own Behalf

This issue was raised in the Habeas Petition Ground Three Pages 44- of 59, and attached Exhibit F (attached to original Habeas petition), Respondent's Answer Pages 9-16, and on the R&R Pages 14-15.

"An accused's right to testify is a constitutional right of fundamental dimension.... Because the right is personal, it may be relinquished only by the defendant, and the defendant's relinquishment of the right must be knowing and intentional." U.S. v. Joelson, 7 F.3d 174, 177 (9th Cir. 1993). However, a defendant "is presumed to assent to his attorney's tactical decision not to have him testify." "[I]f the defendant wants to testify, he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging the lawyer." Id. As with other claims of ineffective assistance of counsel, the Strickland standard is applicable to claims that a defendant's attorney denied him his constitutional right to testify. Matyliniky v. Judge, 577 F.3d 1083, 1097 (9th Cir. 2009) (citing Medley v. Rannels, 506 F.3d 857, 861 (9th Cir. 2007)).

Barajas-Gomez' wife submitted a notarized affidavit, EXF, stating how his attorney was not allowing her husband his constitutional right to testify. This denial proves deficient performance and prejudice, requiring reversal on this Sixth Amendment violation.

C. IAC- Telling Petitioner Not To Take His Medications

This issue was raised in his Habeas Petition Ground Three Pages 44 of 59, Respondent's Answer Pages 9-16, and on the R&R Page 15.

Barajas-Gomez' liberty interests were violated when his attorney forced him to stop taking his medications. Warren v. Schriro, 162 Fed. Appx 705,

710 (9th Cir. 2006). We find that counsel's performance, [in removing petitioner from his psychiatric medications], prejudiced Meade, Meade v. Oregon State Hosp., No. 98-36063, at *9-10 (9th Cir. 1999) (citing Carrier, 477 U.S. 478, 485, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Strickland, 466 U.S. 668 (1984)). On the current record, it appears highly doubtful that Meade, given his mental state at the time of the hearing, was able to aid in his own defense or understand the nature of the proceedings, much less knowing and voluntarily to waive his rights or stipulate to facts resulting in his conviction. A defendant's due process rights are violated if he is convicted while incompetent, Meade, at *9 (citing Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)).

Barajas-Gomez has proven the deficient performance of his ineffective counsel which prejudiced his trial, violated due process, and requires reversal. U.S. Const. Amendments. 5, 6, 14.

D. IAC-Failure To Present Entrapment Defense

This issue was raised in his Habeas Petition Ground Three on Page 44 of 59, Respondent's Answer Pages 9-16, and on the RBR Pages 15-17.

Certainly, "the duty to investigate is part of a defendant's right to reasonably competent counsel." Harris by and through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1355 (W.D. Wa. 1994) (citing U.S. v. Tucker, 716 F.2d 576, 583, n.16 (9th Cir. 1983)).

Refusal to allow petitioner to put on entrapment defense constituted unreasonable application of federal law as it violated his "right to present a defense, complete and meaningful to the jury under the principles set out in Supreme Court cases, Cook v. Kernan, 948 F.3d 952,

977 (9th Cir. 2020).

Barajas-Gomez argues he's proven deficient performance of his counsel, which prejudiced his constitutional rights to effective counsel, right to present a defense, and due process, requiring reversal.

2. Trial Court Judge Impermissibly Interfered With The Jury Verdict When, On Two Occasions When Presiding Juror Reported The Jury Couldn't Reach A Unanimous Verdict As To All Counts, The Court Directed Jury To Continue Deliberations Rather Than Granting A Mistrial

This issue was raised in the Habeas Petition Ground Two on Page 43 of SA, see Exhibits B, D, and G, Respondent's Answer Pages 16-21, and on the R&R Pages 17-21.

We found impermissible judicial coercion in Jiminez principally because the judge failed to remind the jurors of their duty not to surrender their sincerely held beliefs while at the same time making it clear that he wished them to return a unanimous verdict. Jiminez v. Myers, 40 F.3d 976, 980-1 (9th Cir. 1994). In Jiminez we held that under the totality of the circumstances, a trial judge's actions amounted to judicial coercion where the judge twice inquired into the jury's numerical split after they had declared they're deadlocked. Id.

An Allen charge is traditionally understood as an instruction to work towards unanimity by considering the views of others when a jury has reached an impasse in its deliberations. Rodriguez v. Marshall, 125 F.3d 739, 750 (9th Cir. 1997).

Barajas-Gomez herein proves this impermissibly coercive effect on the jury by the trial court judge violated his right to a fair trial as required by the Sixth Amendment requiring reversal.

ARGUMENT WHY CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED

Pursuant to Fed. R. App. 22, Barajas-Gomez has made a substantial showing of the denial of a constitutional right, IAC and denial of a right to a fair trial under the Sixth Amendment. The Court of Appeals will grant a COA since there's a substantial showing of multiple denials of constitutional rights 9th Cir. Rule 22-1 (d); Fed. R. App. P. 22(b); Rules Governing Section 2254 Cases, Rule 11(a); 28 U.S.C. § 2253.

The standard to obtain review is lower than that required for a petitioner to succeed on the merits of his petition. Lambright v Stewart, 220 F.3d 1022, 1024-25 (9th Cir. 2000). To satisfy this lower standard, a petitioner must show reasonable minds could debate over the resolution of the issues or that questions raised in the petition deserve further review. Allen v. Ornoski, 435 F.3d 946, 951 (9th Cir. 2000).

Barajas-Gomez has made a substantial showing of the denial of his constitutional rights requiring a COA issue here. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

IV. CONCLUSION

Barajas-Gomez is herein entitled to a COA-Certificate of Appealability, 28 U.S.C. § 2253(c), since he's proven a violation of his substantial constitutional rights at trial.

Dated this 25 day of July, 2024.

Jose Gomez

Jose Barajas-Gomez

Appellant, Pro Se

APPENDIX E

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court Western	District:
Name (under which you were convicted): Jose G. Barajas/Gomez	Docket or Case No.: 3:22-cv-05897-MJP-MLP
Place of Confinement: MCC/TRU (Monroe Correctional Complex/Twin Rivers Unit)	Prisoner No.: DOC # 422638
Petitioner (include the name under which you were convicted) Jose G. Barajas/Gomez	Respondent (authorized person having custody of petitioner) v. Dept of Corr' MCC/TRU Superintendent Dan White
The Attorney General of the State of: Washington	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Washington State Thurston County Superior Court
2000 Lakeridge Drive SW Olympia, Wa., 98502

(b) Criminal docket or case number (if you know): #19-1-00428-34

2. (a) Date of the judgment of conviction (if you know): March 3rd, 2020 (and) March 4th, 2020

(b) Date of sentencing: May 28th, 2020

3. Length of sentence: 109.5 months w/x2 29 months ran concurrent

4. In this case, were you convicted on more than one count or of more than one crime? Yes No

5. Identify all crimes of which you were convicted and sentenced in this case:

Count I Attempted ROC 2° Not Guilty

Count II Attempted ROC 2° Guilty

Count III Communication w/a Minor for imoral purpose Guilty

Count IV Communication w/a Minor for imoral purpose Guilty

the above was from March 4th, 2020; I should note that the day prior was
the first verdict return March 3rd, 2020 and Count II was also not guilty

6. (a) What was your plea? (Check one)

(1) Not guilty (3) Nolo contendere (no contest)
 (2) Guilty (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

I have never faulted to my Not Guilty to any of the charges, it was my attorney ... who did against my instructions...

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: Wa/St Court of Appeals Division II

(b) Docket or case number (if you know): 56562-5-II

(c) Result: Denied

(d) Date of result (if you know): June 9th, 2022

(e) Citation to the case (if you know): "Gomez does not present competent evidence of unlawful restraint...dismissed as frivolous.."

(f) Grounds raised:

Multiple counts of Ineffective Assistance of Counsel...of both trial and assigned appellate counsel... trial counsel was retained (waste of money) involving failure to object, secreting of evidence from the jury..

Multiple acts of Abuse of Discretion by the trial judge, interferring with the verdict return of the jury and prejudicing Gomez... failure to call a mistrial on the perjury of the presiding juror...

(g) Did you seek further review by a higher state court? Yes No

If yes, answer the following:

(1) Name of court: Wa/St Supreme Court aka Temple of Justice

(2) Docket or case number (if you know): 101033-8 S.Ct

(3) Result: Denied

(4) Date of result (if you know): Aug 26, 2022 & 11-9-2022

(5) Citation to the case (if you know): Denied (erroneously)

(6) Grounds raised: Multiple grounds of IAC in re both trial and of assigned appellate counsel, secreting evidence, failure to object and failure to motion for mistrial(s)... Abuse of discretion by trial judge and Constitutional sentencing issue ...

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: was told that my PRP was to be exhausted in the Districe Court before going to the U.S. Supreme Court

(3) Date of result (if you know): n/a

(4) Citation to the case (if you know): n/a

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Wa/St Court of Appeals Division II

(2) Docket or case number (if you know): #54766-0-II

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: Motion to Recall Mandate Terminating appeal..

(5) Grounds raised: assigned appellate acted against my direct instruction not to file the action and to include my additional appeal issues ans assigned appellate counsel refused and proceeded against/over my instruction not to...

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes No

(7) Result: Denied

(8) Date of result (if you know): December 27th, 2021

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: Washington State Supreme Court
- (2) Docket or case number (if you know): 101033-8
- (3) Date of filing (if you know): Sept 9th, 2022
- (4) Nature of the proceeding: 'Objection to a Commissioners Ruling/Denial and Request for a En Banc Tribunal Review'
- (5) Grounds raised: _____

All the same grounds presented herein and this filing I did send the state supreme court my entire PRP complete w/all of the exhibits A through K; as that way I could be sure that I did send everything that I could for review... though, I dont think they bothered to review the exhibits as they say that I did not sned any credible support...

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No nothing that I was allowed to particiapte in...

(7) Result: DENIED

(8) Date of result (if you know): November 9th, 2022

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court: _____
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): _____
- (4) Nature of the proceeding: _____
- (5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: n/a

(8) Date of result (if you know): n/a

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes No

(2) Second petition: Yes No

(3) Third petition: Yes No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

my AAP refused to include valid appeal issues in my direct and only
persued the frivolous issue he wanted, telling me to file a PRP, I did

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: RTC = Retained Trial Counsel... DPA = Deputy Prosecuting Attorney

IAC = Ineffective Assistance of Counsel... PITA = 'pain in the hee-haw' :) sorry

IAC/RTC' violations are not limited to, but, include, RTC' refusing to follow
my instruction to accept the jury's first verdict/offering of "Hung" on counts I
and II (and) guilty on counts III and IV; RTC' failure to move for a mistrial as
the trial record shows that the presiding juror did deliberately lie to the court
and present false verdict return forms to the court;

This is a complicated issue, as such, I have attached additional pages in order
to explain thoroughly, making references to the trial record and I have supplied
exhibits A through K, Jury questions, Transcripts and verdict return forms...

(b) If you did not exhaust your state remedies on Ground One, explain why: PLEASE see next pages ...

(polite fyi, the following pages eg details ground(s) and are directly from
my PRP that was denied in the state supreme court... deliberately multi-tasking
the pages, in order, that I procure that each issue herein was exhausted at the
state level, thanks, sorry to be a PITA...

discussion of ground continues....

1
2 Grounds for Relief

3 IAC/RTC This issue of IAC does intertwine w/abuse of discretion
4 by the trial judge and prosecutorial misconduct, Gomez does believe this
5 court will identify the responsible entity(ies)...all, of which, violated
6 Gomez' rights, not limited to, Due Process, 6th Amendment and the Equal
7 Protection of the Law(s)...

8 In short... late in the day on Mar 2nd, 2020; after precarious jury
9 instructions, later to be addressed, the jury was instructed by the court
10 per VRP of Mar 2nd, 2020 (Vol-2) pg 753, lines 8-10 and 19-25:

11 'The Court: It is important that you make your decision consistent
12 with the instructions that I have given you... So, once again, even
13 though you've heard the instructions and you've heard closing argue-
14 ment you are instructed to go to the jury room, select a presiding
juror and then leave to return tomorrow morning. This is because of
the lateness of the hour today...'

15 The record shows that there were two days of deliberations, March 3rd
16 and March 4th, of 2020; also, that there were four questions presented to
17 the court from the jury... two on each day... all four jury questions are
18 herein included as Exhibits A, B, C & D...

19 Exhibit A: jury question #1, Mar 3rd, 2020 at 11:28 am "Can we see a
20 clear up-close view of the contents of exhibits 15 & 16 ?"; the judge wrote
21 on the response form "The jury will be brought into the courtroom to view
22 exhibits 15 and 16..."... though, in the record it shows that the judge said
23 per VRP of Mar 3rd, 2020 (Vol 3) pg 765 ln 19 through pg 766 ln 9:

24 "The Court:...they cant see them all And so I will allow the baliff
25 to play those two exhibits using the equipment here in the court
26 room with no one else present, just the baliff anf the jurors And
27 they can view those documents as they are being played. I will allow
the baliff to play those two exhibits up to three times, if that's
requested and to pause if requested..."
28 there were no objections from either counsel... Gomez ask's the court...

Grounds for relief
(cont)

IAC/RTC : (cont) court, is it 'abuse of discretion' by the trial judge or anyother constitutional violating, for the judge to have placed such 'limitations' upon the jury's review of the evidence presented and which the jury requested to review ? Also, did RTCs performance deficient due to failing to object to the limitation ?

Exhibit B: jury question #2, Mar 3rd, 2020; at 4:37 pm, "We have agreement on 2 charges. We are hung on 2 charges. How do we proceed ?"; the judge entered into a colloquy discussing how to respond to jury question #2 and the VRP of Mar 3rd, 2020, Vol #3, pgs 767 through 776, the judge, DPA and RTC do discuss how to respond to the jury' 2nd question... the following transpired, Gomez did 'cherry-pick' through the pages detailing pertinent excerpts from the 3 parties, though, in effort to assist, Gomez has included the transcripts of those pages herein as exhibit E...

Pg #767: The Court: "The baliff has informed me that the jury has a question. I will read the question and then hand it to the clerk if you want to see it. The jury's question is this: 'We have agreement on two charges. We are hung on two charges. How do we proceed?'"

Mr Carpenter: "Your Honor, I dont need to see the question."

The Court: "Are you ready to propose a response or do you need a few minutes with your client?"

Mr Carpenter: "Can I talk to my client?"

The Court: "Please."

This is another example of RTC' (carpenters) deficient performance, he does not even consider communicating with his client (until) after the judge reminded RTC that it would (basically) look good for the record (and) good example where the court interpreters can verify that RTC was not explaining matters to Gomez and the interpreters voiced concern to Gomez...Gomez did...

1
2 Grounds for Relief
(cont)

3 ...repeatedly ask that RTC do what will get him the least amount of DOC
4 incarceration and as little registering as a sex offender as possible and
5 that he would prefer to take the smaller charges, rather than take the chance
6 on being found guilty on the larger charges...

7 However, per the interpreters he/RTC "...was not doing anything for you
8 and you may wish to ask why..." there was talk of 'firing' RTC and replacing
9 him w/an attorney who would communicate/explain things accurately w/Gomez
10 and Gomez asks this court to assist Gomez in obtaining a court investigator
11 to obtain statements from all three interpreters...

12 Pg #767 (cont) VRP of Mar 3rd, 2020, Volume #3...exhibit E...

13 The Court: "Ms Zhou (DPA), do you want to see the note?"

14 Ms Zhou: "No, Your Honor. Thank you" The Court: "Ms Zhou"

15 Ms Zhou: "Your Honor, I think I do not need to see the note, but
16 the state does have a response. I think given how long the jury
17 has deliberated, its appropriate to have the foreman to come in
18 to the courtroom and maybe just inquire as to whether---whether
19 any more time spent deliberating on the two counts that they're
20 hung, whether that would be [pg #768] helpful to them to come
21 to a verdict And I guess if the foreman's answer is no---"

18 The Court: "Presiding juror"

19 Ms Zhou: "Yes, Your Honor, that's what I meant, presiding juror. I
20 think if the answer is yes, my proposal is they keep deliberating
21 but if the answer is no, I guess we will address it at that time"

21 At this time Gomez was under the understanding that RTC/carpenter was to
22 let the court know that the verdict was going to be Not Guilty on counts I &
23 II and Guilty on counts III & IV, per the interpreters... *I want to take it*

24 The Court: "Thank you. (Ms Zhou). Mr Carpenter."

25 Mr Carpenter: You know, I'm not sure what the court's practice is,
26 how long to keep them in back there. Some judges say, you know,
27 keep trying, bring them back in the morning. But if it's usually
28 a day here and then we ask them, I'm fine with that. I'm fine
with the proposal by the state."

1
2 Grounds for Relief

(cont)

3 Pg #768 (cont) VRP of Mar 3rd, 2020, Volume #3...exhibit E...

4 The Court: "So you agree with the proposal of the state?"

5 Mr Carpenter: "Yes, Your Honor"

6 The Court: "Or do you propose something differant?"

7 Mr Carpenter: "The only thing I would propose is read the
8 instructions and I dont think we can tell them anything else
9 So, you know, usuallym I've had judges say refer to the inst-
10 ructions. But, I think it's a good idea what the state proposed
11 so I [pg #769] would agree to that."

12 The Court: "So that's the only proposal you have is the same
13 as the state?"

pg #769 lines 4 & 5

14 Mr Carpenter: "Can I refer one more time to my client?"

15 Gomez notes that at this time RTC/carpenter mumbled for a few seconds to
16 him/Gomez and the interpreters, w/a look of shock on their/her face, spoke
17 to Gomez, letting Gomez know that she did not actually hear Carpenter tell
18 her to ask Gomez anything, to merely just tell Gomez that things were going
19 well and they were going to continue to deliberate...

20 Mr Carpenter: "Your Honor, we'd prefer you just refer them to
21 your instructions." pg #769.. lines 7 & 8

22 Gomez notes for the court that, RTC/carpenter, never uses terminology of
23 'Mr Gomez asks' or 'Mr Gomez would...'; as that would dictate I/Gomez in full
24 knowledge of what was going on, that I/Gomez was specifically the entity who
25 was asking the court to 'Not accept the mistrial on the two class A felony and
26 to keep deliberating'... RTC/carpenters disregarding my/Gomez's request to take
27 the mistrial(s), increased my DOC incarceration from 9-12 months to 146-194
28 months AND put me on Life Community Custody, in lieu, of a few months AND it
made me a class A felon, in lieu, of the class C that I would have only had
from counts III and IV... in other words, in stead of being only found guilty
to counts III and IV (class C) w/am available sentence range of 9 to 12...

1
2 Grounds for Relief
(cont)

3 ...months, which would have basically been 'time served' as I had been
4 in the county for a period of time and/or it would have been converted to
5 'home monitoring' or SOSSA and I'd only had temporary C.C..

6 But, as RTC/carpenter disregarded my request to TAKE THE JUDGES AND THE
7 PROSECUTORS OFFER OF A MISTRIAL ON COUNTS ONE AND TWO AND GUILTY TO COUNTS
8 THREE AND FOUR, it increased my/the felonies to two class A's and two class
9 C's, to an available standard sentence range of 146 to 194 months (75% as
10 counts I & II were 'Attempted!') and LIFE community custody... PLEASE see my
11 declaration, Declaration of Gomez, Exhibit F...

12 Pg #769 (cont) VRP of Mar 3rd, 2020, Volume #3...exhibit E...

13 The Court: So the standard instruction that I would typically
14 provide is to reread the instructions and continue to delib-
erate. Is that what you're requesting that the court do?"

15 Mr Carpenter: "Yes, your Honor"

16 The Court: "And so you're opposed to the state's proposal?"

17 Mr Carpenter: "Yes, Your Honor. As far as I -- we've had no -- I
18 mean, the jury has not indicated they're hung now, but they did
not indicate one way or the other if they thought further delib-
eration would be of assistance. So---."

