72093-7

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Court of Appeals
Division I
State of Washington

NO. 72093-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LOVETT CHAMBERS,

Appellant.

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

The Honorable Theresa Doyle, Judge
The Honorable Michael Hayden, Judge
The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when, over a defense objection, it instructed jurors on manslaughter without any factual basis for that charge.

2. The trial court erred when it denied a motion to suppress appellant's statements to police where detectives failed to scrupulously honor appellant's invocations of his right to remain silent.

3. When denying the defense motion to suppress appellant's statements to police, the trial court erred when it entered a portion of finding of fact 14 and conclusions of law 6-9, and 15.

4. The trial court erred when it denied a motion to suppress evidence that was the product of an illegal warrantless search of appellant's home.

5. When denying the defense motion to suppress evidence from the warrantless search, the trial court erred when it entered conclusion of law 1, the second conclusion numbered 3, both conclusions numbered 4, and both conclusions numbered 6.

6. Appellant was denied his constitutional right to counsel during the preservation deposition of prosecution witness Brian Knight.

7. Prosecutorial misconduct during closing argument denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. A trial court may not instruct jurors on a lesser included offense unless the evidence raises an inference that only the lesser crime was committed. Appellant was charged with murder. He claimed self-defense. The evidence showed that he intentionally used deadly force against another individual, killing him, after that individual threatened him with deadly force. The only proper issue for the jury was whether appellant used intentional deadly force in self-defense. Yet, the court instructed jurors on manslaughter based on a theory appellant may have recklessly caused the individual's death. Did the trial court err?

2. Following his arrest, appellant invoked his right to silence under Miranda[1] several times. Law enforcement must "scrupulously honor" the right to cut off questioning and may not

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

reinitiate discussions with an arrestee unless a significant period of time has passed. Did detectives violate these protections where, despite appellant's multiple invocations of his right to silence, they brought him to headquarters for interrogation and waited less than 45 minutes following appellant's last invocation before attempting to convince him to talk?

3. In finding no violation of appellant's Miranda rights, the trial court entered several findings and conclusions that are not supported by the evidence or the applicable law. Are these findings and conclusions erroneous?

4. Appellant was arrested outside his home. Without a warrant, officers then entered his home to conduct a "protective sweep" and searched all rooms. In the kitchen, they found critical evidence, used that evidence to obtain a search warrant, and then seized that very evidence under authority of the warrant. Where officers were not permitted to conduct the initial "protective sweep," should all fruits of that unlawful search have been suppressed?

5. In upholding the warrantless search of appellant's home, the trial court entered several conclusions that are not supported by the applicable law. Are these conclusions erroneous?

6. During the videotaped deposition of a prosecution witness unavailable for trial, appellant was restrained in chains and cuffs, making it impossible to take notes, review discovery, or effectively communicate with his attorneys. Was this a violation of appellant's rights under the Sixth Amendment and article 1, section 22 of the Washington Constitution?

7. It is serious misconduct to personally attack defense counsel or impugn counsel's character as a means of convincing jurors to convict. During closing argument, and over defense objections, the deputy prosecutor told jurors that the defense had made race an issue in the case to "pander" to their prejudices, cloud their judgment, and convince them to ignore their "rational thought processes." The deputy prosecutor also told jurors they should not be "fooled" by defense efforts and accused counsel of attempting an "equity defense," where appellant's life is weighed against the victim's life as a racist to decide guilt. Did this misconduct deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Lovett Chambers with one count of Murder in the First Degree in

connection with the death of Michael Hood. CP 1-7. Prosecutors later reduced the charge to Murder in the Second Degree, alleging two alternative theories: (1) that Chambers intentionally killed Hood or (2) that Chambers intentionally assaulted Hood, resulting in his death. The charge included a firearm sentencing enhancement. Supp. CP ___ (sub no. 94, Amended Information). Chambers admitted the killing, but claimed self-defense. CP 871-874.

Near the close of evidence, the State proposed instructions on Manslaughter in the First Degree. Supp. CP ___ (sub no. 228, State's Instructions to the Jury (instructions 15-18)). The defense objected, arguing there was no factual basis for such instructions because there was no evidence Hood's death was attributable merely to reckless conduct. Rather, Hood died because Chambers intentionally shot him while fearing for his own life. CP 1726-1735; 44RP 30-40. The defense objection was overruled. 44RP[2] 40; 45RP 3-4.

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[2] This brief refers to the verbatim report of proceedings as follows: 1RP – 1/7/14 (9 pages); 2RP – 1/7/14 (139 pages); 3RP – 1/8/14; 4RP – 1/9/14; 5RP – 1/13/14; 6RP – 1/14/14; 7RP – 1/15/14; 8RP – 1/16/14; 9RP – 1/21/14; 10RP – 1/22/14; 11RP – 1/23/14; 12RP – 1/27/14; 13RP – 1/28/14; 14RP – 1/29/14; 15RP – 1/30/14; 16RP – 1/31/14; 17RP – 2/3/14; 18RP – 2/10/14; 19RP – 2/11/14; 20RP – 2/12/14; 21RP – 2/13/14; 22RP – 2/18/14; 23RP – 2/19/14; 24RP – 2/20/14; 25RP – 2/24/14; 26RP – 2/25/14; 27RP – 2/26/14; 28RP – 2/27/14; 29RP – 3/3/14; 30RP – 3/4/14; 31RP – 3/5/14; 32RP – 3/6/14; 33RP – 3/10/14; 34RP – 3/11/14; 35RP – 3/12/14; 36RP – 3/13/14; 37RP – 3/19/14; 38RP – 3/20/14; 39RP – 3/24/14; 40RP – 3/25/14; 41RP – 3/26/14; 42RP –

Jurors were unable to reach a verdict on Murder in the Second Degree, but found Chambers guilty of Manslaughter in the First Degree and answered "yes" to whether he had been armed with a firearm. CP 1774-1775, 1805.

Chambers moved to set aside the verdicts on multiple grounds. See CP 1806-1827. The motion was denied. 49RP 34-35. The Honorable Theresa Doyle imposed a low-end standard range sentence of 78 months, plus a mandatory 60-month term on the firearm enhancement, for a total sentence of 138 months. CP 1257, 1259. Chambers timely filed his Notice of Appeal. CP 2283-2292.

2. Substantive Facts

In January 2012, 67-year-old Lovett Chambers and his wife, Sara, lived in the West Seattle home they had shared since 1993. 29RP 167; 42RP 71-72, 153. Chambers ran an IT business from a home office and, on January 21, 2012, received word that he had been awarded a contract that could provide years of income and establish his company in the field. He was elated. 42RP 74, 79-81, 163-164.

3/31/14; 43RP – 4/1/14; 44RP – 4/2/14 (a.m.); 45RP – 4/2/14 (p.m.); 46RP – 4/3/14; 47RP – 4/4/14; 48RP – 4/8/14; 49RP – 6/13/14.

Chambers and many of his friends frequented the Feedback Lounge, a West Seattle bar featuring rock memorabilia and classic cocktails. 24RP 17-18, 29-30; 42RP 161-162. The evening of January 21, Chambers drove to the Feedback, which is located on the west side of California Ave. 24RP 49; exhibits 3, 6. North of the Feedback on California Ave., just beyond a cross street, is another bar, the Beveridge Place. 24RP 50-51; exhibits 3, 6. Chambers parked his car by the Beveridge Place, on the west side of California Ave. facing south, before walking farther south and heading into the Feedback. 25RP 55-56, 80-81; 40RP 69; 42RP 168-169; exhibit 3.

Chambers, whom many of the servers and staff knew as "Cid," was well liked at the Feedback Lounge and described as mellow, a very good customer, and a very nice guy. 24RP 31, 41, 52-54, 71-72, 93, 104. His preferred drink was a vodka martini. 24RP 30, 53. And to the extent anything negative could be said about Chambers, it was that he could be "particular" about such things as the lighting, the music, or the glass in which a drink was served. 24RP 31-32, 71-72, 85-86, 102-103. On the evening of January 21, none of the servers or other staff at the Feedback

reported seeing any issues with Chambers. 24RP 42, 72-73, 93-94; 25RP 27.

Chambers did have more to drink than usual that evening. 24RP 83; 25RP 24-25; 42RP 177. He had multiple martinis and a single shot of alcohol purchased by a friend. 24RP 30-31, 81-82; 25RP 23; 40RP 72-73, 82. He also had a beer before arriving. 42RP 167. But no one who saw him that night – friend or bar staff – believed he was significantly impaired when he left for home. 24RP 83, 104-105; 40RP 73, 83-84. Chambers was in a good mood, laughing, talking, and even more relaxed than usual. 24RP 84; 25RP 25; 42RP 177. The bartender who served Chambers his final drink could tell he had been drinking, but was still comfortable serving him. 24RP 81, 104-105.

Chambers recognized he had consumed a significant amount of alcohol and wanted to get home before he began to feel its full effect. 42RP 177-178. He remained clearheaded at that point, however, and his perceptions and judgment were still intact. 42RP 178; 43RP 156.

Among the approximately 150 patrons at the Feedback that night were two Seattle transplants who had recently moved here

from the South – Jonathan Vause and Travis Hood. 24RP 94; 27RP 17-22.

Vause – who even prosecutors described as "a piece of work" – is a self-described "southern boy." 27RP 17; 28RP 139; 46RP 34. He also is a former heroin dealer and two-time convicted felon. 27RP 36-38, 147-148. In 2010, Vause fled North Carolina in violation of his probation, resulting in a warrant for his arrest. 27RP 39-41. Although Vause was not supposed to be in Washington, he was drawn here by the state's progressive marijuana laws. 27RP 39-40. In January 2012, he typically smoked two to four grams of marijuana daily. 27RP 35.

Vause is white, but he frequently employs the word "nigga," which he describes as a term of endearment. 27RP 73-76; 28RP 128-129. He denies being a racist, noting he has probably slept with more black women than white women. 28RP 122-123. And although he understands "nigga" might be construed as an insult in Seattle, he believes the First Amendment protects his right to use the word anywhere he wants. 28RP 128-129, 135.

Hood, also white, was similarly comfortable with the word "nigga" and comfortable with the related word "nigger," the repeated use of which had previously resulted in trouble at another

West Seattle bar, the Rocksport. 27RP 78; 28RP 138-143; 40RP 189. At the Rocksport, Hood, in Vause's presence, repeatedly and loudly used the word "nigger" and continued to do so even after a server told him to stop. 40RP 189-191. A few weeks later, Hood and Vause returned to the Rocksport and Hood again repeatedly used the word "nigger" as he spoke. 40RP 191-192. Hood asked the server to play some "nigger music," which Vause found funny and the server found extremely disturbing. 27RP 77-80; 28RP 138-141; 40RP 192-193.