19 The Court: "SO I'M SORRY TO JUST BE CONFUSED, BECAUSE IT SEEMS
20 LIKE WE'RE GOING BACK AND FORTH. THE NOTE SAYS WE ARE HUNG ON
TWO CHARGES. THATS WHAT THE NOTE SAYS."

21 Mr Carpenter: "Right" [end pg 769, begin pg 770] exhibit E...

22 It appears that RTC/carpenter did completely 'flip' what I/Gomez did
23 make very clear, that if the court & prosecutor were allowing a mistrial
24 on counts I & II, that that would be the best thing, even the judge did
note his confusion in re RTC's flip/flopping...

25 The Sixth Amendment guarantees to me/Gomez the assistance of counsel
26 at every pertinent stage of trial, I did not surrender entire control to
27 RTC for the Sixth Amendment McCoy v Louisiana 138 S.Ct 1500 (2018).

1
2 Grounds for Relief
3 (cont)

4 To establish sufficient prejudice to overcome procedural default
5 w/an IAC claim, a petitioner must show a "reasonability probability"
6 that, but for counsels error(s), a differant result likely would have
7 occurred, Gomez contends that RTC did exactly that..."A petitioner does
8 not have to establish, however, that counsels error 'more likely than not
9 altered the outcome of the case'; Ege V Yukins 485 F.3d 364 (Ca 6 2007);
10 in Gonez' case the result would have been differant...

11 Pg 770 (cont) VRP of Mar 3rd, 2020, Volume #3... exhibit E...

12 The Court: So the state has proposed that the court bring in the
13 presiding juror and ask the presiding juror a pretty standard
14 question, something to the effect of: Do you believe that within
15 a reasonable period of time, the jury will reach verdicts on all
16 charges? And then depending on what the answer is, we'll address
17 that further. Thats what was proposed by the state,"

18 Mr Carpenter: "Okay"

19 The Court: "Are you in agreement with that proposal?"

20 Mr Carpenter: "All right, Your Honor, We agree with that proposal."

21 [the judge remarks and takes a very brief recess]

22 The Court: "Good afternoon juror number one" [ends pg #770]

23 Pg #771 VRP of Mar 3rd, 2020, Volume #3... exhibit E...

24 Juror 1: "Good afternoon"

25 The Court: "Juror number one, are you the presiding juror?"

26 Juror 1: "Yes, I am"

27 The Court: "I have a question for you. It is important that you
28 answer only my question and any follow-up questions that I have
They will all be yes-or-no questions."

Juror 1: "Okay" The Court: "And thats the only answer that I want
you to provide"

At this point the court atmosphere seemed to have taken a 'thickness'
and even the interpreters were letting me know that something was a-miss
and juror #1 had a concerned look on her face as if she had or was about...

1
2 Grounds for Relief
(cont)

3 ...to do something wrong and that the judge was pre-warning her not
4 to...even the interpreters were looking at the judge like they were
5 afraid of something...

6 As has been repeatedly emphasized, the words that a judge says, most
7 particularly to a jury, are extremely important. It is axiomatic..."that
8 jurors are presumed to follow the courts instructions" U.S. vs Espinosa
9 585 F.3d 418, 429 (8th Cir 2009)

10 I understand that the Supreme Court has explained that "the influence
11 of the trial judge on the jury is necessarily and properly of great weight
12 and jurors are ever watchful of the words that fall from him" Bollenbach vs
13 U.S. 326 U.S. 614, 626, 14 S.Ct 919, 38 L.Ed 841 (1894).

14 Pg #771 (cont) VRP of Mar 3rd, 2020, Volume #3, exhibit E...

15 The Court: "And thats the only answer I want you to provide
(the judge paused) Juror number one, is there a reasonable
16 probability of the jury reaching an agreement within a reason-
able time as to all counts"

17 Juror 1: "I'm not sure. If I have to guess, I'd say no."

18 The Court: "But you're not sure?" Juror 1: "I'm not sure"

19 The Court: "Thank you, You may go with the baliff"

20 One truly had to be in the courtroom to feel the intense feeling that
21 juror number one had, as if she was a child being scolded, as if she thought
22 that she had done something wrong, or even as if she was 'ok' being coerced/
23 intimidated, but that she didnt know how to do what was being asked of her
24 and the interpreters were in as much shock as anyone...

25 Juror one, stated 'No', but, after being 'pushed' by the judge, she
26 second guessed herself and knowing that she can not see the future, nor
27 speak for another juror, she said, she couldnt be sure...

Grounds for Relief
(cont)

Pg #771 (cont) VRP pf Mar 3rd, 2020, Volume #3, exhibit E

[the presiding juror left the courtroom]

The Court: "Ms. Zhou"

Ms Zhou: "I think this is unique. Normally, its one way or the other. Your Honor, in light of the presiding juror indicating if she had to guess [end pg 771, begin pg 772] the answer would be no. I think given the time we've spent in the courtroom -- which does span over a week -- however, with the amount of time we actually spent with testimony, I guess I would just bring the jury in and just go from there with regards to the two counts that they do have a verdict on and then because they're hung on the other two, I guess just declaring a mistrial on the other two counts.

I think I would be -- I will say, I think I would be in a differant position if the case had lasted longer and there were more testimony and more days of testimony, but given the amount time we've had and amount of time spent deliberating, in essence they've spent the whole entire day deliberating, thats the basis for the states position."

At this point Gomez is even more of the understanding that the jury is saying 'Hung' on the two more serious counts, I and II, the class A felonies and the ones that increase DOC incarceration time TEN FOLD and invokes Life time CC (community custody)... it appears that even the state/DPA is asking for a mistrial on counts I and II and to go with guilty's on counts III and IV; which Gomez asked RTC to let the judge know was what Gomez was willing to go with then and there...

In the pages to follow, it appears that counsel for the two parties did 'switch' sides, as the State/DPA is working for Gomez basically seeking the mistrials on counts I & II; and RTC for Gomez is seeking to keep deliberating for an increased incarceration, that did result...

Pg #772 (cont) VRP of Mar 3rd, 2020, Volume #3, exhibit E

The Court: "I appreciate that, and time is certainly one factor. I'm concerned because of the lack of certainty in the presiding juror's answer, which, as you indicated, Ms Zhou, is rare....."

1
2 Grounds for Relief
(cont)

3 Pg #772 (cont) VRP of Mar 3rd, 2020, Volume #3, exhibit E...

4 The Court: (cont)"....Typically, when we get a note that says
5 the jury is hung, which is what the note says, typically the
6 answer would be -- the answer to the question is that no,
7 there's not a reasonable probability that the jury could reach
8 a verdict on all counts. But that's [end pg #772]

[begin pg #773] not what we have necessarily. So the state
9 is prepared to a mistrial as to those two counts (I & II) that
10 the jury is struggling with now? Is that what I'm hearing?"

11 Now the court has engaged in disregarding the jury's unequivocal and
12 accurate question of "We are hung on two counts, How do we proceed", there
13 is no part of the question that asks the court if its OK to be hung or any
14 other instruction, the jury stated they were HUNG and basically what do we
15 (the jury) do next, the courts proper response would have been to write the
16 exact same thing the judge wrote on the jury's last (fourth) question, but
17 the judge did not do that... see Exhibit D...

18 The basis for the courts/judges change in terminology, is due to the
19 court now understanding that 'he' has a GUILTY on one of two leading class
20 A felony charges and the judge knows that at least one of the two leading
21 charges is required for sentencing purposes...

22 Pg #773 (cont) VRP of Mar 3rd, 2020, Volume #3, exhibit E...

23 Ms Zhou: "I appologize your Honor, I'm just trying to think"

24 The Court: "I appreciate that. These are not easy decisions to
25 make, which I know. So I'll give you a little bit of time, you
26 know, to really think about that. And I'll hear from Mr Carpen-
27 ter. It is not my intention to sway the parties one way or the
28 other. We have some options.

One option is to indicate to the jury to reread the instru-
ctions and continue to deliberate. A nd another option is to
bring in the jury, accept their verdicts, if they're proper, on
two counts and declare a mistrial on the other two counts, I
think those are the only two options that are available. But I
just note that equivocation in the record."

Here the judge makes some queer excerptions, such as, "if they're...

1
2 Grounds for Relief
(cont)

3 "...If they're proper...", esoterically referring to the jury's finding
4 of guilty on two counts, insinuating that 'guilty' findings are 'proper'
5 and another precarious excretion of the judge is 'bring the jury in and
6 accept their verdicts'; "if they're proper"...

7 Supreme Court precedent spanning more than a century permits a trial
8 judge to instruct a deadlocked jury about its duty to deliberate, but bars
9 the judge from trying to force or coerce a verdict, SEE Allen vs United
10 States 164 U.S. 492, 17 S.Ct 154, 41 L.Ed 528 (1896); in Gomez's case the
11 judge violated Gomez's rights (as) when the trial judge discovered that the
12 judges efforts to influence the jury to reconsider their finding of being
13 'Hung' on counts I & II and now the jury were willing to find guilty on
14 count II, which is an exact charge as count I (and) the judge only needed
15 the jury to change their finding on at least one of the two class A felony
16 charges (count I & II) for sentencing purposes, now the judge was satisfied
17 and ready to consider verdict return 'proper'...

18 Pg #773 (cont) VRP of Mar 3rd, 2020, Volume #3, exhibit E

19 Mr Carpenter: "Your Honor, I need a few minutes to talk to my
20 client. I understand -- I just want to give him the options
and what I think."

21 The Court: "I appreciate that."

22 Mr Carpenter: "Can I get five minutes? I..." [end pg 773]

23 Pg #774 VRP of Mar 3rd, 2020, Volume #3, exhibit E

24 Mr Carpenter: (cont) "...I dont think you have to be on the bench
while we do. Maybe we could just break for a few minutes and then
come back."

25 The Court: "Absolutely. So why don't we take a break and go back
on the record at 4:30."

26 At this point Gomez believed that the trial WAS OVER AND THAT VERDICT
27 RETURN HAD FOUND guilty on only counts III & IV and that counts I & II

1
2 Grounds for Relief
(cont)

3 were 'hung' and that all that was left was sentencing on the two lesser
4 serious counts (III & IV), which at a available sentencing range of 9 to
5 12 month (class C felonies)... Gomez had no idea that his RTC, assisted
6 by the trial judge had now influenced the DPA to change her mind and not
7 propose any mistrials anymore, WHY !!!

8 Pg #774 (cont)VRP of Mar 3rd, 2020, Volume #3, exhibit E...

9 [back from recess]

10 The Court: "Mr Carpenter"

11 Mr Carpenter: "Your Honor, if Mr Barajas/Gomez -- if there
12 is a chance they could arrive on a decision in due course, we
13 would prefer they try it in the morning. So we would prefer
14 they continue to deliberate. AND it was equivocal, her answer
so, you know, we dont want them to know we're the ones asking
them to continue, obviously, but if theres a chance -- a reason-
able chance, then I think thats the standard, then we would
like them to continue deliberating."

15 The Court: "Ms Zhou"

16 Ms Zhou: "Your Honor, I thought about this somemore and I agree
with Mr Carpenter."

17 The Court: "Very well, I will respond in writing to the jury
question by indicating that the jury should return tomorrow
18 Obviously, they'll be [end pg #774] #775 begins] allowed to
go home today, return tomorrow, reread the instructions and
continue to deliberate. Any objection to that?"

19 Ms Zhou: "No, your Honor, thank you"

20 Mr Carpenter: "Your Honor, in that instruction, do you put some
21 thing as long as there's -- you dont limit that anyway or do you
say as long as theres a chance, we just wait for them to notify
if they cant decide?"

22 The Court: "Indeed"

23 Mr Carpenter: "All right. Thats fine, Your Honor"

24 At this point I/Gomez is basically in shock, as the interpreters have
25 been trying to keep me up on what was going on and I couldnt believe that
26 RTC/Carpenter was disregarding my requests that he let the court know that
27 I was in complete agreement w/the DPA/Zhou, in that we should respect the...

1
2 Grounds for Relief
(cont)

3 ...respect the jurors notification that they were 'Hung' on counts
4 I and II and guilty on counts III and IV; for the court and RTC ongoing
5 effort to innuendo to the jury that they have done something wrong by them
6 being 'Hung' on counts I & II and only guilty on counts III & IV, the jury
7 now believes that they must find additional guilty finding(s) and it seems
8 that the judge has teamed w/RTC against the DPA !!!

9 Pg #775 (cont), VRP of Mar 3rd, 2020, Volume #3, exhibit E...

10 The Court: "I'm struggling because normally at the end of the
11 day, I would give them written instructions regarding all of
12 their communications, but I dont think its necessary to do
13 that. So I'm considering indicating, 'You may leave for the
14 day now consistent with my prior instruction to you' And then
I'll give them the opportunity to decide what time to come in
tomorrow to begin their deliberations again and then reread
the instructions and continue to deliberate. Does that make
sense?"

15 Ms Zhou: "Yes, Your Honor" Mr Carpenter: "Yes, Your Honor."

16 Pg #776, basically is the judge concluding the day, by telling counsel
17 that the baliff will deliver the/his written response to the jurors in re
18 'jury question #2' herein attached as exhibit B

19 Gomez asks this court to please make note of the exact terminology the
20 judge wrote on the jury question (Ex-B) jurys question #2

21 "We have agreement on 2 charges. We are hung on 2 charges. How
do we proceed?"

22 "The jury should leave for the day keeping in mind all of the
23 courts instructions regarding your conduct. You may decide what
time to begin again tomorrow. Please begin tomorrow by rereading
the instructions and continue to deliberate. 3-3-20 4:37pm

24
25 At this point, I/Gomez was extremely concerned & confused, even the new
26 interpreter (Anita Ahumada) was noting to me that my attorney was not doing
27 anything to help me and that he didnt do what I asked him to do...that...

1
2 Grounds for Relief
(cont)

3 ...it was if RTC completely ignored my request to him to notify the
4 court that I was completely willing to accept the two guilty findings
5 on counts III and IV and the mistrials on counts I and II, that while
6 I/Gomez did believe that the two girls were 'hookers' and were playing a
7 roll that they used for hustling, I/Gomez notes for the court that I was
8 guilty of soliciting for a hooker/prostitute; but, that at no time did I
9 go looking for under aged girls...

10 I did not even think it was possible as the Badoo format mandates that
11 users must be 18 years of age or older and the girls profile page shows them
12 laying on a bed, holding cash, making comments of how they/she was about her
13 'making the money' and other comments...

14 But due to how they were pretty good at making things out to be some
15 thing they were not, I thought that I had better just accept the guilty(s)
16 on counts III and IV, as they basically would not send me to prison and the
17 counts I and II could...

18
19 March 4th, 2020, began the second day of deliberations, having that the
20 jury's request for 'Hung' on counts I & II and guilty on counts III & IV was
21 not honored by the court and the jury were basically instructed by the court
22 that they had committed error and had to try again...

23 Pg #777, VRP of Mar 4th, 2020, Volume #3, exhibit E...

24 The Court: "Good morning, the baliff has provided to me a question
25 from the jury. The question is as follows: "Can the court provide
26 clarification about the defination of these terms as used in Instr-
27 uction 10: substantial step, preparation, conduct" AND I'll hand
28 the note to the clerk in case the parties want to look at it directly"

Ms Zhou: "I do not need to, Your Honor"

Mr Carpenter: "Just briefly, your Honor."
pg 18 of 59

Grounds for Relief
(cont)

Pg #777 (cont), VRP of Mar 4th, 2020, Volume #3, exhibit E...

The Court: "So I'll give counsel a moment to review instruction number ten, if you wish. Ms Zhou, do you have a proposed response?"

Ms Zhou: "Your Honor, I think my response would be for them just to reread the instructions. There's nothing else we can do."

The Court: "Mr Carpenter?" Mr Carpenter: "Your Honor, the defense agrees with that. I think adding anything besides what's in the instruction would be inappropriate."

The Court: "So typically, I would respond in [end pg #777] and [begin pg #778] this situation, "Please reread the instructions and continue to deliberate." However, because of what occurred yesterday, I'm thinking about responding by indicating that the court will not provide any further instruction and then reread the instructions and continue to deliberate. Any objection to that?"

Mr Carpenter: "Your Honor, I just object to the continue to deliberate. It's almost like if they're hung but you're telling them, right, that takes that away, so I would just object to that last part."

The Court: "Okay, So your -- you would agree to the court indicating that the court will not provide any further instructions please reread the instructions?"

Mr Carpenter: "Yes, Your Honor, I agree to that"

The Court: "Ms Zhou, are you agreed?" Ms Zhou: "Yes, your Honor"

The Court: "Counsel, if you'd review what I've provided, please"

Mr Carpenter: "That's fine, Your Honor, Thank you"

Ms Zhou: " Thank You" [end pg #778] [begin pg #779]

The Court: "So I will provide this to the bailiff. After it is provided to the jury, it will go with the clerk in the file. And we'll be in recess."

Gomez prays that the court is now able to see reversible error, as it is evident that the three parties eg RTC, DPA and the judge; have committed jury coercion, procedural errors and violated my 6th Amend right(s); as the record above shows, the judge admits that "...because of what occurred yesterday" and my RTC now admits that the repeated instruction to the jury for them to "continue to deliberate. It's almost like if they're hung but you're tell-

1
2 Grounds for Relief
(cont)

3 ...telling, right, that takes that away..." my RTC got real wishy/washy
4 with his speaking, the interpreters were with serious expressions on their
5 faces all throughout the proceedings...

6 Gomez notes that if it is now at this point inappropriate for the court
7 to have been repeatedly telling the jury that they must disregard their prior
8 findings eg of being hung and that they must 'return' and reread the instructions
9 and continue to deliberate, implying that they had committed some sort of an
10 error... then why was it appropriate for the court to have done it yesterday
11 in the judges written instructions???

12 Exhibit C: jury question #3, "Can the court provide clarification
13 about the definitions of these terms as used in instruction 10:
+substantial step +preparation +conduct" Mar 4th, 2020 10:29am

14 [judges response] "The court will not provide any further instruc-
15 tions. Please re-read the instructions" Mar 4th, 2020, 10:46am

16 The terminology of instructing the jury that they had to continue to
17 deliberate has been now eliminated, as noted in Allen, the judge is able
18 to instruct the jury in re its duty to deliberate, though, the judge may not
19 use it as means to coerce or influence the jury into believing that the jury
20 had committed error and must reproach their findings... at this point my RTC
21 would not or could not even look me straight in my face w/out showing sign of
22 his shamefulness and his guilt of having betrayed me...

23 [court rejourns from recess]

24 Pg #779 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E...

25 The Court: "The court has been informed by the baliff that the
26 jury has verdicts in this case. Do counsel wish to put anything
on the record before the jury comes in?"

27 Ms Zhou: "No Your Honor" Mr Carpenter: "No, your Honor"

1
2 Grounds for Relief

3 (cont)

4 Pg #779 (cont) VRP of Mar 4th, 2020, Volume #3. exhibit E

5 The Court: "We'll bring the jury in" [jury entered]

6 The Court: "Juror number one, are you holding the verdicts?"

7 Juror 1: "Yes, I am"

8 The Court: "Can you please hand those to the baliff. The court
9 will now publish or read aloud the verdicts..."

10 AT this point and all through page 780, the judge read into the record
11 the findings of the jury...'guilty on all four counts, guilty on all four
12 verdict forms; the judge finished reading the verdicts and explains to the
13 jury that the polling process will now transpire... all four verdict forms
14 Exhibits G, H, I and J

15 Pg #781, VRP of Mar 4th, 2020, Volume #3, exhibit E

16 The Court: "...so the clerk will now poll the jury."

17 The Clerk: "Juror number one, were these your verdicts?"

18 Juror 1: "Yes"

19 The Clerk: "Were these the verdict of the jury?"

20 Juror 1: "Yes" [the court will soon see that this was a false
21 statement to the court by the presiding juror
22 and should have immediately removed/replaced]

23 The Clerk: "Juror number two, were these your verdicts?"

24 Juror 2: "Yes, sir"

25 The Clerk: "Were these the verdicts of the jury?"

26 Juror 2: "Yes"

27 The Clerk: "Juror number three, were these your verdicts?"

28 Juror 3: "Yes"

The Clerk: "Were these the verdicts of the jury?"