On January 21, 2012, Vause and Hood consumed beer and marijuana before arriving at the Feedback Lounge, where they each had two additional beers. 25RP 19; 27RP 46-48, 71-72. Vause and Hood were seated in a back room of the bar and Vause saw Chambers walk by on his way to the restroom. 24RP 19-26, 37; 25RP 16-17; 27RP 58-59, 70; exhibit 5. Vause noticed that Chambers was tall, black, and had a "big structure." 27RP 68, 188-191. He saw Chambers talking to a young woman, whom he was fairly certain was white, although with all the "multicultured and mixed races" in Seattle, Vause could not be certain of her race. 27RP 68-70, 191. It did not appear that Chambers noticed Vause because the two never made eye contact. 27RP 68, 82, 188, 191.

What happened when Chambers left the Feedback that evening was disputed at trial. According to Chambers, as he left the bar and headed north up the sidewalk on California Ave., toward his car, Vause and Hood followed and directed racial epithets at him. 42RP 178-179. He had not noticed either man inside the bar and had no idea why they had targeted him. 42RP 176-177. But they were calling him a nigger and much worse in their southern accents. 42RP 179.

Chambers decided not to confront the men, whom he assumed were drunk, and continued toward his car. 42RP 179-180. Chambers left the sidewalk and walked on California Ave. until he reached his BMW. 42RP 180. He then placed the key in the door lock and twisted it, unlocking both the driver and passenger doors. 42RP 181. Chambers got in the driver's seat but, as he started to put on his seatbelt, Vause opened the passenger door. 42RP 182. Vause also reached toward his waistband, and it appeared to Chambers that he had a knife. 42RP 182. Chambers quickly reached over and pulled the door shut. 42RP 182. Hood then began banging on the trunk lid. 42RP 184, 187.

Chambers felt panicked and wondered if he was being robbed or, given what the men had said to him, perhaps targeted because of his race. 42RP 183. Chambers tried to start his car, but believes he twisted the key too hard, triggering the car's antitheft system and preventing the engine from starting. 42RP 184. Chambers also hit a button on the center console that locks the doors, but it does not work if a door is partially ajar and did not work at that moment. 37RP 68; 42RP 185-186. Chambers was not sure whether the passenger door was completely closed. 42RP 186.

Chambers felt vulnerable inside his unlocked car and ill positioned to fend off a possible knife attack. He grabbed a loaded .45 caliber pistol he kept under the passenger seat, placed it in his waistband, and exited the car, walking farther north on California Ave. away from the men and toward a section of the street with better lighting. 42RP 187-188, 191-196. The safety on the firearm was engaged. 42RP 192.

Chambers was extremely concerned because he had lost sight of Vause, whom he believed had a knife; he could only see Hood. 42RP 193. Hood was on east side of the sidewalk, walking parallel to Chambers as Chambers walked on the west side of the

same sidewalk, and still shouting racist comments. 42RP 194, 196-197. It felt as though Hood was trying to distract Chambers, who feared Vause was going to ambush him from behind. 42RP 195-196.

As Chambers and Hood reached a red pickup truck parked north of the BMW, Hood suddenly reached into the bed of the truck and pulled out a flat-headed shovel. 30RP 72; 42RP 198-199; exhibits 3, 36. Unbeknownst to Chambers, this was Vause's truck. 27RP 51; 42RP 199. Hood faced Chambers and – with a look of rage – held the shovel up in a batter's stance and threatened, "now I'm going to knock your nigger head off." 42RP 199. Chambers believed he was about to be killed. 42RP 200.

Chambers does not recall anything at the scene thereafter. 42RP 201. Other witnesses, however, established that, once Hood raised the shovel, Chambers jumped back from Hood and immediately pulled out his .45 caliber pistol, firing three times without hesitation and in very rapid succession. 27RP 110-112; 28RP 96-97, 102, 152-153; 30RP 53-58, 75-78; exhibit 9 at 3:11:23-3:14:26. Hood still had the shovel in his hands as he turned and fell into the cab of the pickup truck. 28RP 104, 163-164. According to witnesses, Chambers put his gun away inside

his jacket, calmly walked back to his car, sat in the driver's seat for a short time (possibly looking at his phone), and then drove away. 25RP 52-58, 94; 27RP 112-113; 30RP 64-68; exhibit 9 at 3:19:43-3:20:13; 3:23:36-3:25:56; 3:49:05-3:49:37.

Vause provided a different version of events leading up to Hood's use of the shovel. He conceded he smokes a lot of weed and has difficulty remembering some details now years after the event. 28RP 90. But he denied following Chambers that night, denied making racist remarks, and denied opening the passenger door to Chambers' car. 27RP 86-101, 127-128. According to Vause, whatever the dispute, it arose between Hood and Chambers and he did not know what it was about. 27RP 102-111, 129-130.

Vause maintained that Chambers was standing outside the Feedback Lounge as he and Hood exited the bar. 27RP 87-89, 194. Initially, he and Hood walked north together toward his red pickup truck. 27RP 93. But as they passed the cross street just beyond the Feedback Lounge, Hood turned left (heading west) while Vause continued north on California Ave. 27RP 93-96; exhibit 49. When Vause noticed Hood's direction of travel, he said,

"what the hell you doing, nigga, the truck's down here."[3] 27RP 96. Hood corrected his course, but Vause did not wait for him, proceeding to the truck and arriving there first. 27RP 97-98.

According to Vause, he entered the driver's side of the pickup and unlocked the passenger door. 27RP 100. The truck was parked behind a large van, obscuring Vause's view of Hood as Hood approached. 27RP 98-99. Hood came into view on the passenger side about two seconds later with Chambers walking six to eight feet behind him. 27RP 101, 103. Hood turned his head and said something over his shoulder to Chambers. 27RP 103-104. Hood opened the passenger door before grabbing a shovel from the truck bed. He then assumed a batter's stance and said something like "back up off me, mother fucker" or "what are you trying to do?" 27RP 110; 28RP 80-83, 167-168, 173.