Juror 3: "Yes"

1 The transpirings between the Clerk and the Jurors above was the exact
2 same between the rest of the jurors juror 4, juror 5, juror 6, juror 7,
3 juror 8, juror 9, juror 10... all through page #782 and half way through
4 page #783 of VRP Mar 4th, 2020, Volume #3, exhibit E...

5 The Clerk: "Juror number 11, were these your verdicts?"

6 Juror 11: "No"

1
2 Grounds for Relief
(cont)

3 The Sixth Amendment guarantees criminal defendants a verdict by an
4 impartial jury, Dyer vs Calderon 151 F.3d 970, 973 (9th Cir 1998). The
5 bias or prejudice of even a single juror is enough to violate that guar-
6 antee. Accordingly, [t]he presence of a single juror cannot be harmless,
7 the error requires a new trial without a showing of actual prejudice, Dyer
8 @ 973 (n2); also see U.S. vs Martinez/Salazar 528 U.S. 305, 120 S.Ct 774,
9 782, 145 L.Ed 2d 792 (2000)...

10 Challenges for cause are the usual means by which partial or biased
11 jurors should be eliminated. To disqualify a juror for cause requires a
12 showing of either actual or implied bias that is...bias in fact or bias
13 conclusively presumed as a matter of law, 47 Am. Jur.2d Jury §266 (1995).
14

15 Although, bias can be revealed by a jurors express admission of that
16 fact...more frequently, jurors are reluctant to admit actual bias and the
17 reality of their biased attitudes must be revealed by circumstantial evi-
18 dence , U.S. vs Allsup 566 F.ed 68, 71 (9th Cir 1977)...

19 Because determinations of impartiality may be based in large part upon
20 demeanor, the Supreme Court has 'typically accorded deference to the District
21 Court's determinations and reviews a court's findings regarding actual juror
22 bias for "manifest error" or abuse of discretion; see U.S. vs Alexander
23 48 F.3d 1477, 1484 (9th Cir 1995)...

24 In contrast, implied bias presents a mixed question of law and fact
25 which is relievable de novo, Dyer 151 F.3d @979... This is similar and/or
26 identical to the fact patterns at issue in my trial and the presiding juror
27 misconduct detailed herein... Please Reverse...

1 Grounds for Relief

2 (cont)

3 - Returning back to where juror #1 had just stated "No" and
4 all of their faces, seemed as if their balloon had popped; the look on
5 the interpreter looked relieved... I was not sure what was exactly going
6 on, but, I felt as if my RTC should have spoken with me, in order, that I
7 knew what was going on and for my input, RTC did not...

8 Pg #783 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

9 The Court: "Ladies and gentlemen, at this time, I'm going to
10 ask you to go with baliff to the jury room, and I will give
11 you further instruction."

12 (...jury left the courtroom)

13 The Court: "Counsel, based upon the polling that was conducted
14 but not completed by the court clerk, it appears that the jury
15 has not reached unanimous verdicts. Therefore, my proposal is
16 to hand the instructions and verdict forms back to the [pg 783
17 ends...pg 784 begins] baliff and ask the jury to continue to
18 deliberate consistent with the instructions that the court has
19 given the jury. But before I do anything in this unusual cir-
20 cumstance, I will hear from counsel. Ms Zhou."

21 Gomez notes two things for the court, first being that I/Gomez really
22 tried to get RTC/carpenter to communicate w/me, but, kept getting the brush
23 off and the interpreter was as astonished as I was, RTC never even tried to
24 discuss any of this w/me (and) after review of the record to follow, it is
25 apparent that RTC realizes that this case is going to be scrutinized and
26 that RTC had better start making it look like he was earning the hard earned
27 monies my wife and I paid him... if nothing else, to try and clean up all of
28 his deficient performances earlier in my trial...

29 Pg #784 (cont) VRP of Mar4th, 2020, Volume #3, exhibit E

30 Ms Zhou: "Your Honor, I agree with the courts proposal"

31 Mr Carpenter: "Your Honor, I would ask, just as when you talked
32 to the presiding juror 1 yesterday, you asked her a specific legal
33 question, if theres a reasonable possibility. I would like you to
34 add that, to continue deliberating if theres a reasonable possib-
35 ility there would be a verdict."

36 When I saw the look on the interpreters face and I asked her what was

1
2 Grounds for Relief
(cont)

3 ...what was going on, she explained that RTC had asked the court to have
4 the jury keep deliberating 'AGAIN' and I tried to have RTC stop and have
5 a recess so I could ask the court not to listen to RTC, but RTC just kept
6 brushing me off to stay quite...

7 We had a verdict, the jury had stated 'Hung on counts I & II and guilty
8 on counts III & IV and I told RTC/carpenter to please let the court know I
9 was in agreement with that, even though, I still believed that I was not in
10 guilt of any of the present charges, I though it best to take what was more
11 than likely the best that would happen... RTC refused to let the court know
12 what I had requested and RTC did his own thing...

13 Pg #784 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

14 The Court: "I'm not sure exactly what you are asking me to do.
15 So you agree that I should return the instructions and verdict
forms to the jury through the baliff?"

16 Mr Carpenter: "Yes, Your Honor"

17 The Court: "And you agree that they should continue to deliber-
ate. But you have a differant suggestion in terms of what the
court should say."

18 Mr Carpenter: "Yeah, AT the end -- and I dont have the instryc-
19 tion or the question that you asked the presiding juror, but I
think that language should be added to it. If there's a reason-
20 able -- I [end pg 784....begin pg 785] think the language was
something there was a reasonable possibility you can arrive at
21 a decision. Or I think -- I can't remember your exact language
that you used, Your Honor."

22 Gomez believes that one of the most egregious misconducts/inneffective-
23 ness acts that a defendants trial attorney can perform is to refuse and/or
24 fail to emphasize to the trial court his clients requests and to fail to
25 request mistrial after such egregious misconducts by the presiding juror
26 or to even ask that the presiding juror be questioned about why she did
27 deliberately mislead the courts record... such violations absolutely...

1
2 Grounds for Relief

(cont)

3 ...prejudiced me/Gomez in obvious and substantial ways; perhaps this
4 court can identify how many constitutional violations have transpired
5 during these proceedings... "It is clear that when trial counsel is aware
6 of juror misconduct, yet fails to advise the court or request the court
7 to voir dire the jury for possible prejudice this failure can constitute
8 ineffective assistance of counsel, Goven't of Virgin Islands vs Weather-
9 wax 20 F.3d 572 (3rd Cir 1994)...

10 Pg #785 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

11 The Court: "So the language that I used when questioning the
12 presiding juror after there was an indication that they could
13 not reach a decision was, "Is there a reasonable probability
of the jury reaching an agreement on all counts within a reason-
able amount of time

14 Mr Carpenter: "I would ask that you add that, if -- continue to
15 deliberate, if there's a reasonable probability, and the rest,
that you add that to your instruction."

16 The Court: "Ms Zhou"

17 Ms Zhou: "Your Honor, I understand where Mr Carpenter is coming
18 from; however, I don't believe it's necessary or appropriate at
19 this time, because I don't think it's an issue that we've heard
20 from the jury that they're hung again. It just sounds like the
21 last note they had for us just before they all came out was that
22 they were all unanimous on the verdict, and during the polling
23 process, it became clear that one of the jurors indicated that
24 that was not her verdict. And so I guess it is just -- I [end
25 pg 785...begin pg 786] I think it is a situation where the court
26 just advises them to continue deliberating until, I think, if we
27 get another note saying now they're hung again, and I think that
28 would be when we just take the presiding -- or ask the presiding
juror herself at that point whether or not she believed they will
come to a verdict, if there is a reasonable probability that they
will come to agreement within a reasonable amount of time.

But as of right now, the last indication that we have from the
jury, that wasn't the situation where they were hung, because
they said they were unanimous and so I guess I would just ask the
court to -- my proposal is just what the court initially proposed
which is simply asking them to keep deliberating."

The state efforts to simply ignore her first belief that due to the jury
sending 'out' word that the jury was 'hung' on counts I & II and especially

Grounds for Relief
(cont)

...that the jurys notification was met w/a an erroneous instruction that basically told the jury that they had erred and to 'continue to deliberate' but, possibly the most egregious 'cover-up' transpiring is the fact that the presiding juror (#1) did knowingly mislead the court by stating that the jury was unanimous in finding of guilty on all charges...

Pg #786 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

The Court: "So the court will not include language of a reasonable probability of reaching agreement within a reasonable amount of time at this time. I dont think it's appropriate now.

My concern right now is that the jury indicated it reached a unanimous decision when clearly it didn't. What I don't know is whether a juror in the jury room voted a certain way and now didn't, or I don't know [end pg 786...begin pg 787] what happened or whether the presiding juror somehow didn't think that the verdict needed to be unanimous. I'm guessing, because I don't know what caused this situation of the polling answer'..."

I/Gomez notes for the record that no one, RTC particularly, has efforted to obtain my input on the misconducts, apart from the interpreter discussing w/me what was going on and reiterating her concern that RTC was not "doing anything for you" (being me)... for the next many pages RTC ignores my request to be heard, not until the jury sent out their last (4th) question from the jury did RTC bother to try and make it look like he was actually communicating w/me and he could tell I was irked at him...

Pg #787 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

The Court: (cont) "...SO my concern right now is just that all of the jurors understand the unanimity requirement and that any verdict be consistent with that. That is my only concern right now. I'm not dealing with any other concerns. That being said, because this is an unusual situation, what I would like to is, I would like the parties the(?) confer regarding the exact language that the court should give to the jury at this point, under standing that I've already ruled that I'm not going to include language about a reasonable probability of reaching a decision within a reasonable amount of time. SO with that ruling...."

1
2 Grounds for Relief

(cont)

3 Pg #787 (cont) VRP of Mar 4th, 2020, Volume #3, Exhibit E

4 The Court: "...SO with that ruling, I'd like the parties
5 to confer, if they can, to reach an agreement on the
6 language. Mr Carpenter did you have a suggestion?"

7 Mr Carpenter: "Yeah, I'd like to put something on the record
8 your Honor." The Court: "Certainly."

9 Mr Carpenter: "Because without that language [end pg 787...
10 begin pg 788] it's almost as if the court is telling them they
11 have to come to a decision. Okay. That's the implication of your
12 words and that's not true, but that's the implication without
13 adding that language. The court is telling them they have to
14 agree. And that's why I think it's unfair to the defendant if
15 you dont add that language, because they dont have to agree.
16 So I want to put that on the record that that langiage, you
17 know, we feel should be added."

18 AT this point I /Gomez am doing all I can to remain calm, as earlier,
19 a few minutes ago I had tried, in my choppy (at best) english, to tell
20 RTC/carpenter that I was extremely up set, that if he was not going to do
21 what I asked that I wanted to fire him... even the interpreters did almost
22 chuckle hearing my 'english' (splang-lish)... if the situation was not so
23 serious they would have laughed...

24 It seems that RTC took a differant stance after my little outburst and
25 I think he is now trying to do something for me, but, it may just be another
26 tactic to generate misleading records... it seems that the 'language' that
27 he/RTC was asking to have put in the day prior, is no longer desirable to
28 him and he now doesn't want it in... all this discussion between RTC and
the judge should have transpired when the jury sent out its notice/question
asking how to proceed as they were hung on two counts and guilty on the
other two counts...though, at that time (yesterday) RTC/Carpenter certainly
had another agenda and was not even communicating w/me, let alone letting
the court know what I was requesting, or the trial would have been over...

Grounds for Relief
(cont)

...I reiterate that I believe RTC, my retained attorney was pushing his own agenda, against my request to accept the mistrial offered by the DPA when the jury first announced it being hung on counts I & II...

I understand that the Sixth Amendment guarantee of counsel does not demand error free representation, but it does mandate that I be represented by "counsel reasonably likely to render and rendering effective assistance", Vela vs Estelle 708 F.2d at 961 (Ca 5 1983)...

Pg #788 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E...

The Court: "Understood, So as I've indicated, the language that was proposed, I am not going to include. It is standard language used in a different situation than we have here. But the court is open to other language that might address Mr Carpenters concerns, but not the language proposed. This is why I think it might be helpful to have the attorneys confer regarding appropriate language in this situation that might address Mr Carpenters concern but is not the language that's to be used in a different situation.

So I will take a brief recess and allow the parties to confer. If they come up with an agreement, I will hear it. If the parties don't come to an agreement. I will hear if the parties have different suggested language. Court will be in recess [end pg 788]

Gomez contends that an unreasonable application of the law and/or court routine procedures exists "if the state court unreasonably extends a legal principal from our precedent to a new context where it should not apply" see Williams vs Taylor 529 U.S. 362, 146 L.Ed 2d 389, 120 S.Ct 1495 (2000); also RTC/Carpenter fell below the level of effective assistance by failing to request a 'cautionary' instruction from the judge to the presiding juror for her misconduct the day prior...Freeman vs Class 95 F.3d 639 (Ca 8 1996).

Pg #789 VRP of Mar 4th, 2020, Volume #3, exhibit E...

The Court: "Have counsel reached an agreement?"

Ms Zhou: "Your Honor, Mr Carpenter and I have conferred on the language. I dont believe we have an agreement."

1
2 Grounds for Relief

3 (cont)

4 Pg #789 (cont), VRP of Mar 4th, 2020, Volume #3, exhibit E...

5 The Court: "Okay, so Ms Zhou, what do you propose?"

6 Ms Zhou: "Your Honor, my proposal is what the court had initially
7 proposed, just to advise the jury to carefully reread
8 all the instructions and I believe Your Honor also indicated
9 continue deliberating. And speaking with Mr Carpenter, I understand
10 his concern; however, I don't believe we're in a situation,
11 based on all the things that's happened so far in the
12 deliberation process, where the jury doesn't know that it's
13 okay to be hung. Because I think they do know that since,
14 yesterday, the first question was what happens if we're hung
15 on two counts and we have a verdict on two (pause)..."

16 Gonzalez notes for the record, a) Ms Zhou errs, the 1st question from the
17 jury yesterday was not about being 'hung', it was the jury requesting to
18 review exhibits 15 and 16 (and) the 2nd question from the jury yesterday
19 was, in fact, "We have agreement on 2 charges. We are hung on 2 charges.
20 How do we proceed?"; mistating which question may be 'harmless', though,
21 excluding the complete jury question, especially the sentence where the
22 jury is simply asking how to 'proceed'...

23 Absolutely Ms Zhou errs in asking the trial court to believe that the
24 jury is now aware that it is 'okay' to be hung after what transpired yes-
25 terday (as) due to the repeated instructions from the court, the jury is now
26 gun-shy and believes that they erred and should not be hung on both counts
27 I & II, thus the change to guilty on count II...

28 Pg #789 (cont) VRP of Mar 4th, 2020. Volume #3, exhibit E

29 Ms Zhou: (cont) "...So I think the idea that they understand
30 that it could potentially be a hung jury on some counts, I
31 think they're mindful of that, because that was the first
32 thing that came to their mind yesterday.

33 So given everything that's happened, the state's [end pg 789]
34 [begin pg 790] request would just be for the court to propose,
35 I guess, the response of what the court had initially proposed
36 Thank you."

37 The Court: "Mr Carpenter."
38

1
2 Grounds for Relief

(cont)

3 Pg #790 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

4 Mr Carpenter: "Your Honor, you've already ruled against what
5 I suggest. I haven't changed. But I would like to hear what
6 you're going to give. I don;t think you should say continue
7 to deliberate. I'd say read the instructions. You don't have
8 to put continue to deliberate at the end. I'm not sure if you
9 were going to do that or not."

10 The Court: "So, Mr Carpenter, do you have a differant proposal
11 other than the language of reasonable probability? Do you have
12 a differant proposal for the court to consider at all?"

13 Mr Carpenter: "No, Your Honor, But can I hear what you're think-
14 ing of doing? You know, I/m not sure what -- I may have a sugg-
15 estion for a slight modification of what you are planning on
16 doing right now."

17 I/Gomez seems to hear a totally differant Carpenter/RTC, from the day
18 prior, more than likely from my serious tone in my behaved outburst(s) to
19 him in re his not telling the court what I asked him to and his doing his
20 own agenda, his turning down the mistrial on the two serious counts that
21 hold serious prison time and now RTC seems to making an effort to perform
22 as a reasonable attorney, too little too late... as RTC already allowed the
23 trial court to negatively influence the jury by repeatedly telling them to
24 keep/re-deliberate, even after being hung...

25 I/Gomez appologizes to the court for including so much of the verbatim
26 transcrip(s) directly into this brief, though, due to the significant effect
27 the parties & the judge had in this ground for relief, it was necessary and
28 the court will soon see the need...

Pg #790 (cont)

29 The Court: "So I appreciate that and I'm happy to give you my
30 thoughts. I asked both counsel to give me your thoughts. I
31 asked both counsel to give me your proposals. Frankly, neither
32 one has. I just want the record to be clear that I'm giving
33 that offer to folkes to propose language. [end pg #790]

34 [begin pg #791 The Courts proposed language is as follows
35 "Please reread the court's instructions and deliberate con-
36 sistent with those instructions."

37 Mr Carpenter: "I dont have any suggestions to that, your Honor..."

1
2 Grounds for Relief

(cont)

3 Pg #791 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E...

4 Mr Carpenter: "...I think the defense had clear what language
we wanted, so I don't have any comment on that language."

5 The Court: "Ms Zhou, any suggestions or objections with that
language that I've just read?"

6 Ms Zhou: "No, your Honor"

7 The Court: "So what I'd actually like to do is bring the whole
jury back in and orally give that instruction to the jury and
then send them out. Any objection to that?"

8 Ms Zhou: "No, Your Honor" Mr Carpenter: "No, Your Honor"

9
10 Gomez notes that his RTC/carpenter did voice some of my/Gomez's request
11 in re not instructing the jury to continue to deliberate as it gives false
12 innuendo/impression of the jury having erred in their prior actions, though
13 RTC still hasn't notified the court of my request to have accepted the states
14 offer of a mistrial on counts I & II (and) the following remarks by the judge
15 are now to the entire jury panel, in lieu, of just bring out the presiding
16 juror as the judge had done until the presiding juror did lie to the court
17 the day prior; no action taken by anyone...

(the jury re-renters)

18 Pg #791 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

19 The Court: "Ladies and Gentlemen, at this time, I am returning
the instructions and verdict forms to the bailiff, who will re-
turn them to you. Please reread the court's instructions and
20 deliberate consistent with those instructions. You may go with
the bailiff at this time." [the jury exits] "Counsel, anything
21 for the record?" [pg #791 ends]

22 GOMEZ ASKS THIS COURT SHOULD THE PRESIDING JUROR HAVE BEEN REPLACED and
23 SHOULD RTC or THE COURT REQUESTED/PERFORMED A VOIR DIRE OF THE INCIDENT ??
24 and THE NEXT COUPLE OF PAGES DISPLAY EGREGIOUS REVERSABLE ERRORS...

25 Pg #792 VRP of Mar 4th, 2020, Volume #3, exhibit E...

26 Ms Zhou: "No, your Honor" Mr Carpenter: "No, your Honor."

27 The Court: "So, I plan to provide the jury with a note at 4:30
if we don't hear from them between now and then. The note..."

Grounds for Relief
(cont)

Pg #792 (cont) VRP of Mar 4th, 2020, Volume #3. exhibit E...

The Court: (cont) "...The note, as I indicated previously, would be consistent and directly including the language that I read on the record previously. Is there anything else to discuss at this time?"