Vause conceded that Chambers absolutely could have concluded Hood was about to strike him with the shovel. 28RP 150-152. Vause compared Chambers' reaction to a hiker that stumbles upon a large rattlesnake. Chambers flailed his arms and jumped backwards two or three steps before pulling out his pistol.

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[3] Although at trial Vause maintained there was nothing wrong with the word "nigga," when speaking to police about what happened, he chose to replace "nigga" with a less offensive pronoun or to simply omit a pronoun. 28RP 16-22.

27RP 110-111; 28RP 149-152. Vause heard Hood say, "nigga, watch out, he's got a gun" and saw him begin to turn toward the door opening as Chambers quickly fired three shots.[4] 27RP 111; 28RP 152. Vause estimated that less than a second elapsed between Hood raising the shovel and Chambers firing his gun. 28RP 153. According to Vause, Chambers then put his gun in his jacket and casually walked away, a walk Vause would later describe as "a slow '80's pimp style walk." 27RP 112-113; 28RP 108-109.

Hood sustained three gunshot wounds: one that entered near the upper middle abdomen, one to the far right middle back, and one to the far right upper back. 34RP 155-160; exhibit 142. It was not possible to determine the order of the injuries. 34RP 160, 196. The shot that entered at Hood's abdominal area entered at an angle, did not penetrate his body cavity, travelled under the skin, exited, and then entered the back of his left arm (tricep muscle) before once again exiting. 34RP 157-159, 178, 191-192. This particular wound was not lethal and could have spun Hood around

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[4] Vause similarly cleaned up this statement when speaking to police and a prosecutor, trading "nigga" for less racist language. 28RP 80-87. In fact, Vause had been asked directly at that time whether Hood used the word "nigga" at any point that night, and Vause said "no, no, no, no, not at all." 28RP 87, 173.

from his original position. 34RP 170, 178-179. The angle of this shot and resulting injuries were consistent with a left-handed batter's stance (right hip and right shoulder toward Chambers). 34RP 191-192, 199-200, 213, 224. One possibility is that Hood was originally in this stance when shot, he then rotated to his left, thereby exposing the right side of his back for the two immediately successive shots. 34RP 210-213. These two shots – which lacerated Hood's liver and severed a major artery – were straight on from back to front. 34RP 171-179. Hood did not survive. 29RP 63; 34RP 193.

Police were dispatched at 9:42 p.m. in response to 911 calls regarding the incident. 25RP 125. At the scene, they found in close proximity the shell casings, a spent round, blood, and the shovel Hood had used to threaten Chambers. 25RP 113, 117; 26RP 130, 175-176; exhibits 20, 36. Based on a description of Chambers, his car, and a partial license plate number, officers obtained an address for his residence, which was about a mile from the scene. 24RP 59-60, 94-96; 25RP 27-28, 117-118, 146, 154-155, 160-161; 37RP12-13. Chambers was cooperative and arrested there without incident at 10:49 p.m., about an hour after

the shooting. 29RP 90-92, 111, 162. He was "a little bit out of it," but it was unclear whether this was attributable to alcohol consumption or the shock of what he had experienced. 29RP 92, 115-116. Sara also was home and did not know her husband had been involved in a shooting. 29RP 117-120. When her husband arrived home, he had poured himself a large glass of wine and, for the most part, just sat quietly. 42RP 101.

Officers found Chambers' gun right next to his car keys on a kitchen table. 29RP 93; exhibit 116. A firearms expert determined that the shell casings and spent round collected at the scene had been fired from this gun. 36RP 120-121.

Police had Chambers' BMW removed from his garage and towed to a processing facility off Airport Way. 26RP 190-196. Unfortunately, it had recently snowed and rained and, during the tow, the outside of the car was slathered in slush and road grime, thereby greatly reducing the possibility that Vause's or Hood's fingerprints or DNA would be found on the passenger door handle or trunk lid. 30RP 43-44; 36RP 181; 37RP 14, 22-24, 52-55; 40RP 49-53; 41RP 55-78, 125. Complicating matters further, once police placed the car in their storage facility, a thick layer of dust settled on the exterior. 37RP 58-59; 41RP 57. Indeed, no useable prints

and neither man's DNA were found on the car. 30RP 24-30, 172-176; 31RP 24-27; 40RP 142-148; 41RP 119-124. Under the circumstances, however, this absence did not mean that Vause and Hood did not touch Chambers' car. 40RP 146-148; 41RP 107-108, 123-124. Given law enforcement's handling of the car, it was simply impossible to know. 41RP 133-136.

Although Chambers invoked his right to silence under Miranda v. Arizona multiple times following his arrest, Seattle Police Homicide Detectives Cloyd Steiger and Jason Kasner eventually obtained a statement from him. 29RP 163-164; 32RP 126-129; 33RP 14, 35-36, 47-48; 34RP 29-33; exhibits 135, 137. He was not entirely cooperative, however, claiming he had no memory of events after the men opened his passenger side door and banged on the trunk. Exhibit 137, at 21-72. He did not even share with detectives the undisputed fact that Hood had threatened to strike him with the shovel. 34RP 97-98.

The detectives' conversation with Chambers at times was heated and accusatory, and they called him a liar. 33RP 15, 108-114, 127-128, 161; 34RP 73-76. Chambers would later explain that he had not been entirely honest with detectives because he did not trust law enforcement generally and – based on their treatment

of him – these two detectives specifically. 42RP 205-217; 43RP 19-57, 86.

Dr. Mark Cunningham, a board certified clinical and forensic psychologist, evaluated Chambers. 37RP 138-142, 151. Among his findings, Dr. Cunningham concluded that Chambers' distrust of law enforcement stems largely from numerous life-threatening and traumatic experiences he endured within the criminal justice system beginning when he was a boy and continuing well into adulthood. 37RP 160-161. These experiences, along with the impact of alcohol consumption, explained his evasiveness with detectives. 37RP 161-162. And this was true even though Chambers had maintained a conventional lifestyle for the past 20 years. 37RP 162. Dr. Cunningham also diagnosed Chambers as suffering from PTSD, which not only impacted his interactions with detectives, but also may explain his inability to recall events once Hood threatened him with the shovel. 37RP 161.

Chambers' blood was drawn after 3:00 a.m. and revealed a blood alcohol level of approximately .20. 32RP 90, 101-102; 35RP 103-104. Based on hypotheticals involving many assumptions, which may or may not be true, a State's expert estimated Chambers' blood alcohol level could have peaked as high as .25

after his arrest and around midnight. 35RP 134-141, 154. Hood's blood tested positive for cannabinoids and he had a blood alcohol level of approximately .096. 34RP 218-219; 36RP 76-78.

Police recovered a knife – with the blade open and locked – among debris in the bed of Vause's pickup. 31RP 63-67; 35RP 43-46; exhibits 84-85. Vause claimed the knife belonged to Hood and had been placed there a day or two prior to the shooting. 27RP 122-125. He denied carrying it the night of January 21. 27RP 125. Hood's DNA was found on the handle and blade. 26RP 72. Vause's was not. 34RP 112, 115. Forensic experts agreed, however (just as they did regarding Chambers' car), this absence does not mean that Vause did not handle the knife the evening of January 21, 2012. 26RP 103-105, 109; 34RP 137-140; 41RP 116.

Those who knew Chambers confirmed that he had no history of responding violently to use of the word nigger. 42RP 130-151; 43RP 70-73, 80-83. And Chambers denied that it was the use of this word on the evening of January 21, 2012 that led to the shooting. 43RP 83.

The State theorized that Chambers was drunk, may have overheard Hood and Vause saying "nigga" and overreacted by following the men and intentionally killing Hood. 45RP 48-49, 62-

75; 46RP 17-20, 60. The defense argued that Hood and Vaughn targeted and followed Chambers because of his race, Hood – armed with a shovel and intending to commit a hate crime – posed a legitimate and imminent threat to Chambers' life, and Chambers acted in lawful self defense by intentionally shooting and killing him. 46RP 61-168.

Although jurors convicted Chambers of manslaughter, that conviction should be reversed for the reasons that follow.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT INSTRUCTED JURORS ON MANSLAUGHTER WITHOUT A FACTUAL BASIS FOR THAT CHARGE.

Under the Washington Constitution, a criminal defendant has the right to be informed of the nature and cause of the offense against which he or she must defend at trial. Const. art. 1, § 22 (amend. 10). Juries may consider, in addition to the charged crime, any lesser included offense of that crime. RCW 10.61.006 provides, "the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment of information." This statute satisfies constitutional notice requirements. State v. Berlin, 133 Wn.2d 541, 544-545, 947 P.2d 700 (1997).

When determining whether a lesser-included offense instruction is appropriate, Washington courts apply the two-prong test in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978):

> Under the Washington rule, a [party] is entitled to an instruction on a lesser-included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

Workman, 90 Wn.2d at 447-448 (citations omitted).

Workman's first prong (the "legal prong") is satisfied if it is impossible to commit the greater offense without also committing the lesser. State v. Porter, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). Chambers was charged with Murder in the Second Degree under two alternative theories: (1) he intentionally killed Hood or (2) intentionally assaulted Hood, resulting in his death. Supp. CP ___ (sub no. 94, Amended Information). Manslaughter in the First Degree satisfies Workman's legal prong for Murder in the Second Degree under the intentional murder alternative.[5] Berlin, 133 Wn.2d at 551.

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[5] Manslaughter is not, however, a lesser included offense of Murder in the Second Degree under the felony murder alternative. State v. Tamalini, 134 Wn.2d 725, 728-730, 953 P.2d 450 (1998).

Under Workman's second prong (the "factual prong"), this Court views the supporting evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Satisfying this prong, however, can be difficult:

> the factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically . . . the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

Id. at 455 (citations omitted). It is not enough that the jury might disbelieve the evidence pointing to guilt on the charged offense. Rather, the evidence must affirmatively establish the defendant's guilt on the lesser offense. Id. at 456. Stated another way, "when substantial evidence in the record supports a rational inference that the defendant committed only the lesser included offense to the exclusion of the greater offense, the factual component of the test for entitlement to a [lesser included] offense instruction is satisfied." Id. at 461.

"A person is guilty of manslaughter in the first degree when . . . [h]e or she recklessly causes the death of another person." RCW 9A.36.060(1)(a). For manslaughter, "[a] person is reckless

or acts recklessly when he or she knows of and disregards a substantial risk that [death] may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." Washington Pattern Jury Instructions, WPIC 10.03 (3rd ed. 2014); RCW 9A.08.010(1)(c); State v. Gamble, 154 Wn.2d 457, 467, 114 P.3d 646 (2005). In contrast, "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." WPIC 10.01 ; RCW 9A.08.010(1)(a).