Ms Zhou: "No, Your Honor."

Mr Carpenter: "I'm not sure what note, what language, what note"

The Court: "The language that I read to them when they were dismissed"

Mr Carpenter: "Oh" The Court: "after closing arguments"

Mr Carpenter: "Okay, I got it, Thank You your Honor."

The Court: "So if you want to see that language, I can -- it's going to be printed out and given to the presiding juror. I will give it to the court clerk so you can look at it before its given."

Mr Carpenter: "Thank you Your Honor." [end pg 792; begin pg 793]

The Court: "Okay" Mr Carpenter: "Thank You"

The Court: "But it's the same language that I already direct them. We may hear a note or a verdict before then."

Ms Zhou: "Thank You Your Honor" The Court: "Court will be in recess"

[recess over, court resumes]
still Mar 4th, 2020

The Court: "We have a note from the jury. The jury's note reads as follows: I guess I should characterize it as a question, The jurys's question is, "We have agreement on three charges. We do not have agreement on one charge. How do we proceed", counsel do you want to have a minute?"

Ms Zhou: "I do not need a minute." Mr Carpenter: "Yes, Your Honor"

The Court: "So we'll be in recess very briefly"

It appears as the court sought to disregard the jury's directions to the court of what the jury has found and use the last section of the jury's 'note', where the jury asks 'How to proceed', in order to claim the entire ofmat from the jury was a question... this appears to be tactic by the trial court judge in order to justify the courts prior mishandling of the jury's declaration of the jury's findings...

1
2 Grounds for Relief

(cont)

3 Pg #793 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E
4 [recess over, court resumes]

5 The Court: "I take it counsel has had adequate time."

6 Mr Carpenter: "Yes, Your Honor" [end pg 793...begin pg 794]

7 The Court: "Ms Zhou, I'll hear from you first."

8 Ms Zhou: "Your Honor, I think the state's proposal would be to
9 have the presiding juror come out into the court room and just
10 ask the same question we asked her yesterday afternoon, which
11 is -- I actually can't remember the courts question, but I think
12 it's something along the lines of do you believe there's a reason-
13 able probability that if the jury had reasonable amount of time
14 that they can be -- they can come up with a verdict on all counts
15 or something along those lines. And I think that's the states
16 proposal."

17 The Court: "'Mr Carpenter" Mr Carpenter: "Your Honor, We -- it's
18 been two days, and a lot of, you know, it's almost -- yesterday
19 after one day, I think the state at first asked that. So we would
20 ask, if they can't, which doesn't seem like they have at least on
21 at least one charge that you declare a mistrial on that charge and
22 lets hear their verdicts on the other three charges. That's what we
23 would want."

24 I/Gomez notes for the record that RTC/carpenters response was a lot of
25 mumbling and lack of certainty in his words and his deficient performare
26 does include, but is not limited to, his (whether deliberate or other) fail-
27 ure to complete sentences, omitting critical pieces of factual informations
28 such as: 'two days' [of deliberating; 'its almost [mistrial] yesterday';
'the state at first asked that' [a mistrial be on counts I & II w/guilties
on counts III & IV]...

After RTCs mumbling and omitting critical pieces of information, RTC
then goes into asking the trial court for a mistrial, that he was asked to
ask/agree to yesterday when the state offered one w/the jury hung on counts
I & II, but RTC refused to and now after the jury was coerced/manipulated
into reconsidering their verdict return, and noe have changed to include one
of the serious charges (count II) RTC wants a mistrial agreement... which,

Grounds for Relief
(cont)

...which, resulted in a ten-fold increase in DOC time for me and it is very likely that if RTC had accepted the first mistrial offer from the state the day prior I would not have gotten any DOC time...

RTC's actions fell well below the level of 'effective assistance of counsel' guaranteed by the constitution, it can not even be claimed as sound trial strategy, under the circumstances, the challenged action [or lack of action] was unreasonable and cannot be considered 'sound trial strategy' Strickland vs Washington (489) 104 S.Ct 2052 (1984).

Pg #794 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

The Court: "Mr Carpenter, I tend to agree with you, but is there any harm in bringing in the presiding juror and asking those questions?" [end pg 794...begin pg #795]

Mr Carpenter: "Here's what I'm afraid of; If this presiding juror wants to convict, she may just say, you know, there is a reasonable, and go back and we don't know, right? I mean, there's no harm I guess. We can hear from her. But sometimes they're invested -- she appears to be invested in a conviction. So we know that now from what happened during the polling."

The Court: "So I don't think we can conclude that."

Mr Carpenter: "All right, Well --" THE COURT INTERRUPTS

The Court: "But I appreciate your argument."

Clearly the record displays that there was need to perform an inquiry into why the presiding juror had misinformed the court the day prior and to replace juror #1 aka the presiding juror; thus, RTC/carpenter failed to request such actions and the judge failed to secure my rights of Due Process and Equal Protection of the Laws, please reverse...

Pg #795 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

Mr Carpenter: "Okay" The Court: "So you are opposed to asking the question of the presiding juror?"

Mr Carpenter: "Yes, Your Honor"

The Court: "I frankly don't think it's necessary. I think that we've given this jury plenty of time and direction to come up with..."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Grounds for Relief
(cont)

Pg #795 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

The Court: (cont) "...unanimous verdicts on all four charges. They have now come into agreement on three out of 4 charges and based upon the amount of time, basically almost 2 whole days of deliberations, it appears to me that they're not going to come to an agreement as to one charge. What I would like to propose is that I respond to [end pg 795-begin pg 796] this note to ask the presiding juror to indicate on the one count they cannot reach agreement on, to state, 'The jury can not decide', or something to that effect as to that one count and then fill in the verdict form on the counts they can agree on. And then we bring them back into the courtroom."

The record shows that the judge, the prosecutor (and previously RTC (my attorney ??) were all efforting to coax the jury into returning guilty findings on all 4 charges, juror #11 disallowed that... and now the judge has coerced/intimidated the jury into changing their being 'hung' on both count I and II, such would deny the sentencing court from basically sending me to the DOCs, as counts III & IV only carry 9 to 12 months and that may have been non DOC time...

The judge now notes that now that the jury is willing to change at least one of the hung factors on at least one of the two serious counts (I & II); that will enable sentencing factors to enhance and now the court is willing to provide a mistrial on count I only...

Pg #796 (cont) VRP of Mar 4th, 2020, Volume #3, exhibit E

Ms Zhou: "Yes, your Honor, Thank you"

Mr Carpenter: "Yes, your Honor, we agree with that" I DID NOT

The Court: "So, Mr Carpenter, you dont object to that plan?"

Mr Carpenter: "No, not at all."

The Court: "And Ms Zhou, do you object to this plan?"

Ms Zhou: "No your Honor, thank you."

The Court: "Counsel, if you'll look at this language and indicate if you have any objection to that language."

Ms Zhou: "The state is okay with that, Thank you."

Mr Carpenter: "The defense, also, your Honor."

1
2 Grounds for Relief

(cont)

3 Exhibit D: is the jurys 4th and final 'question' form to the trial
4 court which STATES "We have agreement on 3 charges. We do not have agree-
5 ment on 1 charge. How do we proceed?"]date/time Mar 4th, 2020 @ 3:29 pm;
6 and the judges response is: "Please write on the verdict form on the count
7 that you do not unanimously agree 'cannot decide' and complete the verdict
8 forms on the remaining verdicts. After that the baliff will bring you into
9 the courtroom" date/time Mar 4th, 2020 @3:55 pm...

10 I/Gomez asks the Appellate Court to please refresh with the terminology
11 of the jury and the judge in exhibit B herein, which is the jurys first notice.
12 to the trial court stating, "We have agreement on 2 charges. We are hung on
13 2 charges. How do we proceed?", date/time Mar 3rd, 2020 @4:37 pm... and the
14 judges response of "The jury should leave for the day keeping in mind all of
15 the courts instructions regarding your conduct. You may decide what time to
16 begin tomorrow. Please begin tomorrow by re-reading the instructions and
17 continue to deliberate", date/time Mar 3rd, 2020 @4:37 pm...

18 Gomez prays this court see's the need to reverse the conviction after
19 seeing the extremely prejudicial errors the trial court made... there were
20 two full days of deliberation, Mar 3rd & 4th, 2020; at the end of the first
21 day the jury sent out a note telling the judge they were ready, that they
22 were hung on counts I & II and guilty findings on counts III & IV, I/Gomez
23 asked my RTC to accept the states offer at that time for a mistrial on the
24 two serious counts I & II, RTC never even told the judge...

25 The jurys terminology in both of their notices to the judge are nearly
26 identical, switching out them being hung on 2 charges in the first notice
27 for them being hung on only 1 charge in their second notice...

1
2 Grounds for Relief

(cont)

3 I/Gomez also notes that the judges responses to the jurors two nearly
4 identical notices prejudiced me/Gomez beyond repair... in the judges first
5 response, eg the jury being hung on 2 counts and 'how to proceed' the judge
6 instructs the jury 'should leave for the day keeping in mind all of the courts
7 instructions regarding your conduct. You may decide what time to begin tomorrow
8 Please begin by re-reading the instructions and continue to deliberate'; the
9 courts direction to 'continue to deliberate' was error...

10 As in this circumstance it coerced the jury, implying to the jury that
11 they had made error, that the court did not appreciate the jury being hung
12 on the two serious counts, the judge started the response to the jury telling
13 them to 'leave for the day', denying them their option to be called out for a
14 reading of the verdicts...further intimidating the jury by the judge stating
15 to them to mindful 'of your conduct' without explaining to the jury why, the
16 door is open for interpretation of verdict error...

17 Then soon after the judges response was given to the jury, the jury sent
18 word out that they were ready and upon reading of the verdict, juror eleven
19 made record that she was not in agreement with the reading, that the presiding
20 juror had erred in stating to the court that the jury was in agreement and the
21 procedural errors previously discussed transpired in re the judge and RTCs
22 failure to replace the presiding juror... or to even perform an inquiry as
23 to what had caused the misleading of the court...

24 After all that, then the jury sends note out saying that they are now
25 only hung on one count, that they are guilty on three counts, asking 'how to
26 proceed'; now the judge has a totally different agenda... now that the jury is
27 willing to convict on one of the serious charges that will enable the ...

1
2 Grounds for Relief
3 (cont)

4 ...sentencing court to bestow nearly 10 years of incarceration, where
5 such DOC implementing was not available w/the jury being hung on counts
6 I and II... only the prosecutor was willing to go w/a mistrial on counts
7 I & II and she (ms zhou) had voiced herself to that effect...

8 Now that the judge see's the jury's change of guilty findings having
9 increased to her satisfactions, now the judge eliminate terminology of the
10 jury having to keep deliberating and now states to the jury to simply "Please
11 write on the verdict form on the count that you do not unanimously agree 'can
12 not decide' and complete the verdict forms on the remaining verdicts. After
13 that the baliff will bring you into the courtroom..."

14 I/Gomez asks why did the judge tell the jury that they had to go home for
15 the day (yesterday) and to come back and keep deliberating until they changed
16 some of their verdicts... and then now declare a mistrial...

17 When the jury and the prosecutor were all in agreement that a mistrial
18 was the appropriate court action the day prior, I had asked my attorney/RTC
19 to let the court know I was in agreement with the mistrial on counts I & II
20 yesterday, now the judge and everybody else (the judge, the prosecutor and
21 even my RTC) are happy w/an additional guilty finding...

22 I/Gomez understand that in a criminal trial, the judges last words to
23 the jury is apt to be the decisive words the jury adheres to, especially if
24 they are in re a specific action by the jury... in my case it is clear that
25 the judge was intimidating/coercing/telling the jury that they had committed
26 error and had to keep deliberating until they fixed it...

27 I/Gomez believes that this Honorable Court is able to see so much more
28 than I am and that this Honorable Court knows much more about the violations
I suffered than I do and I pray this court will reverse///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Grounds for Relief
(cont)

Pg #796 (cont) VRP of Mer 4th, 2020, Volume #3, exhibit E

The Court: "Thank you. So because I anticipate when I give this to the baliff that the jury will have verdicts on three counts and will indicate cannot decide on one count, do counsel [end pg 796...begin pg 797] require anything further in terms of the record or any questions asked or argument before being prepared to stipulate to a mistrial as to the remaining count?"

Ms Zhou: "No Your Honor, not from the state."

Mr Carpenter: "No Your Honor, not from the defense."

The Court: "Okay, The reason I ask that is because from my perspective, the only information that we do not have at this point is which count. It doesn't appear to me that that would make a difference. AND so what I would be prepared to do is to ask on the record after I read all of the information on the verdict forms whether counsel will stipulate to a mistrial and then make that finding of a mistrial in front of the jury. Is there any objection to that?"

Ms Zhou: "No, Your Honor." Mr Carpenter: "No, Your Honor."

At this point the judge having successfully coerced/intimidated the jury into changing one of their hung decisions on one of the two counts that the judge required to bestow an tremendously increased incarceration time, that was not feasible with the jury's first verdict return, where the presiding juror committed reversible misconduct, where RTC failed to move for mistrial, failed to express his clients request to the court, and where the court failed to perform inquiry as to the presiding jurors (#1) deliberate misleading of the courts record...

The jury was then brought back in and the judge instructed juror #1, the presiding juror (the same one) to hand the verdict forms to the baliff for the judge to read... these were the same exact verdict forms that the jury had delivered the first time, earlier today, where the presiding juror had knowingly submitted false information, writing 'Guilty' on all four of the verdict form, even though the presiding juror very well knew that ...

1
2 Grounds for Relief
(cont)

3 ...that the jury was 'not' in unanimous agreement on guilty findings on
4 counts I and II, this was lime-lighted when the judge/clerk began to poll
5 the jury and when juror #11 was asked, "were these your verdicts?" and
6 juror #11 stated "NO" [VRP 3-4-20 pg781]... where upon a mountain of IAC
7 and abuse of discretions were committed...

8 Now upon the jury's second verdict, using the same exact verdict forms
9 as the jury did upon the first verdict return (w/all 4 guiltys) and now w/
10 the judges influence, the jury has changed from being hung on counts I and
11 II, as indicated by the jurys note to the court (exhibit B) where the judge
12 ignored the states agreement to a mistrial on counts I & II, where MY OWN
13 KFC ignored my request to accept the states mistrial offer...

14 Exhibits G, H, I & J: the four verdict forms, that the judge returned
15 to the jury yesterday and instructed the jury to basically 'try it again',
16 innuendoing to the jury that they had erred...

17 On exhibit G, this court can plainly see where the presiding juror was
18 allowed to cross out the 'guilty' finding she had initially and deliberately
19 misinformed the court record (w/out reproach), the presiding juror appears
20 to have initialed her scratching out and now inplacing, per instruction of
21 the judge "cannot decide"...

22 The judge makes it perfectly clear that he is okay with the jury being
23 hung on one of the serious counts (I & II) as long as he got the jury to
24 change their verdict to unanimous agreement on at least one of counts I or
25 II ' as the judge states "...because from my perspective, the only informa-
26 ation that we dont have at this point is which count. It doesnt appear to
27 me that that would make a differance..."; thus, yesterdays misconducts...

1
2 Grounds for Relief

(cont)

3 ...by the judge and my RTC, the state (ms zhou) was the only one who was
4 asking for the mistrial after the jurors note^e stated hung on counts I & II
5 and the judge and my RTC ignored the presiding jurors misconducts and the
6 need to perform inquiry into that...

7 Now they are all happy to arrange for a mistrial, as the judges effort
8 to coerce the jury into reproaching one of the serious counts for sentencing
9 issues, when any reasonable court would have mistrialed OR in the minimal
10 alternative performed inquiry as to the presiding jurors misconduct and at
11 least removed/replaced the presiding juror...

12 On the last page of Exhibit E [VRP of Mar 3rd/4th, 2020, Volume #3] the
13 judge asks both parties counsel if either would 'wish to speak to the jury'
14 before they leave the building (in the jury room) and only the state chose
15 to do so... my RTC stated "No"... ANY reasonable attorney would have taken
16 this opportunity to make inquiry to juror #11 and juror #1 (presiding juror)
17 as to the issue and collected material for his clients appeal and/or a New
18 Trial motion but Carpenter simply scooted on out...

19 The Supreme Court recently has made it clear that a "defendant need not
20 establish that an attorneys deficient performance more likely than not alt-
21 ered the outcome in order to establish prejudice under Strickland" and that
22 the reasonable probability standard "is not a sufficiency of evidence test"
23 Kyles vs Whitley 115 S.Ct. 1155, 1156 (1986)...

24 Rather, a "reasonable probability is a probability sufficient to under-
25 mine confidence in the outcome" Strickland vs Washington 466 U.S. 668, 80
26 L.Ed 2nd 674, 104 S.Ct 2052 (1984)... my/Gomezs RTC deficient performance
27 rendered the trial unfair and the verdict suspect...please Reverse...

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO: Abuse of Discretion committed by the trial judge are not limited to his failure to protect the courts integrity eg failure to declare a mistrial when the presiding juror did deliberately lie to the court and presented false verdict form to the court...also the judges deliberate interferring w/the deliberations and multiple verdict returns, in order, to coerce the jury into changing their initial verdict/findings to harsher findings, that would enable the sentencing court to impose lengthy period of incarceration...

Again, I note that this ground(s) is complicated and the timeframe intertwines w/the prior ground(s), and the explanation is lengthy, thus, in order to minimize the courts reading, to save brief space and not have the court rereading the same material; I rely upon the prior pages to support this ground(s), :

(b) If you did not exhaust your state remedies on Ground Two, explain why: I should note that all of the supporting exhibits are referred to in the prior pages and the grounds timeframe intertwine, but I am pretty sure the court (you) are quite scholared at this and I pray that I have supplied you sufficient material...

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

n/a

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: n/a

Name and location of the court where the motion or petition was filed: n/a

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE: In this section of IAC issues I/Gomez reference to various VRPs of the trial (supplying them as exhibits) and also exhibit- F a notarized Declaration of my wife Susana Tamayo/Gomez; which all detail and procure that I had repeatedly told my RTC (Carpenter) that I wanted to testify at trial and he did coerce me into not testifying, by telling me that he would basically abandone me, terminating his representation if I chose to take the stand...also, that he was the initiator of why all of my medications were halted, telling me the court would frown on me for being on meds...and that I was not entitled to discuss or any issue of Entrapment in my line of defense; the following pages establish and...

1 ...with the support of the evidence(s) herein that the IAC issues not only
2 transpired, but that they irreversibly prejudiced me...

3 I/Gomez believes that the prior two issues carry the gravity and
4 magnitude to allow this court to apply the relief sought herein, though
5 in order to be thorough and complete and not leave any issues unmentioned
6 (and) later to be considered unpreserved for litigation... I am including
7 them and ask this court to please weigh them in the cumulative manner as
8 they all are serious acts of IAC and/or abuse of discretion and IAC of my
9 assigned appellate counsel, as well as RTC/Carpenter...

10 I/Gomez had better take a moment to apologize to the court for this
11 copious pleading, not just the pleading, but also, the exhibits attached
12 herein... especially exhibit E (actually only exhibit E) as it is the VRP
13 of Deliberation & Verdict Return(s), it was supplied to me [double] sided
14 and I understand that the court 'frowns' on documents that are double sided
15 and would prefer them copied on only one side...

16
17 IAC/RTC & AAC C: During the trial proceedings (and prior) I/Gomez did
18 repeatedly tell RTC (retained trial counsel (Mr Carpenter)) that I did not
19 have anything to hide and that I wanted to let the jury hear my testimony.
20 The interpreter(s) and my wife Susana (see declaration of Susana...) are all
21 able to support that and that RTC repeatedly told me that if I gave testimony
22 the trial would go 'bad' for me and that I would go to prison, but, I kept
23 telling RTC that I wanted to and he kept telling me that he would not be
24 able to help me if I did... see Exhibit F

25 VRP of Mar 2nd, 2020, Volume #2, page #673... The Court: "Mr Carpenter
26 the state has rested its case. It is now time for the defense to pres-
27 ent testimony and exhibits. As you know the defense is not required to
28 present any testimony, exhibits or anything else as part of its case.

You previously indicated that you didnt have any witnesses other than
your client potentially. Is that still true?"

1
2 Grounds for Relief
3 (cont)

4 VRP of Mar 2nd, 2020, Volume #2, page #673... Mr Carpenter: "Yes, your Honor, I dont have any witnesses except perhaps my client."

5 At this point the judge told RTC that 'we' would be in recess in order
6 to allow RTC to discuss whether or not I was going to give testimony and
7 RTC was more serious than before, before RTC was always confused and now he
8 was nervous... RTC repeated his telling me that if I took the stand that I'd
9 more than likely be found guilty by the jury and that it would be best for me
10 not to and that the court would like that better...

11 RTC coerced me into believing that I had better not give testimony, then
12 RTC smiled and got serious again and told me that the judge would probably
13 ask me him self if I wanted to testify and then ask me if it was my decision
14 and for me to make sure that I told the judge that it was my decision not to
15 testify, RTC told me that I had better not mess it up...

16 VRP of Mar 2nd, 2020, Volume #2, page #674 (court back from recess)

17 The Court: "Mr Carpenter, have you had adequate time to discuss
with your client his decision whether to testify in his trial?"

18 Mr Carpenter: "I have, Your Honoe and he will not testify."

19 The Court: "Mr Carpenter, with your permission, I'd like to ask
him directly." Mr Carpenter: "Of course."

20 The Court: "Mr Barajas/Gomez, have you had adequate time to
21 discuss with your attorney the decision whether or not you
will testify in this trial?"

22 The Defendant: "(Through the Interpreter) Yes."

The Court: "Do you need anymore time?"

23 The Defendant: "(Through the Interpreter) No"

The Court: "Is it your decision that you are not testifying?"

24 The Defendant: "(Through the Interpreter) Yes, that's my decision"

25 The Court: "And have you been explained by your attorney that you
are not required to testify but you may testify and have all your
questioned answered about that decision?"

26 The Defendant: "(Through the Interpreter) Yes"

27 The Court: "Thank You."

1 Clearly the record procures that my RTC never had any true intention to
2 effectively represent me (his client) not even with the understanding that I
3 wanted to give testimony at my trial, as he/RTC made it clear to the trial
4 judge that he/RTC did not believe it 'appropriate' for me to give testimony
5 after I had invoked my right to remain silent at arrest...

6
7 IAC/RTC: The higher courts have established that attorney's who
8 adopts and acts as if in belief that his client should be convicted fails
9 to function in any meaningful sense as the Governments adversary, U.S. VS
10 Cronic 466 U.S. 648, 80 L.Ed 2d 657, 104 S.Ct. 2039 (1984)...

11 Here, in Gomez' case, RTC was constitutionally inadequate in his rep-
12 resentation, refusing to present Gomez' chosen line of defense Entrapment,
13 even though there was an abundance of evidence to support Entrapment Gomez'
14 RTC took surreptitious measures to negate Gomez' ability to participate in
15 his own defense, lets explore that...

16 Available county jail medical records procure and is supported by the
17 prognosticated testimony of the court interpreter, that Gomez' RTC coaxed/
18 instructed Gomez to stop taking all of his medications 7 to 10 days prior to
19 the trial proceedings, misleading Gomez into believing that being on meds
20 during the proceedings would make him look bad to the jury...

21 It is well understood that if a patient abruptly stops taking all of his
22 medications, 5 or 6 in total, including psychiatric medication for depression
23 the patient will not only suffer physical abnormalities, but, also psychiatric
24 unstableness and vulnerability issues...

25 Incorporate the above w/the court record assigning the interpreter of
26 the court to Gomez, actually the trial record shows *3* interpreters assigned
27

1 assigned to Gomex, Ms Anita Ahumada, Ms Alejandria Contreras and Ms Elena
2 Kerrigan, I requested their statements, denied by state, especially Ahumada
3 spoke/discussed w/Gomez of how Gomez' RTC (glenn Carpenter) was "...not
4 doing anything to help..." Gomez, both interpreters E/K & A/C discussed w/
5 Gomez to consider replacing his RTC and also, one did recommend to RTC for
6 Gomez to petition the court for a SOSSA plea...

7 Gomez has never faltered from his claim of innocence from the charges
8 as depicted in the record...he has admittedly noted that he was soliciting
9 for a prostitute, that he believed that the two respondents were well above
10 the age of 18, as users of the 'Badoo' media must be 18 years of age or older
11 and Gomez was willing to plea to that even if it meant he would have to Plea
12 to a SOSSA and anyother registry issues...

13 However, Gomez never had such opportunity as his RTC stated to the court
14 interpreter that Gomez did not qualify for SOSSA, when in fact there was an
15 eligibility factor that did allow Gomez to petition the court for such, though
16 no where in the record does it show RTC ever discussing/petitioning this to
17 the state or to the court...

18 To return to the denial of RTC to present Gomez' requested defense, in
19 part, of denial and Entrapment, RTC deliberately kept Gomez in the 'dark' and
20 mislead Gomez into believing that Gomez' defense of Entrapment was going to
21 be part of the trial... however, that was not true, in fact the VRP of Volume
22 #1 Feb 24th, 2020, pg 21, lines 9-19 (3.5 hearing) RTC states:

23 "Mr Carpenter: AND number 11, Your Honor, I'm not planning to
24 argue about a missing witness. If something comes up during the
25 trial, obviously, we have to get it approved by the court. Number
26 12, I'm not going to mention procedural history, et cetera. I am
27 agreed to number 12. Number 13, is general denial, is not entrap-
28 ment, I should be allowed to cross about proper techniques, but,
29 I'll do it -- I may or may not do that, but, I'm not arguing en-
30 trapment, your honor, so I think thats all of them."

1
2 Grounds for Relief
(cont)

3 IAC/RTC A (cont) then the court/judge states directly thereafter RTC/
4 Carpenter, still VRP Vol #1 (2-24-20), now line 20 through pg 22 down
5 to lines 1 through 9... the judge says...

6 "The Court: So with regard to all of those motions that Mr
7 Carpenter (RTC) indicated were agreed, those now become orders
8 of the court, so those motions in limine are now orders in limine
9 and the attorneys are obligated to advise their witnesses and
10 clients of those orders, And with regard to all of them and spe-
11 cifically to number five the attorneys and witnesses must follow
12 those orders unless a party brings up an issue that the court
addresses. So for instance, Mr Carpenter indicated number 11 he's
not aware of any reason to bring up, but, things may change, so
using that as an example, it will be the obligation of counsel
to bring that up with the court to get approval before anything
like that is mentioned in front of the jury."

13 An evidentiary hearing would have disclosed that a viable 'entrapment'
14 defense was available, though, RTC failed/refused to request one or even to
15 include 'entrapment' as a line of defense... The question of whether Gomez
16 was a victim of entrapment, was a question that should have been presented
17 to the jury to decide, as it is a question of 'fact' and for RTC to have
18 denied Gomez this was/is reversable error...

19 RTC was inadequate in his representation, especially since there were
20 multiple interviews of witnesses (all detectives/police officers) whose very
21 own responses supported an 'entrapment' defense, though, RTC failed to bring
22 forth the matter, Capps vs Sullivan 921 F.2d 260 (Ca 10 1990)...

23 The above would have entitled Gomez to an 'Entrapment' Instruction and
24 the jury would have been the trier of facts, and another of Gomez' fundamental
25 constitutional rights would not have been sabotaged (and) Gomez may not have
26 been found guilty of the charges at bar... 'please' apply the relief sought
27 vacate w/prejudice or new trial, thank you...

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

Yes, I believe in good faith that all of the issues I have presented
in this/my Habeas 2254, were exhausted at the highest level in the state
courts and they all do have merit, supported by the trial record...

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? _____

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? _____

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? _____

Yes No

(4) Did you appeal from the denial of your motion or petition? _____

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? _____

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: This last issue questions the constitutionality of the states using the Seriousness Level of a Crime that never transpired as means to apply a much harsher Standard Available Sentencing Range at sentencing... violating numerous fundamental constitutional rights, eg Equal Protection of the Law, my rights to Due Process/etc...I am sure that this court knows better than I do and that after review of the following pages this court will see the erroneous application of a seriousness level of XI, when the appropriate seriousness level of III...while washington state enjoys its own legislation allowing the state to sentence a defendant at a 75% of a committed crime, the state does not have any authority to impose a seriousness level of a crime that was not committed...

(b) If you did not exhaust your state remedies on Ground Four, explain why: Please see following pages...

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes No

(2) If you did not raise this issue in your direct appeal, explain why: I note (politely) that my AAC (assigned appellate counsel) refused to include and I was told that I had to file a PRP, I did and it was denied, please see pg 2 section 9 for

(d) **Post-Conviction Proceedings:** exhaustion of this issue :)

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

1 In order to assist this court I/Gomez has included herein as exhibit K
2 Washington states Sentencing Grid for Offender Score (of points), complete
3 with the list of Crimes Included Within Each Seriousness Level (under RCW
4 9.94A.515) hopefully to support my/Gomez' claim that Washington state did
5 misapply a harsher seriousness level than it should have and/or that the
6 law allows... if the state courts are not allowed to impose 100% of the crime
7 for sentencing purposes, if it was only 'attempted', then why does the state
8 apply a seriousness level of a crime that was not committed ??

9 IAC/RTC Both, RTC and AAC refused/failed to adequately
10 raise, argue and/or object to the erroneous application of Serious
11 Level of XI for sentencing purposes and include in direct appeal:

12 The use of a Seriousness Level of a crime that was not committed is a
13 crime in and of itself... in this case there was never any sort of physical
14 contact between me and the hookers I was soliciting for, whom turned out to
15 be affiliates of a police organization, the only actual action on my part
16 was being on the/a computer and communicating w/the officers, whom claim
17 that I believed they were under age children and not hookers...

18 The facts of the case do ~~not~~ support that, the computer program that we
19 were communicating mandates that the user be at least 18 years of age and/
20 or above, the officers user profiles showed pictures of one of the officers
21 laying on a bed, holding money in her hand, making comments of her "I'm about
22 the hustle" and "looking for a daddy" (sugar daddy) and "About making that
23 money"... thus, no element of any crime ...

24 RTC/Carpenters deficient performance included, inter alia, failure to
25 protect my Due Process rights & Equal Protection of the Law...this issue is
26 also one of the IAC issues that AAC's (assigned appellate counsels) deficient
27 performance included - refusing to include it in my direct appeal... eg...

1
2
3 ...the superior court records show that I/Gomez was charged w/2 counts
4 of Attempted ROC 2° (attempted rape of a child 2°) (counts I & II), also
5 w/2 counts of Communication w/a Minor for Immoral Purposes... I've never
6 faltered from my claim of innocence of all four charges, though, I do admit
7 my guilt to having been soliciting for a hooker/prostitute on-line (and) I
8 pray nothing in this PRP appears as an admission of guilt...I am simply in
9 effort to minimize the egregeous sentence imposed...

10 Under RCW 9.94A.515 CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL: no
11 where in level XI is there listed any such crime as Att/ROC 2°, there is
12 only Manslaughter 1°, Rape 2° and ROC 2°, no such crime as Attempted ROC 2°
13 and to have applied Seriousness level XI was erroneous...especially since the
14 record procures that no physical contact ever transpired, not even any actual
15 meeting in person, only on the computer (Badoo)...

16 In order to apply an appropriate Serious Level, we have to travel down
17 RCW 9.94A.515, in order, to find one... level X Child Molestation/Kidnapping/
18 serious acts of violence... level IX Assault of A Child 2°/Homicide by Water-
19 craft/Vehicular Homicide/other serious violent acts... level XIII Manslaugh-
20 ter 2°/variations of Homicide by Watercraft & Vehicular Homicide... level XII
21 Child Molestation 2°/other Homicide by Watercraft & Vehicular Homicide/other
22 serious violent acts... level VI Incest/Rape of a Child 3°... level V Child
23 Molestation 3°/Custodial Sexual Misconduct/Kidnapping 2°/Rape 3°... level IV
24 Assault 2°/Hit & Run Injury... SEE Exhibit K...

25 ALL of the above have one thing in common, they all require the physical
26 engagement of the perpetrator and the victim... it is not until we reach the
27 Seriousness level of III, that we find a level that is the highest level that

1
2 Grounds for Relief
(cont)

3 can be considered appropriately applied to a charge of Attempted ROC 2°,
4 that was accompanied w/charge of Communication w/a Minor for Immoral Pur-
5 poses, as there was no physical contact or even any meeting...

6 In Seriousness Level III is where the charge of Comm w/a Minor for Imm/
7 Purposes can be found and also is Cyber Stalking (and) Promoting Prostitution
8 all, of which, more appropriate suited to the evidence of the case that was
9 presented at my trial... however, seriousness level II does begin w/Computer
10 Trepass, but level III would be applicable...

11 The jurys first/initial verdict return supported the fact that the level
12 XI was inappropriate, as the jury did return (1st) w/a notice of being Hung
13 on both counts I & II, which had XI applied, as the evidence did not support
14 such charges... it was not until the judges erroneous coercing and abuse of
15 discretional influence that the jury were instructed to ReDeliberate and to
16 get it 'proper', then the jury did feel obligated to change on of the level
17 XI charges to a guilty finding...

18 Thus, the highest level of seriouness, for sentencing purposes, that does
19 actually contain a crime involving a computer, no physical contact/injury is
20 level III and if the erroneous 6 points the prosecutor applied are applied to
21 level III, that enables the sentencing court to a Standard Available Sentence
22 Range of 22 - 29 months...however, if the sentencing court took into consider-
23 ation that I/Gomez had No Criminal History and that the 6 points were arrived
24 solely from the present actionthere was a strong probability that First Time
25 Offender guidelines and probation applied...

26 Additionally, if this court considers that the 1st verdict return from
27 the jury did eliminate the sentencing courts ability to use counts I and II

1
2 IAC/RTC/AAC D (cont)

Grounds for Relief
(cont)

3 for additional points and then there would have only been 3/three points
4 available for sentencing, as initially there were only guilty verdicts on
5 counts III & IV, which invokes a Standard Available Sentencing Range for a
6 level III w/three (3) points is 9 - 12 months and w/the first time offender
7 availability, probationary time very possible...

8 I/Gomez declares that, both, RTC and AAC (trial counsel and appellate
9 counsel) are guilty of IAC, trial counsel for refusing/failing to object and
10 present the above issues to the trial/sentencing court and appellate counsel
11 for refusing/failing to present the above issues to the DIV II Appellate Court
12 for review... in U.S. vs Bradley 628 F.3d 394 (CA 7 2010) we find:

13 id @ pg-400 "... a defendant has a due process right to be
14 sentenced based on accurate information and the threshold for
15 accuracy is whether the information has 'sufficient indicia of
16 reliability to support its probable accuracy' U.S. vs Pulley 601
17 F.3d 660, 665 (7th Cir 2010). Sentencing judges necessarily have
18 'discretion to draw conclusions about the testimony given and the
19 evidence introduced at sentencing', but 'due process requires
20 that sentencing determinations be based on reliable evidence,
not speculation or unfounded allegations", United States vs
England 555 F.3d 616, 622 (7th Cir 2009) [1615]...

21 I/Gomez asks this court to please instruct resentencing at a level III
22 in lieu of the XI used, if possible by adhering to the jurys initial verdict
23 return or due to the inappropriateness of level XI...

24 Additionally, if the court agrees that the jurys initial verdict return
25 should have been honored, then please reduce the sentencing points respect-
26 ively to 3/three, in lieu, of the 6 the prosecutor and my RTC allowed the
27 judge to use w/out objection... thank you

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

yes, though, my AAC (assigned appellate counsel) did
refuse to include them in my/his direct appeal and when I complained
I was told that I would have to file a PRP, I did and it was denied
please see page 2 herein section 9... thanks

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

All have been presented in my PRP and I did basically use 90%
of the actual pages from my PRP and all of the exhibits presented
therein and herein... thanks

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

Not to my knowledge, but AAC did some that I did not request and
I am not sure wht he did, I believe it was frivolous and did not
need to clutter my direct appeal...

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

Not to the best of my knowledge...basically the direct appeal
that AAC filed in my name was worthless and did compromise my Direct
Appeal and force me to file a PRP w/my Appeal Grounds...

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: same as below

(b) At arraignment and plea: same as below

(c) At trial: RTC (retained trial counsel) Glenn Carpenter WSBA #18301
of 24730 36th Avenue South Kent, Washington 98032

(d) At sentencing: same as above

(e) On appeal: AAC (assigned appellate counsel) N/K (nielsen & Koch)
of 1908 East Madison Street Seattle, Washington 98122

(f) In any post-conviction proceeding: _____
n/a

(g) On appeal from any ruling against you in a post-conviction proceeding: _____
same as above AAC.... PRP was Pro Se...

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____
n/a

(b) Give the date the other sentence was imposed: n/a

(c) Give the length of the other sentence: n/a

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

I believe that I did timelt file this Habeas 2254 :)

- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Vacate the matter w/prejudice OR Dismiss Count II and Resentence to only counts III & IV as was the jury' first verdict return or in the minijal alternative Reverse/Remand for New Trial...
or any other relief to which petitioner may be entitled.

Jose Barajas

Signature of Attorney (if any)
Jose G. Barajas/Gomez #422638

Pro Se

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Habeas Corpus was requested to be scanned by facility law library to the United States District Court Western @ Seattle on December 19th, 2022;

Scanned on: _____

Jose Barajas

Signature of Petitioner
Jose G. Barajas/Gomez

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

Thank you for your time and considerations... sorry for the mess...

19-1-00428-34
JYN 56.2
Jury Note
7837560



FILED
THURSTON COUNTY, WA
SUPERIOR COURT

MAR 03 2020

Linda Myhre Enlow
Thurston County Clerk

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,
Plaintiff,
vs.
JOSE GUADALUPE BARAJAS GOMEZ,
Defendant.

No. 19-1-00428-34.

JURY QUESTION TO COURT

Jurors: If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly in the space provided below. Please print legibly. The presiding juror should sign and time-date the question, and give it to the bailiff. In your question, do not indicate how your deliberations are proceeding. Do not state how many jurors have voted on any particular issue or charge.

Jury's Question:

Can we see a clear up-close view of the
contents of exhibits 15 + 16?

Dated: 3rd of March, 2020
Time: 11:09 am

Kira Rader
Presiding Juror's Signature

Court's Answer:

The jury will be brought into the courtroom to
view exhibits 15 and 16.

Dated: 3rd of March, 2020
Time: 11:28 a.m.

Carol Murphy
Honorable Judge Carol Murphy

A

19-1-00428-34
JYN 56.1
Jury Note
7837542



FILED
THURSTON COUNTY, WA
SUPERIOR COURT

MAR 03 2020

Linda Myhre Enlow
Thurston County Clerk

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,
Plaintiff,
vs.
JOSE GUADALUPE BARAJAS GOMEZ,
Defendant.

No. 19-1-00428-34

JURY QUESTION TO COURT

Jurors: If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly in the space provided below. Please print legibly. The presiding juror should sign and time-date the question, and give it to the bailiff. In your question, do not indicate how your deliberations are proceeding. Do not state how many jurors have voted on any particular issue or charge.

Jury's Question:

We have agreement on 2 charges. We are hung on 2 charges. How do we proceed?

Dated: 3rd of ^{March} ~~February~~, 2020
Time: 3:55 pm

Presiding Juror's Signature

Court's Answer:

The jury should leave for the day keeping in mind all of the court's instructions regarding your conduct. You may decide what time to begin again tomorrow. Please begin tomorrow by re-reading the instructions and continue to deliberate.