At Chambers' trial, the court erred when it found the factual prong satisfied for Manslaughter in the First Degree because the evidence failed to demonstrate that Chambers committed this offense to the exclusion of Murder in the Second Degree. Hood's death was the result of intentional acts, not reckless, and the only proper question for jurors was whether Chambers' use of intentional deadly force was justified under the circumstances.

Indeed, *all of the evidence* established that Chambers intentionally shot Hood three times in response to Hood's threat with the shovel. Chambers was a long-time gun owner and experienced shooter. 28RP 96; 40RP 63, 90-93, 96-98; 42RP 94, 106-108. He did not pull out his firearm until after Hood grabbed

the shovel and assumed a batter's stance, at which time Chambers believed Hood was about to kill him and jumped back. 27RP 108-111; 28RP 96, 102, 152-153; 42RP 199-200. Before firing the gun, Chambers had to release the safety. 42RP 192. He then fired it three times, without hesitation, in quick succession. 27RP 112; 28RP 96, 152-153; 30RP 76. Each shot required a separate trigger pull and at least 4 lbs. of pressure. 36RP 112, 142. All three shots were fired while Hood still held the shovel. 28RP 104, 163-164. All three shots hit their intended target. 30RP 53; 34RP 155-160. And once Hood fell into the open door of the pickup, Chambers stopped firing, put his pistol away, and calmly walked back to his car. 25RP 54; 27RP 113-114; 28RP 98.

In State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000), the defendant and several accomplices severely beat the victim, Thomas. During that beating, the defendant twice stabbed Thomas with a pocketknife, puncturing an artery in his chest and causing his death. Id. at 471-472. The defendant was convicted of Murder in the Second Degree. Id. at 473. On appeal, the defense argued jurors should have considered the lesser included offenses of Manslaughter in the First and Second Degrees based on the theory the defendant's use of a small knife demonstrated his intent

to merely assault Thomas (which recklessly or negligently led to his death) rather than kill him. Id. at 480-481. Recognizing there must be affirmative and "substantial evidence" indicating manslaughter was committed to the exclusion of murder, the Supreme Court found this evidence lacking. Id. at 481-482. The Court reasoned:

> Perez-Cervantes cannot . . . overcome the presumption that an actor intends the natural and foreseeable consequences of his conduct. The State's evidence showed that Perez-Cervantes twice attacked Thomas with a knife, after Thomas had been kicked and beaten into submission. "A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability." *State v. Myers*, 133 Wash.2d 26, 38, 941 P.2d 1102 (1997). In short, there was no evidence that affirmatively established that Perez-Cervantes acted recklessly or with criminal negligence in plunging the blade into Thomas. Whatever Perez-Cervantes' subjective intent, his objective intent to kill was manifested by the evidence admitted at trial. His requested instructions rested on the theory that the jury might disbelieve some of the evidence indicating his intent to kill, and find, by default, that he must have acted with recklessness or criminal negligence. This is not enough. *See State v. Berlin*, 133 Wash.2d at 546, 947 P.2d 700. . . .

Perez-Cervantes, 141 Wn.2d at 481-482; see also State v. Adams, 138 Wn. App. 36, 42-43, 47-48, 155 P.3d 989 (defendant convicted of murder after placing sock in baby's mouth, causing suffocation; not entitled to instruction on manslaughter in absence of showing

acts were merely reckless or negligent rather than intentional), review denied, 161 Wn.2d 1006, 169 P.3d 33 (2007).

Similarly, there was no evidence affirmatively establishing Chambers acted recklessly when he repeatedly shot Hood until Hood dropped the shovel. His objective intent to use deadly force was manifested by all of the evidence at trial. The only disputed issue was whether he reasonably perceived that Hood posed an imminent threat to his life as he grabbed the shovel and assumed a batter's stance. If he did, he was entitled to use deadly force and acted in lawful self-defense. If he did not, he was guilty of intentional murder. See CP 1797 (justifiable homicide instruction).

In overruling the defense objection to a manslaughter instruction, the trial court believed State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998), controlled. 44RP 2-7, 30-41. It does not. Schaffer and the victim, Magee, had words inside a Seattle nightclub. After both men left the club, Schaffer approached Magee, who shook his fist, swore, and threatened to kill Schaffer. Id. at 357. Magee moved his arm to his back, which caused Schaffer to fear he might be reaching for a gun. Schaffer drew his own gun and fired seven shots. Id. Shaffer shot Magee twice in the back and three times in the legs. One bullet hit Magee's

girlfriend, and one bullet hit a passerby. Magee – who was never even armed – died from his wounds. Id. Schaffer was charged with murder and claimed self-defense. Id.

The Supreme Court held that a lesser included offense instruction on manslaughter is warranted where the evidence reveals that, although the defendant may have initially acted defensively in the reasonable belief he was in imminent danger, "he recklessly or negligently used excessive force to repel the danger he perceived." Id. at 358 (citing State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986); State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981)). Shooting an unarmed man five times (and two others once each) satisfied that evidentiary hurdle. Id.

Schaffer is well reasoned under its facts. Given that Magee put his hand behind his back, Schaffer might honestly and reasonably have believed he faced imminent danger. However, because Schaffer never saw a weapon (and, in fact, Magee was unarmed), a jury could find that Schaffer unreasonably believed he had to use deadly force and therefore recklessly shot Magee five times. That is why a manslaughter instruction was proper.