Dated: 3rd of ^{March} ~~February~~, 2020
Time: 4:37 pm

Honorable Judge Carol Murphy

19-1-00428-34
JYN 59
Jury Note
7837081



FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2020 MAR -4 PM 4:48

Linda Myhre Enlow
Thurston County Clerk

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

vs.

JOSE GUADALUPE BARAJAS
GOMEZ,

Plaintiff,

Defendant.

No. 19-1-00428-34

JURY QUESTION TO COURT

Jurors: If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly in the space provided below. Please print legibly. The presiding juror should sign and time-date the question, and give it to the bailiff. In your question, do not indicate how your deliberations are proceeding. Do not state how many jurors have voted on any particular issue or charge.

Jury's Question:

We have agreement on 3 charges. We do not have agreement on 1 charge. How do we proceed?

Dated: 4th of March, 2020
Time: 3:29 pm

[Signature]
Presiding Juror's Signature

Court's Answer:

Please write on the verdict form on the count that you do not unanimously agree "cannot decide" and complete the verdict forms on the remaining verdicts. After that, the bailiff will bring you into the courtroom.

Dated: 4th of March, 2020
Time: 3:55 p.m.

[Signature]
Honorable Judge Carol Murphy



FILED
Court of Appeals
Division II
FILED

State of Washington
1/10/2022 9:06 AM
State of Washington
11/3/2020 8:00 AM

COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,)
) COURT OF APPEALS
Plaintiff,) NO. 54766-0-II
)
vs.) THURSTON COUNTY
) NO. 19-1-00428-34
JOSE GUADALUPE BARAJAS-GOMEZ,)
)
Defendant.)
)
)
)

VERBATIM REPORT OF PROCEEDINGS
(Jury Trial - Volume 3)

BE IT REMEMBERED that on March 3 and 4, 2020, and
May 28, 2020, the above-entitled matter came on for jury
trial before the HONORABLE CAROL MURPHY, Judge of
Thurston County Superior Court.

Reported by: Aurora Shackell, RMR CRR
Official Court Reporter, CCR# 2439
2000 Lakeridge Drive SW, Bldg No. 2
Olympia, WA 98502

COPY

APPEARANCES

For the Plaintiff:

OLIVIA ZHOU
Prosecuting Attorney
2000 Lakeridge Drive SW
Olympia, Washington 98502

For the Defendant:

GLENN KENNETH CARPENTER, Jr.
Attorney at Law
24730 36th Ave S
Kent, WA 98032-4105

Also Present:

ELENA KERRIGAN
Spanish Interpreter

ALEJANDRA CONTRERAS
Spanish Interpreter

ANITA AHUMADA
Spanish Interpreter

I N D E X

<u>Description</u>	<u>Page</u>
DELIBERATIONS	761
JURY QUESTION #1	761
JURY QUESTION #2	767
JURY QUESTION #3	777
VERDICT	779
DELIBERATIONS	783
JURY QUESTION #4	793
VERDICT	798
SENTENCING HEARING	810

JURY DELIBERATIONS

1 March 3, 2020

2 THE HONORABLE CAROL MURPHY PRESIDING

3 * * * * *

4
5 THE COURT: Good morning. The bailiff has
6 informed me that the jury has a note or question.
7 The question of the jury is as follows: "Can we see
8 a clear up-close view of the contents of Exhibits 15
9 and 16?"

10 I will hand the note to the clerk, if counsel wish
11 to view the note.

12 MS. ZHOU: I do not need to, Your Honor.

13 MR. CARPENTER: I'm fine, Your Honor.

14 THE COURT: So the Exhibits 15 and 16 are
15 essentially not visible to the jury at this time.
16 They are in some electronic form. I don't recall,
17 because I don't see the exhibits up close. But my
18 understanding is that they are requesting to view the
19 contents of those electronic exhibits, and my
20 inclination is to allow them to do that here in the
21 courtroom.

22 Any other thoughts regarding how to respond? Ms.
23 Zhou?

24 MS. ZHOU: Your Honor, I guess, if I may just
25 check with the clerk to see what Exhibit 15 and 16

JURY DELIBERATIONS

1 is. I don't actually know what the two exhibits are.

2 THE CLERK: I believe they're the profiles
3 from the website.

4 MS. ZHOU: Okay.

5 THE COURT: So the discs.

6 THE CLERK: Yeah.

7 THE COURT: That's what I thought. So I
8 wasn't sure what electronic format they are, but I
9 think they're discs.

10 MS. ZHOU: Yes, Your Honor. And Your Honor, I
11 apologize Your Honor, I forgot what the court's
12 question was. Sorry.

13 THE COURT: Do you have a different proposal,
14 or do you wish to comment on that?

15 MS. ZHOU: I think because the discs are
16 evidence and it would be something they would
17 normally view just as part of their deliberation
18 process, I think from the State's perspective, I
19 believe I should just show madam clerk on how to play
20 it on all that equipment right there, and then I
21 think -- I don't think anyone else needs to be in the
22 courtroom necessarily for the jury to view it, since
23 we don't necessarily get to be part of the
24 deliberation process, had this occurred in the jury
25 deliberation room

JURY DELIBERATIONS

1 THE COURT: Indeed. It would be inappropriate
2 for that to occur. Typically, I would ask the
3 bailiff to play that. Do you think that that could
4 be done?

5 MS. ZHOU: Yes, Your Honor. I just, I
6 couldn't remember typically when we do it, whether I
7 would show it to the bailiff on how to operate the
8 system or if it was madam clerk.

9 THE COURT: Anything else?

10 MS. ZHOU: No, Your Honor, not from the State.

11 THE COURT: Mr. Carpenter.

12 MR. CARPENTER: Your Honor, my concern is how
13 they see it. I think they have a right to see it. I
14 mean, as it was played, I think they should have to
15 see it as the way it was played and offered during
16 the trial. In other words, I guess I need to know
17 what the court proposes on how the bailiff should
18 just get the run, let it run through and that's it,
19 or what is the court proposing.

20 THE COURT: You tell me about your concern.

21 MR. CARPENTER: Okay. Well, I'm concerned
22 with it being magnified more than it was during the
23 trial. I mean, I think they have a right to see it.
24 The bailiff just hits play. It plays, and they see
25 it. I guess if they want to play it again, they can

JURY DELIBERATIONS

1 play it as many times as they want. But I'm
2 concerned with magnifying, not magnifying. Because,
3 you know, they don't have a magnifying glass to look
4 at the other thing. The electronic, I guess they're
5 going to see it here on this computer with the
6 magnifying. It has capabilities of magnifying stuff
7 that they don't have for other evidence. So I think
8 they should just play for them and that's fine.

9 THE COURT: Okay. So you're agreed with the
10 court's proposal, as long as the bailiff doesn't
11 magnify it.

12 MR. CARPENTER: Right, Your Honor.

13 THE COURT: Understood. Okay. Ms. Zhou,
14 anything else?

15 MS. ZHOU: Your Honor, I'm not aware of how
16 the video can be magnified, so I wasn't planning on
17 showing the bailiff on how to magnify that because
18 I'm not aware of how to do that either.

19 THE COURT: Understood.

20 MS. ZHOU: My proposal was simply going to
21 show the bailiff how to start the video and then how
22 to pause it, because I think what -- the whole entire
23 video has been admitted. However the State chooses
24 to publish it during its case, I don't think dictates
25 how the jury views the video that specific

JURY DELIBERATIONS

1 exhibit. And so I was just planning on showing the
2 bailiff on how to play it from start to finish and
3 also advise them that if certain parts needs to be, I
4 guess, paused, just basically where the pause button
5 is. That's all I was planning on doing.

6 THE COURT: Understood. So you have no
7 objection to allowing the bailiff to operate the
8 equipment to show the jury and that it won't be
9 magnified?

10 MS. ZHOU: Yes, Your Honor.

11 THE COURT: Mr. Carpenter, do you have any
12 other concerns?

13 MR. CARPENTER: No, Your Honor.

14 THE COURT: Okay. So I'm confident that no
15 part of the images will be any more magnified than
16 can be seen on the screens in the courtroom, similar
17 to what was done during trial. It seems appropriate
18 for the jury to be able to observe those documents
19 with the discs. They can't see them at all. And so
20 I will allow the bailiff to play those two exhibits
21 using the equipment here in the courtroom with no one
22 else present, just the bailiff and the jurors. And
23 they can view those documents as they are being
24 played. I will allow the bailiff to play those two
25 exhibits up to three times, if that's requested, and

JURY DELIBERATIONS

1 to pause if requested.

2 Any objection to that?

3 MS. ZHOU: No, Your Honor.

4 MR. CARPENTER: No, Your Honor.

5 THE COURT: So I plan to respond in the note
6 indicating that, "You will be allowed to view those
7 exhibits in the courtroom," without anymore details.
8 I think the bailiff understands the specifics of the
9 court's direction.

10 MR. CARPENTER: Thank you, Your Honor.

11 MS. ZHOU: Yes, Your Honor. Thank you.

12 THE COURT: Counsel, do you wish to look at
13 the response?

14 MS. ZHOU: No, Your Honor.

15 MR. CARPENTER: Sure, Your Honor.

16 Thank you, Your Honor.

17 THE COURT: So I'm signing that response and
18 providing it to the bailiff. And the clerk will lock
19 the courtroom after she leaves so it will just be her
20 and the bailiff and the jury.

21 Anything else?

22 MS. ZHOU: No, Your Honor. Thank you.

23 MR. CARPENTER: No, Your Honor.

24 THE COURT: Court is in recess.

25 (Recess)

JURY DELIBERATIONS

1 THE COURT: The bailiff has informed me that
2 the jury has a question. I will read the question,
3 and then hand it to the clerk if you want to see it.
4 The jury's question is this: "We have agreement on
5 two charges. We are hung on two charges. How do we
6 proceed?"

7 MR. CARPENTER: Your Honor, I don't need to
8 see the question.

9 THE COURT: Are you ready to propose a
10 response, or do you need a few minutes with your
11 client?

12 MR. CARPENTER: Can I talk to my client?

13 THE COURT: Please.

14 (Pause.)

15 THE COURT: Ms. Zhou, do you want to see the
16 note?

17 MS. ZHOU: No, Your Honor. Thank you.

18 THE COURT: Ms. Zhou.

19 MS. ZHOU: Your Honor, I think I do not need
20 to see the note, but the State does have a response.

21 I think given how long the jury has deliberated,
22 it's appropriate to have the foreman to come into the
23 courtroom and maybe just inquire as to whether --
24 whether any more time spent deliberating on the two
25 counts that they're hung whether that would be

JURY DELIBERATIONS

1 helpful to them to come to a verdict. And I guess if
2 the foreman's answer is no --

3 THE COURT: Presiding juror,

4 MS. ZHOU: Yes, Your Honor, that's what I
5 meant, presiding juror. I think if the answer is
6 yes, my proposal is they keep deliberating, but if
7 the answer is no, I guess we will address it at that
8 time.

9 THE COURT: Thank you. Mr. Carpenter.

10 MR. CARPENTER: You know, I'm not sure what
11 the court's practice is, how long to keep them back
12 there. Some judges say, you know, keep trying, bring
13 them back in the morning. But if it's usually a day
14 here, and then we ask them, I'm fine with that. I'm
15 fine with the proposal by the State.

16 THE COURT: So you agree with the proposal of
17 the State?

18 MR. CARPENTER: Yes, Your Honor,

19 THE COURT: Or do you propose something
20 different?

21 MR. CARPENTER: The only thing I would propose
22 is read the instructions, and I don't think we can
23 tell them anything else. So, you know, usually, I've
24 had judges say refer to the instructions. But I
25 think it's a good idea what the State proposed --

JURY DELIBERATIONS

1 would agree to that.

2 THE COURT: So that's the only proposal you
3 have is the same proposal as the State?

4 MR. CARPENTER: Can I refer one more time to
5 my client?

6 (Pause.)

7 MR. CARPENTER: Your Honor, we'd prefer you
8 just refer them to your instructions.

9 THE COURT: So the standard instruction that I
10 would typically provide is to reread the instructions
11 and continue to deliberate. Is that what you're
12 requesting that the court do?

13 MR. CARPENTER: Yes, Your Honor.

14 THE COURT: And so you're opposed to the
15 State's proposal?

16 MR. CARPENTER: Yes, Your Honor. As far as
17 I -- we've had no -- I mean, the jury has not
18 indicated they're hung now, but they didn't indicate
19 one way or the other if they thought further
20 deliberation would be of assistance. So --

21 THE COURT: So I'm sorry to just be confused,
22 because it seems like we're going back and forth.
23 The note says we are hung on two charges. That's
24 what the note says.

25 MR. CARPENTER: Right.

JURY DELIBERATIONS

1 THE COURT: So the State has proposed that the
2 court bring in the presiding juror and ask the
3 presiding juror a pretty standard question, something
4 to the effect of: Do you believe that within a
5 reasonable period of time, the jury will reach
6 verdicts on all charges? And then depending on what
7 the answer is, we'll address that further. That's
8 what was proposed by the State.

9 MR. CARPENTER: Okay.

10 THE COURT: Are you in agreement with that
11 proposal?

12 MR. CARPENTER: All right. Your Honor, we
13 agree with that proposal.

14 THE COURT: Very well. I'm going to leave the
15 bench, and I'll ask the bailiff to bring in the
16 presiding juror shortly. I'm just going to go grab
17 the language. I want to make sure I'm asking the
18 exact correct language when I ask the juror -- the
19 presiding juror that one question. Then the
20 presiding juror will leave the courtroom, and we'll
21 proceed.

22 MS. ZHOU: Yes, Your Honor.

23 THE COURT: We'll be in recess very briefly.

24 (Recess.)

25 THE COURT: Good afternoon. Juror Number...

JURY DELIBERATIONS

1 JUROR 1: Good afternoon.

2 THE COURT: Juror Number one, are you the
3 presiding juror?

4 JUROR 1: Yes, I am.

5 THE COURT: I have a question for you. It is
6 important that you answer only my question and any
7 follow-up questions that I have. They will all be
8 yes-or-no questions.

9 JUROR 1: Okay.

10 THE COURT: And that's the only answer that I
11 want you to provide.

12 Juror Number one, is there a reasonable
13 probability of the jury reaching an agreement within
14 a reasonable time as to all counts?

15 JUROR 1: I'm not sure. If I have to guess,
16 I'd say no.

17 THE COURT: But you're not sure?

18 JUROR 1: I'm not sure.

19 THE COURT: Thank you. You may go with the
20 bailiff.

21 (The presiding juror left the courtroom.)

22 THE COURT: Ms. Zhou.

23 MS. ZHOU: I think this is unique. Normally,
24 it's one way or the other. Your Honor, in light of
25 the presiding juror indicating if she had to guess,

JURY DELIBERATIONS

1 the answer would be no, I think given the time
2 they've deliberated and given the amount of time
3 we've spent in the courtroom -- which does span over
4 a week -- however, with the amount of time we
5 actually spent with testimony, I guess we would just
6 bring the jury in and just go from there with regards
7 to the two counts that they do have a verdict on, and
8 then because they're hung on the other two, I guess
9 just declaring a mistrial on the other two counts.

10 I think I would be -- I will say, I think I would
11 be in a different position if the case had lasted
12 longer and there were more testimony and more days of
13 testimony, but given the amount of time we've had and
14 amount of time spent deliberating, in essence,
15 they've spent the whole entire day deliberating,
16 that's the basis for the State's position.

17 THE COURT: I appreciate that, and time is
18 certainly one factor. I'm concerned because of the
19 lack of certainty in the presiding juror's answer,
20 which, as you indicated, Ms. Zhou, is rare.
21 Typically, when we get a note that says the jury is
22 hung, which is what the note says, typically the
23 answer would be -- the answer to the question is that
24 no, there's not a reasonable probability that the
25 jury could reach a verdict on all counts. But that's

JURY DELIBERATIONS

1 not what we have necessarily.

2 So the State is prepared to stipulate to a
3 mistrial as to those two counts that the jury is
4 struggling with now? Is that what I'm hearing?

5 MS. ZHOU: I apologize, Your Honor, I'm just
6 trying to think.

7 THE COURT: I appreciate that. These are not
8 easy decisions to make, which I know. So I'll give
9 you a little bit of time, you know, to really think
10 about that. And I'll hear from Mr. Carpenter. It is
11 not my intention to sway the parties one way or the
12 other. We have some options. One option is to
13 indicate to the jury to reread the instructions and
14 continue to deliberate. And another option is to
15 bring the jury in, accept their verdicts, if they're
16 proper, on two counts and declare a mistrial on the
17 other two counts. I think those are the only two
18 options that are available. But I just note that
19 equivocation in the record.

20 Mr. Carpenter.

21 MR. CARPENTER: Your Honor, I need a few
22 minutes to talk to my client. I understand -- I just
23 want to give him the options and what I think.

24 THE COURT: I appreciate that.

or MR. CARPENTER: Can I get five minutes? I

JURY DELIBERATIONS

1 don't think you have to be on the bench while we do.
2 Maybe we could just break for a few minutes and then
3 come back.

4 THE COURT: Absolutely. So why don't we take
5 a break and go back on the record at 4:30.

6 MR. CARPENTER: Thank you.

7 THE COURT: Thank you.

8 (Recess.)

9 THE COURT: Mr. Carpenter.

10 MR. CARPENTER: Your Honor, if
11 Mr. Barajas-Gomez -- if there is a chance they could
12 arrive on a decision in due course, we would prefer
13 they try it in the morning. So we would prefer they
14 continue to deliberate. And it was equivocal, her
15 answer, so, you know, we don't want them to know
16 we're the ones asking them to continue, obviously,
17 but if there's a chance -- a reasonable chance, then
18 I think that's the standard, then we would like them
19 to continue deliberating.

20 THE COURT: Ms. Zhou.

21 MS. ZHOU: Your Honor, I thought about this
22 some more, and I agree with Mr. Carpenter.

23 THE COURT: Very well. I will respond in
24 writing to the jury question by indicating that the

JURY DELIBERATIONS

1 allowed to go home today, return tomorrow, reread the
2 instructions and continue to deliberate.

3 Any objection to that?

4 MS. ZHOU: No, Your Honor. Thank you.

5 MR. CARPENTER: Your Honor, in that
6 instruction, do you put something as long as
7 there's -- you don't limit that any way, or do you
8 say as long as there's a chance, we just wait for
9 them to notify if they can't decide?

10 THE COURT: Indeed.

11 MR. CARPENTER: All right. That's fine, Your
12 Honor.

13 THE COURT: I'm struggling, because normally
14 at the end of the day, I would give them written
15 instructions regarding all of their communications,
16 but I don't think it's really necessary to do that.
17 So I'm considering indicating, "You may leave for the
18 day now consistent with my prior instructions to
19 you." And then I'll give them the opportunity to
20 decide what time to come in tomorrow to begin their
21 deliberations again and then reread the instructions
22 and continue to deliberate. Does that make sense?

23 MS. ZHOU: Yes, Your Honor.

24 MR. CARPENTER: Yes, Your Honor.

25 THE COURT: Counsel, if you would review the

JURY DELIBERATIONS

1 language that I have written to see if you have any
2 objections or corrections, please.

3 MS. ZHOU: No objection from the State.

4 MR. CARPENTER: No objection, Your Honor.

5 THE COURT: And I've signed that response.

6 I'll hand it to the bailiff, and he'll give it to the
7 clerk for the court file.

8 Anything else for the record?

9 MS. ZHOU: No, Your Honor.

10 MR. CARPENTER: Your Honor, just what time do
11 you want us here tomorrow?

12 THE COURT: I don't know what time they're
13 going to agree to come back. So I would say if you
14 could just ask court administration downstairs, I'll
15 send our bailiff down to see what time they've agreed
16 to, but it might take a few minutes.

17 MR. CARPENTER: Yes, Your Honor.

18 THE COURT: Whatever time they decide, I would
19 say you still have a few, you know, a good 15 minutes
20 or half hour once they start, and it may be, you
21 know, beyond that. Does that make sense?

22 MR. CARPENTER: Yes, Your Honor. Nothing
23 else, Your Honor.

24 THE COURT: We'll be in recess.
25

JURY DELIBERATIONS

1 March 4, 2020

2 THE HONORABLE CAROL MURPHY PRESIDING

3 * * * * *

4
5 THE COURT: Good morning. The bailiff has
6 provided to me a question from the jury. The
7 question is as follows: "Can the court provide
8 clarification about the definition of these terms as
9 used in Instruction 10: Substantial step,
10 preparation, conduct."

11 And I'll hand the note to the clerk in case the
12 parties want to look at it directly.

13 MS. ZHOU: I do not need to, Your Honor.

14 MR. CARPENTER: Just briefly, Your Honor.

15 THE COURT: So I'll give counsel a moment to
16 review instruction number ten, if you wish.

17 Ms. Zhou, do you have a proposed response?

18 MS. ZHOU: Your Honor, I think my response
19 would be for them just to reread the instructions.
20 There's nothing else that we can do.

21 THE COURT: Mr. Carpenter.

22 MR. CARPENTER: Your Honor, the defense agrees
23 with that. I think adding anything besides what's in
24 the instruction would be inappropriate.

THE COURT: ... I would respond in

JURY DELIBERATIONS

1 this situation, "Please reread the instructions and
2 continue to deliberate." However, because of what
3 occurred yesterday, I'm thinking about responding by
4 indicating that the court will not provide any
5 further instruction and then reread the instructions
6 and continue to deliberate.

7 Any objection to that?

8 MR. CARPENTER: Your Honor, I just object to
9 the continue to deliberate. It's almost like if
10 they're hung but you're telling them, right, that
11 takes that away. So I would just object to that last
12 part.

13 THE COURT: Okay. So your -- you would agree
14 to the court indicating that the court will not
15 provide any further instructions, please reread the
16 instructions?

17 MR. CARPENTER: Yes, Your Honor, I agree to
18 that.

19 THE COURT: Ms. Zhou, are you agreed?

20 MS. ZHOU: Yes, Your Honor.

21 THE COURT: Counsel, if you'd review what I've
22 provided, please.

23 MR. CARPENTER: That's fine, Your Honor.
24 Thank you.

VERDICT

1 THE COURT: So I will provide this to the
2 bailiff. After it is provided to the jury, it will
3 go with the clerk in the file. And we'll be in
4 recess.

5 (Recess.)

6 THE COURT: The court has been informed by the
7 bailiff that the jury has verdicts in this case. Do
8 counsel wish to put anything on the record before the
9 jury comes in?

10 MS. ZHOU: No, Your Honor.

11 MR. CARPENTER: No, Your Honor.

12 THE COURT: We'll bring the jury in.

13 (Whereupon the jury entered the courtroom.)

14 THE COURT: Juror Number one, are you holding
15 the verdicts?

16 JUROR 1: Yes, I am.

17 THE COURT: Can you please hand those to the
18 bailiff.

19 The court will now publish or read aloud the
20 verdicts.

21 Verdict Form 1: We the jury find the defendant,
22 Jose Guadalupe Barajas-Gomez, guilty of the crime of
23 attempted rape of a child in the second degree as
24 charged in Count 1. Dated today's date and signed by

VERDICT

1 Verdict Form 2: We the jury find the defendant,
2 Jose Guadalupe Barajas-Gomez, guilty of the crime of
3 attempted rape of a child in the second degree as
4 charged in Count 2. Dated today's date and signed by
5 the presiding juror.

6 Verdict Form 3: We the jury find the defendant,
7 Jose Guadalupe Barajas-Gomez, guilty of the crime of
8 communication with a minor for immoral purposes as
9 charged in Count 3. Dated today's date and signed by
10 the presiding juror.

11 Verdict Form 4: We the jury find the defendant,
12 Jose Guadalupe Barajas-Gomez, guilty of the crime of
13 communication with a minor for immoral purposes as
14 charged in Count 4. Dated today's date and signed by
15 the presiding juror.

16 Ladies and gentlemen, there is a second step to
17 declaring your verdicts today. Next, what we're
18 going to do is called polling. The court clerk is
19 going to ask each of you two questions. He will ask
20 you first whether these are your verdicts and second,
21 whether these are the verdicts of the jury. He will
22 ask you each of those questions by your juror number.
23 So recall Juror Number one is closest to me in the
24 top row. 1 through 6 are in the back row there.

VERDICT

1 7 through 12 are in the front row.

2 So the clerk will now poll the jury.

3 THE CLERK: Juror Number one, were these your
4 verdicts?

5 JUROR 1: Yes.

6 THE CLERK: Were these the verdicts of the
7 jury?

8 JUROR 1: Yes.

9 THE CLERK: Juror Number two, were these your
10 verdicts?

11 JUROR 2: Yes, sir.

12 THE CLERK: Were these the verdicts of the
13 jury?

14 JUROR 2: Yes.

15 THE CLERK: Juror Number three, were these
16 your verdicts?

17 JUROR 3: Yes.

18 THE CLERK: Were these the verdicts of the
19 jury?

20 JUROR 3: Yes.

21 THE CLERK: Juror Number four, were these your
22 verdicts?

23 JUROR 4: Yes, sir.

24 THE CLERK: Were these the verdicts of the

VERDICT

1 JUROR 4: Yes, sir.

2 THE CLERK: Juror Number five, were these your
3 verdicts?

4 JUROR 5: Yes.

5 THE CLERK: Were these the verdicts of the
6 jury?

7 JUROR 5: Yes.

8 THE CLERK: Juror Number six, were these your
9 verdicts?

10 JUROR 6: Yes.

11 THE CLERK: Were these the verdicts of the
12 jury?

13 JUROR 6: Yes.

14 THE CLERK: Juror Number seven, were these
15 your verdicts?

16 JUROR 7: Yes.

17 THE CLERK: Were these the verdicts of the
18 jury?

19 JUROR 7: Yes.

20 THE CLERK: Juror Number eight, were these
21 your verdicts?

22 JUROR 8: Yes.

23 THE CLERK: Were these the verdicts of the
24 jury?

25 JUROR 8: Yes.

VERDICT

1 THE CLERK: Juror Number nine, were these your
2 verdicts?

3 JUROR 9: Yes.

4 THE CLERK: Were these the verdicts of the
5 jury?

6 JUROR 9: Yes.

7 THE CLERK: Juror Number ten, were these your
8 verdicts?

9 JUROR 10: Yes.

10 THE CLERK: Were these the verdicts of the
11 jury?

12 JUROR 10: Yes.

13 THE CLERK: Juror Number 11, were these your
14 verdicts.

15 JUROR 11: No.

16 THE COURT: Ladies and gentlemen, at this
17 time, I'm going to ask you to go with the bailiff to
18 the jury room, and I will give you further
19 instruction.

20 (Whereupon the jury left the courtroom.)

21 THE COURT: Counsel, based upon the polling
22 that was conducted but not completed by the court
23 clerk, it appears that the jury has not reached
24 unanimous verdicts. Therefore, my proposal is to
25 hand the instructions and verdict forms back to the

VERDICT

1 bailiff and ask the jury to continue to deliberate
2 consistent with the instructions that the court has
3 given the jury.

4 But before I do anything in this unusual
5 circumstance, I will hear from counsel. Ms. Zhou.

6 MS. ZHOU: Your Honor, I agree with the
7 court's proposal.

8 MR. CARPENTER: Your Honor, I would ask, just
9 as when you talked to the presiding Juror 1
10 yesterday, you asked her a specific legal question,
11 if there's a reasonable possibility. I would like
12 you to add that, to continue deliberating if there's
13 a reasonable possibility there would be a verdict.

14 THE COURT: I'm not sure exactly what you're
15 asking me to do. So you agree that I should return
16 the instructions and verdict forms to the jury
17 through the bailiff?

18 MR. CARPENTER: Yes, Your Honor.

19 THE COURT: And you agree that they should
20 continue to deliberate. But you have a different
21 suggestion in terms of what the court should say?

22 MR. CARPENTER: Yeah. At the end -- and I
23 don't have the instruction or the question that you
24 asked the presiding juror, but I think that language

VERDICT

1 think the language was something there was a
2 reasonable possibility you can arrive at a decision.
3 Or I think -- I can't remember your exact language
4 that you used, Your Honor.

5 THE COURT: So the language that I used when
6 questioning the presiding juror after there was an
7 indication that they couldn't reach a decision was,
8 "Is there a reasonable probability of the jury
9 reaching an agreement on all counts within a
10 reasonable amount of time?"

11 MR. CARPENTER: I would ask that you add that,
12 if -- continue to deliberate, if there's a reasonable
13 probability, and then the rest, that you add that to
14 your instruction.

15 THE COURT: Ms. Zhou?

16 MS. ZHOU: Your Honor, I understand where
17 Mr. Carpenter is coming from; however, I don't
18 believe it's necessary or appropriate at this time,
19 because I don't think it's an issue that we've heard
20 from the jury that they're hung again. It just
21 sounds like the last note they had for us just before
22 they all came out was that they were unanimous on the
23 verdict, and during the polling process, it became
24 clear that one of the jurors indicated that that was

VERDICT

1 think it is a situation where the court just advises
2 them to continue deliberating until, I think, if we
3 get another note saying now they're hung again, and I
4 think that would be when we just take the
5 presiding -- or ask the presiding juror herself at
6 that point whether or not she believed they will come
7 to a verdict, if there's a reasonable probability
8 that they will come to agreement within a reasonable
9 amount of time.

10 But as of right now, the last indication that we
11 have from the jury, that wasn't the situation where
12 they were hung, because they said they were
13 unanimous, and now it turns out seems like they're
14 not unanimous, and so I guess I would just ask the
15 court to -- my proposal is just what the court
16 initially proposed, which is simply asking them to
17 keep deliberating.

18 THE COURT: So the court will not include
19 language of a reasonable probability of reaching
20 agreement within a reasonable amount of time at this
21 time. I don't think it's appropriate now.

22 My concern right now is that the jury indicated it
23 reached a unanimous decision when clearly it didn't.
24 What I don't know is whether a juror in the jury room

VERDICT

1 what happened, or whether the presiding juror somehow
2 didn't think that the verdict needed to be unanimous.
3 I'm guessing, because I don't know what caused this
4 situation of the polling answer.

5 So my concern right now is just that all of the
6 jurors understand the unanimity requirement and that
7 any verdict be consistent with that. That is my only
8 concern right now. I'm not dealing with any other
9 concerns.

10 That being said, because this is an unusual
11 situation, what I would like to do is, I would like
12 the parties to confer regarding the exact language
13 that the court should give to the jury at this point,
14 understanding that I've already ruled that I'm not
15 going to include language about a reasonable
16 probability of reaching a decision within a
17 reasonable amount of time.

18 So with that ruling, I'd like the parties to
19 confer, if they can, to reach agreement on the
20 language.

21 Mr. Carpenter, did you have a question?

22 MR. CARPENTER: Yeah, I'd like to put
23 something on the record, Your Honor.

24 THE COURT: Certainly.

MR. CARPENTER: Because without that language

VERDICT

1 it's almost as if the court is telling them they have
2 to come to a decision. Okay. That's the implication
3 of your words, and that's not true, but that's the
4 implication without adding that language. The court
5 is telling them they have to agree. And that's why I
6 think it's unfair to the defendant if you don't add
7 that language, because they don't have to agree.

8 So I want to put that on the record that that
9 language, you know, we feel should be added.

10 THE COURT: Understood. So as I've indicated,
11 the language that was proposed, I am not going to
12 include. It is standard language used in a different
13 situation than we have here. But the court is open
14 to other language that might address Mr. Carpenter's
15 concerns, but not the language proposed. This is why
16 I think it might be helpful to have the attorneys
17 confer regarding appropriate language in this
18 situation that might address Mr. Carpenter's concern
19 but is not the language that's to be used in a
20 different situation.

21 So I will take a brief recess and allow the
22 parties to confer. If they come up with an
23 agreement, I will hear it. If the parties don't come
24 to an agreement, I will hear if the parties have
25 different suggestions.

VERDICT

1 recess.

2 (Recess.)

3 THE COURT: Have counsel reached an agreement?

4 MS. ZHOU: Your Honor, Mr. Carpenter and I
5 have conferred on the language. I don't believe we
6 have an agreement.

7 THE COURT: Okay. So Ms. Zhou, what do you
8 propose?

9 MS. ZHOU: Your Honor, my proposal is what the
10 court had initially proposed, just to advise the jury
11 to carefully reread all the instructions, and I
12 believe Your Honor also indicated continue
13 deliberating. And speaking with Mr. Carpenter, I
14 understand his concern; however, I don't believe
15 we're in a situation, based on all the things that's
16 happened so far in the deliberation process, where
17 the jury doesn't know that it's okay to be hung.
18 Because I think they do know that since, yesterday,
19 the first question was what happens if we're hung on
20 two and we have a verdict on two. So I think the
21 idea that they understand that it could potentially
22 be a hung jury on some counts, I think they're
23 mindful of that, because that was the first thing
24 that came to their mind yesterday.

25 So given everything that's happened, the State's

VERDICT

1 request would just be for the court to propose, I
2 guess, the response of what the court had initially
3 proposed. Thank you.

4 THE COURT: Mr. Carpenter.

5 MR. CARPENTER: Your Honor, you've already
6 ruled against what I suggest. I haven't changed.
7 But I would like to hear what you're going to give.
8 I don't think you should say continue to deliberate.
9 I'd say read the instructions. You don't have to put
10 continue to deliberate at the end, I'm not sure if
11 you were going to do that or not.

12 THE COURT: So, Mr. Carpenter, do you have a
13 different proposal other than the language of
14 reasonable probability? Do you have a different
15 proposal for the court to consider at all?

16 MR. CARPENTER: No, Your Honor. But can I
17 hear what you're thinking of doing? You know, I'm
18 not sure what -- I may have a suggestion for a slight
19 modification of what you are planning on doing right
20 now.

21 THE COURT: So I appreciate that, and I'm
22 happy to give you my thoughts. I asked both counsel
23 to give me your proposals. Frankly, neither one has.
24 I just want the record to be clear that I'm giving

VERDICT

1 The court's proposed language is as follows:

2 "Please reread the court's instructions and
3 deliberate consistent with those instructions."

4 MR. CARPENTER: I don't have any suggestions
5 to that, Your Honor. I think the defense made clear
6 what language we wanted, so I don't have any comment
7 on that language.

8 THE COURT: Ms. Zhou, any suggestions or
9 objections with that language that I've just read?

10 MS. ZHOU: No, Your Honor.

11 THE COURT: So what I'd actually like to do is
12 bring the whole jury back in and orally give that
13 instruction to the jury and then send them out. Any
14 objection to that?

15 MS. ZHOU: No, Your Honor.

16 MR. CARPENTER: No, Your Honor.

17 (Whereupon the jury entered the courtroom.)

18 THE COURT: Ladies and gentlemen, at this
19 time, I am returning the instructions and verdict
20 forms to the bailiff, who will return them to you.
21 Please reread the court's instructions and deliberate
22 consistent with those instructions.

23 You may go with the bailiff at this time.

24 (Whereupon the jury left the courtroom.)

25 THE COURT: Counsel, anything for the record?

VERDICT

1 MS. ZHOU: No, Your Honor.

2 MR. CARPENTER: No, Your Honor.

3 THE COURT: So, I do plan to provide the jury
4 with a note at 4:30 if we don't hear from them
5 between now and then. The note, as I indicated
6 previously, would be consistent and directly
7 including the language that I read on the record
8 previously.

9 Is there anything else we need to discuss at this
10 time?

11 MS. ZHOU: No, Your Honor.

12 MR. CARPENTER: I'm not sure what note, what
13 language, what note.

14 THE COURT: The language that I read to them
15 when they were dismissed --

16 MR. CARPENTER: Oh..

17 THE COURT: -- after closing arguments.

18 MR. CARPENTER: Okay. I got it. Thank you,
19 Your Honor.

20 THE COURT: So if you want to see that
21 language, I can -- it's going to be printed out and
22 given to the presiding juror. I will give it to the
23 court clerk so that you can look at it before it's
24 given.

VERDICT

1 THE COURT: Okay.

2 MR. CARPENTER: Thank you.

3 THE COURT: But it's the same language that I
4 already directed them. We may hear a note or a
5 verdict before then.

6 MS. ZHOU: Thank you, Your Honor.

7 THE COURT: Court will be in recess.

8 (Recess.)

9 THE COURT: We have a note from the jury. The
10 jury's note reads as follows: I guess I should
11 characterize it as a question. The jury's question
12 is, "We have agreement on three charges. We do not
13 have agreement on one charge. How do we proceed?"

14 Counsel, do you want to have a minute?

15 MS. ZHOU: I do not need a minute.

16 MR. CARPENTER: Yes, Your Honor.

17 THE COURT: Would you like me to leave the
18 bench?

19 MR. CARPENTER: Yes, Your Honor.

20 THE COURT: So we'll be in recess very
21 briefly.

22 (Recess.)

23 THE COURT: I take it counsel has had adequate
24 time.

MR. CARPENTER: Yes, Your Honor.

VERDICT

1 THE COURT: Ms. Zhou, I'll hear from you
2 first.

3 MS. ZHOU: Your Honor, I think the State's
4 proposal would be to have the presiding juror come
5 out into the courtroom and just ask the same question
6 we asked of her yesterday afternoon, which is -- I
7 actually can't remember the court's question, but I
8 think it's somewhere along the lines of do you
9 believe there's a reasonable probability that if the
10 jury had reasonable amount of time, that they can
11 be -- they can come up with a verdict on all counts,
12 or something along those lines. And I think that's
13 the State's proposal.

14 THE COURT: Mr. Carpenter.

15 MR. CARPENTER: Your Honor, we -- it's been
16 two days, and a lot of, you know, it's almost --
17 yesterday after one day, I think the State at first
18 asked that. So we would ask, if they can't, which
19 doesn't seem like they have at least a decision on at
20 least one charge that you declare a mistrial on that
21 charge, and let's hear their verdicts on the other
22 three charges. That's what we would want.

23 THE COURT: Mr. Carpenter, I tend to agree
24 with you, but is there any harm in bringing in the
25

VERDICT

1 MR. CARPENTER: Here's what I'm afraid of: If
2 this presiding juror wants to convict, she may just
3 say, you know, there is a reasonable, and go back and
4 we don't know, right? I mean, there's no harm, I
5 guess. We can hear from her. But sometimes they're
6 invested -- she appears to be invested in a
7 conviction. So we know that now from what happened
8 during the polling.

9 THE COURT: So I don't think we can conclude
10 that.

11 MR. CARPENTER: All right. Well --

12 THE COURT: But I appreciate your argument.

13 MR. CARPENTER: Okay.

14 THE COURT: So you are opposed to asking the
15 question of the presiding juror?

16 MR. CARPENTER: Yes, Your Honor.

17 THE COURT: I frankly don't think it's
18 necessary. I think that we've given this jury plenty
19 of time and direction to come up with unanimous
20 verdicts on all four charges. They have now come to
21 agreement on three out of four charges, and based
22 upon the amount of time, basically almost two whole
23 days of deliberations, it appears to me that they're
24 not going to come to an agreement as to one charge.

--
I would like to respond to that I respond to

VERDICT

1 this note to ask the presiding juror to indicate on
2 the one count they cannot reach agreement on, to
3 state, "The jury cannot decide," or something to that
4 effect as to that one count, and then fill in the
5 verdict form on the counts they can agree on. And
6 then we bring them back into the courtroom.