Had Chambers shot Hood as Hood reached into the bed of the pickup truck, but before he could see what Hood was trying to

retrieve, the two cases would be parallel. But that is not what happened. Chambers used deadly force only after he faced what everyone agrees was threatened deadly force by Hood. The evidence is not sufficient to support a finding that Chambers recklessly used "excessive force" given that he was facing a man with a shovel, held ready to strike, in very close proximity. The critical point is this: unlike Schaffer, Chambers could not honestly and reasonably believe he was in danger of death without also honestly and reasonably believing that he needed to respond with deadly force. Therefore, Schaffer simply does not apply.

Where the evidence either established murder or warranted an acquittal, jurors should not have been offered the improper option of a compromise verdict on manslaughter. See State v. Robinson, 12 Wash. 349, 41 P. 51 (1895). Chambers' conviction for that offense must be reversed.

2. THE TRIAL COURT ERRED WHEN IT DENIED A MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO DETECTIVES WHERE DETECTIVES FAILED TO SCRUPULOUSLY HONOR APPELLANT'S INVOCATIONS OF HIS RIGHT TO REMAIN SILENT.

The defense moved under CrR 3.5 to suppress Chambers' interview with Detectives Steiger and Kasner on multiple grounds,

including their failure to scrupulously honor his invocations of the right to remain silent. See CP 157-158; 10RP 50-60, 62, 64-70. Although the trial court erroneously denied the defense motion, its written findings of fact accurately summarize most of the evidence at the CrR 3.5 hearing. See CP 2277-2280.

Chambers was arrested on his front porch at 10:49 p.m. CP 2277; 5RP 30, 65. Seattle Police Officer Anthony Belgarde immediately read Chambers his Miranda rights and asked if he understood. Chambers indicated that he did. CP 2277; 5RP 30, 41, 64-65. Belgarde then asked if he wished to speak with police and Chambers replied with a firm "no." CP 2277; 5RP 41, 65.

A short time later, Officer Kyle Galbraith took custody of Chambers and drove him to the Southwest Precinct. CP 2277; 5RP 48-49. Chambers was upset about his arrest; Galbraith told Chambers he was being recorded by a camera in the patrol car, to which Chambers responded, "fuck you." CP 2277; 5RP 134-135. About an hour after arriving at the Southwest Precinct in West Seattle, and by order of homicide detectives, Officer Galbraith transported Chambers to Seattle Police Department Headquarters in downtown Seattle for interrogation. CP 2277; 5RP 137-139, 153; 6RP 9-10, 20-21, 48, 112-113.

At about 12:28 a.m., Chambers was placed in an interview room at headquarters, his handcuffs were removed, and he was given a glass of water. CP 2277-2278; 5RP 155; 6RP 23, 86-87. He was then left alone in that room for about 2½ hours. CP 2278; 5RP 156; 6RP 50, 87.

At about 3:07 a.m., Detectives Cloyd Steiger and Jason Kasner removed Chambers from the interview room to drive him to Harborview for a blood draw. CP 2278; 6RP 25, 88, 102, 122-123. On the way, Chambers again invoked his Miranda rights, telling them, "I don't want to talk about this."[6] CP 2278; 6RP 21. No substantive questions were asked of him at that time. CP 2278; 5RP 160; 6RP 88-90.

Following the blood draw, at about 3:50 a.m., detectives arrived back at their car with Chambers. CP 2278; 6RP 36. Although Chambers had indicated he did not want to talk, Detective Steiger still wanted to question him and advised him of his Miranda rights. CP 2278; 5RP 162-164; 6RP 27, 90-91; pretrial exhibit 25, at 4. After confirming that Chambers understood these rights – and

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[6] Detective Steiger testified that he believed Chambers made this invocation of silence in the car on the way to Harborview. 6RP 21-22. The trial judge then entered a consistent oral finding. See 11RP 140. This somehow was mistakenly converted to a written finding that it happened on the way to the car. See CP 2278 (undisputed finding of fact 14). This is incorrect.

while heading for the jail – Steiger told Chambers that he wanted to hear his side of the story. CP 2278; 5RP 165; 6RP 27-28, 91; pretrial exhibit 25, at 4.

Chambers said he did not remember what happened. CP 2278; 5RP 162, 165-166; 6RP 28. The detectives asked him where he had been prior to the shooting, and Chambers told them the Feedback Lounge. He also said there had not been any trouble while inside the bar. CP 2278; pretrial exhibit 25, at 4. Once they arrived at the jail's sally port, Steiger asked Chambers if he remembered what happened, and Chambers again said he did not. CP 2278; 5RP 165-166; pretrial exhibit 25, at 4. Chambers then asked Steiger if he had a picture of the man who had been shot. Steiger said he did, asked if they should go to his office to talk, and Chambers agreed. CP 2278; 5RP 166; 6RP 91-92; pretrial exhibit 25, at 4.

At 4:05 a.m., Chambers was back in the interview room at headquarters. Steiger again read Chambers his Miranda rights and confirmed that he understood. CP 2278; 5RP 168; 6RP 93-94, 123. The detectives then interviewed Chambers for the next hour. CP 2278. As already discussed, Chambers was not honest with

detectives, telling them that he remembered nothing after the men tried to enter his car through the passenger door. CP 2279.

The trial court concluded that detectives had not violated Chambers' Miranda rights by failing to honor his invocation of silence. 11RP 139-146; CP 2280-2281. This ruling is erroneous.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Custodial interrogation is inherently coercive and, to counteract its impact, police must administer Miranda warnings prior to any questioning. State v. I.B., 187 Wn. App. 315, 320, 348 P.3d 1250 (2015) (citing Miranda, 384 U.S. at 479). "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473-474.