7 MS. ZHOU: Yes, Your Honor. Thank you.

8 MR. CARPENTER: Yes, Your Honor. We agree
9 with that.

10 THE COURT: So, Mr. Carpenter, you don't
11 object to that plan?

12 MR. CARPENTER: No, not at all.

13 THE COURT: And Ms. Zhou, do you object to
14 that plan?

15 MS. ZHOU: No, Your Honor. Thank you.

16 THE COURT: Counsel, if you'll look at this
17 language and indicate if you have any objection to
18 that language.

19 MS. ZHOU: The State is okay with that. Thank
20 you.

21 MR. CARPENTER: The defense, also, Your Honor.

22 THE COURT: Thank you. So because I
23 anticipate when I give this to the bailiff that the
24 jury will have verdicts on three counts and will

VERDICT

1 require anything further in terms of the record or
2 any questions asked or argument before being prepared
3 to stipulate to a mistrial as to the remaining count?

4 MS. ZHOU: No, Your Honor, not from the State.

5 MR. CARPENTER: No, Your Honor, not from the
6 defense.

7 THE COURT: Okay. The reason I ask that is
8 because from my perspective, the only information
9 that we do not have at this point is which count. It
10 doesn't appear to me that that would make a
11 difference. And so what I would be prepared to do is
12 to ask on the record after I read all of the
13 information on the verdict forms whether counsel will
14 stipulate to a mistrial and then make that finding of
15 a mistrial in front of the jury. Is there any
16 objection to that?

17 MS. ZHOU: No, Your Honor.

18 MR. CARPENTER: No, Your Honor.

19 THE COURT: So I do anticipate that this will
20 be the last time we'll see this jury in the
21 courtroom, and so then I'll proceed with essentially
22 indicating that they are completed with their jury
23 service and further explanation to them. Is that
24 what the parties anticipate?

25 MS. ZHOU: Yes, Your Honor.

VERDICT

1 MR. CARPENTER: Yes, Your Honor.

2 THE COURT: So we'll be in recess briefly.

3 (Recess.)

4 THE COURT: Counsel, anything for the record
5 before we bring the jury in?

6 MS. ZHOU: No, Your Honor.

7 MR. CARPENTER: No, Your Honor.

8 THE COURT: We'll bring the jury in.

9 (Whereupon the jury entered the courtroom.)

10 THE COURT: Juror Number one, are you holding
11 the verdict forms?

12 JUROR 1: Yes, I am.

13 THE COURT: Please hand those to the bailiff.

14 I will now read aloud the verdict forms. Verdict
15 Form 1: We the jury find the defendant, Jose
16 Guadalupe Barajas-Gomez, (cannot decide, of the crime
17 of attempted rape of a child in the second degree as
18 charged in Count 1, signed today's date -- dated
19 today's date and signed by the presiding juror.)

20 Counsel, it appears to me that on Verdict Form 1,
21 the jury, consistent with the court's instruction,
22 indicated that the jury cannot decide as to Count 1.
23 Based upon the jury's inability to come up with a
24 unanimous verdict on Count 1 within a reasonable
25

VERDICT

1 Count 1?

2 MS. ZHOU: Yes, Your Honor.

3 MR. CARPENTER: Yes, Your Honor.

4 THE COURT: As to Count 1, the court declares
5 a mistrial.)

6 The court will continue to read the verdict forms.

7 Verdict Form 2: We the jury find the defendant,
8 Jose Guadalupe Barajas-Gomez, guilty of the crime of
9 attempted rape of a child in the second degree as
10 charged in Count 2. Dated today's date and signed by
11 the presiding juror.

12 Verdict Form 3: We the jury find the defendant
13 Jose Guadalupe Barajas-Gomez, guilty of the crime of
14 communication with a minor for immoral purposes as
15 charged in Count 3. Dated today's date and signed by
16 the presiding juror.

17 Verdict Form 4: We the jury find the defendant,
18 Jose Guadalupe Barajas-Gomez, guilty of the crime of
19 communication with a minor for immoral purposes as
20 charged in Count 4. Dated today's date and signed by
21 the presiding juror.

22 Ladies and gentlemen, with regard to the three
23 counts upon which you have entered verdicts, there is
24 this other step in declaring those verdicts. This is
25 called polling, where each of you will answer

VERDICT

1 questions asked of the clerk individually. You will
2 answer the two questions that you're now familiar
3 with, is this your verdict and is this the verdict of
4 the jury. We'll begin with Juror Number one and go
5 through Juror Number 12.

6 THE CLERK: Juror Number one, is this your
7 verdict?

8 JUROR 1: Yes.

9 THE CLERK: Is this the verdict of the jury?

10 JUROR 1: Yes.

11 THE CLERK: Juror Number two, is this your
12 verdict?

13 JUROR 2: Yes.

14 THE CLERK: Is this the verdict of the jury?

15 JUROR 2: Yes.

16 THE CLERK: Juror Number three, is this your
17 verdict?

18 JUROR 3: Yes.

19 THE CLERK: Is this the verdict of the jury?

20 JUROR 3: Yes.

21 THE CLERK: Juror Number four, is this your
22 verdict?

23 JUROR 4: Yes, ma'am.

24 THE CLERK: Is this the verdict of the jury?

25 JUROR 4: Yes, ma'am.

VERDICT

1 THE CLERK: Juror Number five, is this your
2 verdict?

3 JUROR 5: Yes.

4 THE CLERK: Is this the verdict of the jury?

5 JUROR 5: Yes.

6 THE CLERK: Juror Number six, is this your
7 verdict?

8 JUROR 6: Yes.

9 THE CLERK: Is this the verdict of the jury?

10 JUROR 6: Yes.

11 THE CLERK: Juror Number seven, is this your
12 verdict?

13 JUROR 7: Yes.

14 THE CLERK: Is this the verdict of the jury?

15 JUROR 7: Yes.

16 THE CLERK: Juror Number eight, is this your
17 verdict?

18 JUROR 8: Yes.

19 THE CLERK: Is this the verdict of the jury?

20 JUROR 8: Yes.

21 THE CLERK: Juror Number nine, is this your
22 verdict?

23 JUROR 9: Yes.

24 THE CLERK: Is this the verdict of the jury?

25 JUROR 9: Yes.

VERDICT

1 THE CLERK: Juror Number ten, is this your
2 verdict?

3 JUROR 10: Yes.

4 THE CLERK: Is this the verdict of the jury?

5 JUROR 10: Yes.

6 THE CLERK: Juror Number 11, is this your
7 verdict?

8 JUROR 11: Yes.

9 THE CLERK: Is this the verdict of the jury?

10 JUROR 11: Yes.

11 THE CLERK: Juror Number 12, is this your
12 verdict?

13 JUROR 12: Yes.

14 THE CLERK: Is this the verdict of the jury?

15 JUROR 12: Yes.

16 THE COURT: Thank you, ladies and gentlemen.
17 Based upon your responses, your three verdicts are
18 unanimous as required by law, and the court is
19 accepting and entering those three verdicts. I have
20 already declared a mistrial as to Count 1. That was
21 the count where you could not reach a unanimous
22 verdict.

23 Shortly, you will go to the jury room for the last
24 time in this case. The bailiff has some
25 administrative matters for you, and then you'll be

VERDICT

1 allowed to go. As I indicated to you at the start of
2 this trial when I issued many instructions to you,
3 when you are completed with your jury service, you
4 are free from all of those instructions. You are
5 free to discuss this case and your jury service with
6 anyone you wish, but you're not required to do so. I
7 say that, because people may ask you questions about
8 this case or about your jury service, and I want you
9 to be clear that the decision to speak about this
10 case or to discuss in any way this case or your jury
11 service is completely up to you. You do not need to
12 answer any questions, but you may if you wish.

13 So when you go back to the jury room, and, as I
14 indicated, the bailiff has some administrative
15 matters to take care of, after that, I will join you
16 in the jury room. I will take any input that you
17 have for me on behalf of the court or myself, court
18 staff, and take any input that you want to share with
19 me. I will also answer any questions that you have
20 for me if I can. Sometimes I can't answer some
21 questions, but if I can answer them, I will.

22 After that, the attorneys may or may not wish to
23 speak with you. The decision to remain when I go
24 back there or when the attorneys, if they want to, to
25 discuss it with you, is yours completely. You need

VERDICT

1 not stay. As I said, when you go back to the jury
2 room and take care of those matters with the bailiff,
3 your jury service is over, and you are not required
4 to stay at all. But I offer that if you want to
5 discuss it with me, you can.

6 Because I don't know whether any of you will be
7 there when I go back to the jury room, I want to
8 thank you right now for your jury service. I know
9 that this has been a very difficult time for all of
10 you. I know that you have put your time and effort
11 into this case and, obviously, struggled to reach
12 agreement. And I just appreciate the seriousness
13 with which each of you approached your jury service.
14 You took that summons seriously, and you took this
15 case seriously. And on behalf of the parties, the
16 court and your community, I thank you for that
17 service. I know that all of you had other things to
18 do this week and last week, and you invested your
19 time and your energy, and I know how exhausting jury
20 service is, so I just want to say that I very much
21 appreciate your service on this case. I thank you,
22 and I know that it is going to be a relief to you to
23 be done, but this is very serious work that you've
24 done these last two weeks on this case, and I thank
25 you for that. I just can't say it enough.

VERDICT

1 I think sometimes people don't appreciate how
2 difficult jury service is, but I see it often that
3 jurors take the job very seriously.

4 With that, you are free to go with the bailiff at
5 this time.

6 (Whereupon the jury left the courtroom.)

7 THE COURT: Ms. Zhou.

8 MS. ZHOU: And Your Honor, based on the fact
9 that Mr. Barajas-Gomez has been convicted on three
10 charges, which all three of them under RCW 10.64.025,
11 according to that RCW, the court is required to take
12 him into custody pending sentencing, so that would be
13 the State's request, is for the court to revoke bail
14 in this matter and then take Mr. Barajas-Gomez into
15 custody.

16 And I think because there was -- the court
17 declared a mistrial on one of the counts, I will also
18 ask for, I guess, just a status hearing, just so I
19 can figure out what to do with regards to that one
20 count and whether or not the State will be retrying
21 that count. And then that would be my request is to
22 set a status hearing, which if the State is not
23 proceeding on that, then I think prior to that, I
24 will let Mr. Carpenter know, and he and I can sign
25 off on an order for PSI for the court to sign so that

VERDICT

1 process can be start as well.

2 THE COURT: Mr. Carpenter, do you believe that
3 the parties can agree as to an order regarding a
4 status hearing and the order -- excuse me -- the
5 conditions of release and that sort of thing?

6 MR. CARPENTER: I think so, Your Honor. I
7 think so.

8 THE COURT: I mean, there's no discretion of
9 the court to have your client taken into custody.

10 MR. CARPENTER: No, I know the statute reads
11 "shall."

12 THE COURT: And a report will need to be
13 generated for sentencing, and then the State has a
14 decision to make as to the remaining count. I don't
15 think the court has any discretion to do anything
16 other than allow the State to make that decision.

17 Ms. Zhou has indicated a status hearing. Are you
18 in agreement as to that?

19 MR. CARPENTER: Sure, Your Honor. I have no
20 objection to that. Is the State then -- maybe I need
21 some clarification -- waiting to set a sentencing
22 date based on what's going to happen at that status
23 hearing? Is that what I'm hearing?

24 THE COURT: I don't know if that's what I'm

VERDICT

1 are going to set a sentencing date. I was getting to
2 that later.

3 MR. CARPENTER: I have no objection to a
4 status hearing.

5 THE COURT: So we'll proceed in the manner
6 proposed by Ms. Zhou, and I think the parties can
7 probably come to agreement as to the form of that
8 order indicating that Mr. Barajas-Gomez will be taken
9 into custody and a status hearing will be set. I'd
10 ask the parties to confer regarding a date for that
11 status hearing. It need not be before me, I don't
12 think. I think it can be before any judge.

13 MS. ZHOU: Should I just -- should we just put
14 it on the -- I guess an omnibus calendar, since
15 that's what we would normally set, a case management
16 conference.

17 THE COURT: That seems reasonable to me. I'd
18 ask the parties to confer regarding that date, but I
19 would also like to set a sentencing date today, and
20 that can be changed, but I definitely want to have a
21 date on the books. I generally schedule those for
22 Wednesday morning at 8:30, and so if the parties
23 could confer regarding a date for that, the only
24 conflicts that I tend to have are on a different case
25 that's specifically assigned to me, and I think Ms.

VERDICT

1 Zhou is familiar with that case and those dates that
2 might present a conflict.

3 MS. ZHOU: And, Your Honor, I guess the only
4 thing I would seek clarification on is with regards
5 to Your Honor mentioned you're typically available on
6 Wednesdays at 8:30. Is Your Honor wanting
7 Mr. Carpenter and I to go check with Mr. Bales prior
8 to the conclusion of today's hearing so we can put a
9 sentencing date on the 3.2 order?

10 THE COURT: I would like there to be a date,
11 yes.

12 MS. ZHOU: Yes, Your Honor. I think
13 Mr. Carpenter and I can work on all of that.

14 THE COURT: Okay. So I don't think there's
15 going to be any disagreement as to the form of the
16 order, so I plan to leave the bench and just sign
17 that order when the parties are completed with that.
18 And if there's any disagreement, I can certainly come
19 back on the bench and we'll address it, but I don't
20 anticipate that.

21 MR. CARPENTER: All right. Can
22 Mr. Barajas-Gomez be here until we finalize that
23 order, Your Honor?

24 THE COURT: Yes, he'll need to sign that
25 order. So until I sign it, he'll need to remain

VERDICT

1 here.

2 MR. CARPENTER: Thank you.

3 THE COURT: Do the attorneys wish to speak to
4 the jury if there is anyone remaining?

5 MS. ZHOU: I would, Your Honor, as always.
6 Thank you.

7 MR. CARPENTER: No, Your Honor.

8 THE COURT: Very well. Is there anything else
9 we need to address on the record?

10 MS. ZHOU: No, Your Honor.

11 MR. CARPENTER: No, Your Honor.

12 THE COURT: Thank you very much, counsel.

13 MR. CARPENTER: Thank you, Your Honor.

14 THE COURT: We are completed.

15

16

--o0o--

17

18

19

20

21

22

23

24

25

Trial

E (enl) 2400



FILED
THURSTON COUNTY, WA
SUPERIOR COURT

MAR 04 2020

Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSE GUADALUPE BARAJAS GOMEZ,

Defendant.

NO. 19-1-00428-34

VERDICT FORM 1

KR We, the jury, find the defendant, JOSE GUADALUPE BARAJAS GOMEZ,
Cannot
~~Guilty~~ decide of the crime of ATTEMPTED RAPE OF A CHILD IN
("Not Guilty" or "Guilty")

THE SECOND DEGREE as charged in Count 1.

DATE: March 4 2020

Yin Ruan

PRESIDING JUROR

G



FILED
THURSTON COUNTY, WA
SUPERIOR COURT

MAR 04 2020

Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSE GUADALUPE BARAJAS GOMEZ,

Defendant.

NO. 19-1-00428-34

VERDICT FORM 2

We, the jury, find the defendant, JOSE GUADALUPE BARAJAS GOMEZ,

Guilty of the crime of ATTEMPTED RAPE OF A CHILD IN
("Not Guilty" or "Guilty")

THE SECOND DEGREE as charged in Count 2.

DATE: March 4 2020



PRESIDING JUROR

H

19-1-00428-34
VRD 68
Verdict Form
7839255



FILED
THURSTON COUNTY, WA
SUPERIOR COURT

MAR 04 2020

Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSE GUADALUPE BARAJAS GOMEZ,

Defendant.

NO. 19-1-00428-34

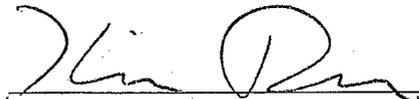
VERDICT FORM 3

We, the jury, find the defendant, JOSE GUADALUPE BARAJAS GOMEZ,

Guilty of the crime of COMMUNICATION WITH A MINOR
("Not Guilty" or "Guilty")

FOR IMMORAL PURPOSES as charged in Count 3.

DATE: March 4 2020


PRESIDING JUROR





FILED
THURSTON COUNTY, WA
SUPERIOR COURT

MAR 04 2020

Linda Myhre Enlow
Thurston County Clerk

NO. 19-1-00428-34

**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

vs.

JOSE GUADALUPE BARAJAS GOMEZ,

Plaintiff,

Defendant.

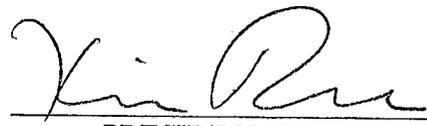
VERDICT FORM 4

We, the jury, find the defendant, JOSE GUADALUPE BARAJAS GOMEZ,

Guilty of the crime of COMMUNICATION WITH A MINOR
("Not Guilty" or "Guilty")

FOR IMMORAL PURPOSES as charged in Count 4.

DATE: March 4 2020


PRESIDING JUROR

J

APPENDIX F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSE G. BARAJAS GOMEZ,

Petitioner,

v.

DAN WHITE,

Respondent.

Case No. C22-5897-MJP

ORDER DISMISSING FEDERAL
HABEAS ACTION

The Court, having reviewed Petitioner's petition for writ of habeas corpus, Respondent's answer to the petition, Petitioner's response to Respondent's answer, the Report and Recommendation of Michelle L. Peterson, United States Magistrate Judge, and the remaining record, hereby finds and ORDERS:

- (1) The Report and Recommendation is approved and adopted.
- (2) Petitioner's petition for writ of habeas corpus (dkt. # 5) is DENIED, and this action is DISMISSED with prejudice.
- (3) In accordance with Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, a certificate of appealability is DENIED.

1 (4) The Clerk is directed to send copies of this Order to Petitioner, to counsel for
2 Respondent, and to the Honorable Michelle L. Peterson.

3 DATED this _____ day of _____, 2023.

4
5 MARSHA J. PECHMAN
6 United States District Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

United States District Court
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSE G. BARAJAS GOMEZ,

Petitioner,

v.

DAN WHITE,

Respondent.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C22-5897-MJP

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

The Report and Recommendation is approved and adopted. Petitioner's petition for writ of habeas corpus is denied, and this action is dismissed with prejudice.

Dated this _____ day of _____, 2023.

RAVI SUBRAMANIAN

Clerk

Deputy Clerk

From: ECF@wawd.uscourts.gov <ECF@wawd.uscourts.gov>
Sent: Wednesday, August 30, 2023 4:44 PM
To: ECF@wawd.uscourts.gov
Subject: Activity in Case 3:22-cv-05897-MJP Barajas Gomez v. White Order on Objections to Report and Recommendation

External Email

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** There is no charge for viewing opinions.

U.S. District Court

United States District Court for the Western District of Washington

Notice of Electronic Filing

The following transaction was entered on 8/30/2023 at 4:43 PM PDT and filed on 8/30/2023

Case Name: Barajas Gomez v. White

Case Number: 3:22-cv-05897-MJP

Filer:

Document Number: 18

Docket Text:

ORDER adopting [16] Report and Recommendation. Gomez's petition for a writ of habeas corpus (Dkt. No. [5]) and this action are DISMISED with prejudice. In accordance with Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, a certificate of appealability is DENIED. Signed by Judge Marsha J. Pechman. **6 PAGE(S), PRINT ALL (Jose Barajas Gomez, Prisoner ID: 422638) (SB)**

3:22-cv-05897-MJP Notice has been electronically mailed to:

Christopher Mark Fowler c.fowler@atg.wa.gov, corolyaef@atg.wa.gov, correader@atg.wa.gov

Jose G Barajas Gomez docmccinmatefederal@DOC1.WA.GOV

3:22-cv-05897-MJP Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1035929271 [Date=8/30/2023] [FileNumber=9536850-0
] [b40741f2903937f3099e8953f74d47325e4fe067fe5dcfcc605f6d6f8404f60499b
06cd2038c58c7d65bc74877eeae12dfea2d47d8feeb49565924be3b3c2731]]