This does not mean that a person who has invoked his right to silence "can never again be subjected to custodial interrogation by any police officer at any time or place on any subject." Michigan v. Mosley, 423 U.S. 96, 102, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). But it does not mean the opposite extreme, either – "a resumption of interrogation after a momentary respite." Id.

Instead, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" Id. at 104 (quoting Miranda, 384 U.S. at 474, 479). Law enforcement officers may not reinitiate discussions with a defendant unless "a significant period of time" has passed with a fresh set of Miranda warnings and a valid waiver. In re Cross, 180 Wn.2d 664, 682, 327 P.3d 660 (2014); State v. Cornethan, 38 Wn. App. 231, 233-234, 684 P.2d 1355, review denied, 103 Wn.2d 1007 (1984).

In Mosley, the defendant was arrested in connection with multiple robberies, advised by a robbery detective of his Miranda rights, and indicated to that detective that he did not want to talk about those crimes. Questioning ceased and he was placed in a cell. Mosley, 423 U.S. at 97. Over two hours later, a homicide detective had the defendant taken to the homicide offices to be questioned about a homicide case. Id. at 97-98, 104. The defendant was again advised of his Miranda rights, agreed to speak to the detective about that crime, and provided a statement implicating himself. Id. at 98. The Supreme Court concluded the defendant's initial invocation regarding the suspected robberies

had been "scrupulously honored" based on several factors, including: (1) upon his invocation of silence, interrogation regarding the robberies ceased immediately and there was no subsequent attempt to question him on those crimes or convince him to reconsider, (2) there was an interval of more than 2 hours before questioning resumed, (3) the defendant was given fresh Miranda warnings, and (4) questioning was conducted by a different officer, at a different location, and focused solely on an unrelated crime. Id. at 105. The Court concluded the subsequent questioning "about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies." Id.

Based on a comparison of the facts in Mosley, Seattle Police failed to "scrupulously honor" Chambers' invocation of his right to silence.

As an initial matter, it is worth noting that Chambers invoked his right to silence multiple times. The first time was his emphatic "no" when Officer Belgarde provided Miranda warnings and asked if he wished to speak with police. CP 2277; 5RP 30, 41, 64-65.

The second time was shortly after those warnings in the car with Officer Galbraith on the way to the Southwest Precinct.

Galbraith told Chambers he was being audio and video recorded, to which Chambers responded, "fuck you" and said nothing else in the car thereafter. CP 2277; 5RP 134-135. The question is whether a reasonable police officer would understand this statement in the car to express a desire not to speak. State v. Piatnitsky, 180 Wn.2d 407, 413, 325 P.3d 167 (2014), cert. denied, 135 S. Ct. 950 190 L. Ed. 2d 843 (2015). A reasonable officer would. See State v. Reuben, 62 Wn. App. 620, 621, 626, 814 P.2d 1177 ("Go fuck yourself" following Miranda an invocation), review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991); see also Miranda, 384 U.S. at 473-474 (defendant may indicate "in any manner").

Despite the first two invocations, homicide detectives ordered Chambers brought to headquarters and placed in an interview room for the express purpose of interrogation. CP 2277; 5RP 137-139, 153; 6RP 20-21, 112-113.

The third time Chambers invoked his right to silence was when Detective Steiger and Kasner were taking Chambers to Harborview and Chambers said, "I don't want to talk about this." CP 2278; 6RP 21.

Very little time passed between this final assertion and Steiger's attempt to nonetheless convince him to speak. Precisely

how long is impossible to determine. But detectives removed Chambers from the interview room to drive him to Harborview at about 3:07 a.m. CP 2278; 6RP 25, 88, 102, 122-123. Shortly thereafter, during the drive, Chambers indicated he did not want to talk about the incident. CP 2278; 6RP 21. Following the blood draw, detectives arrived back at their car with Chambers at about 3:50 a.m. CP 2278; 6RP 36. Detective Steiger then attempted to question him. CP 2278; 5RP 162-165; 6RP 27-28, 90-91; pretrial exhibit 25, at 4. Thus, *at most*, detectives waited 43 minutes following Chambers' last invocation of his rights before attempting to get him to talk.

A period less than 45 minutes falls well short of the required "significant time" found in cases where the defendant's rights were scrupulously honored. See Mosley, 423 U.S. at 104 (more than two hours); State v. Elkins, ___ Wn. App. ___, 353 P.3d 648, 655-656 (2015) (five hours); State v. Brown, 158 Wn. App. 49, 60, 240 P.3d 1175 (2010) (two hours), review denied, 171 Wn.2d 1006, 249 P.3d 183 (2011); State v. Wheeler, 43 Wn. App. 191, 201, 716 P.2d 902 (1986) (next day); Cornethan, 38 Wn. App. at 235 (eleven hours); State v. Vannoy, 25 Wn. App. 464, 469, 610 P.2d 380

(1980) (four hours); State v. Robbins, 15 Wn. App. 108, 110, 547 P.2d 288 (three days), review denied, 87 Wn.2d 1012 (1976).

There are other noteworthy distinctions between this case and Mosley. Here, unlike Mosley, the same officers in whose presence Chambers invoked his right to silence initiated the attempt to speak with him. Here, unlike Mosley, Chambers had invoked silence on the very crime about which detectives wished to question him. Division Three has held this fact, by itself, means that officers did not scrupulously honor a defendant's rights. See Brown, 158 Wn. App. at 59 (citing Reuben, 62 Wn. App. at 626, but acknowledging debate on this issue); see also Cornethan, 38 Wn. App. at 232-233, 235 (no violation where questioning eleven hours later concerning different crime). And here, unlike Mosley, the last invocation and subsequent attempt to speak with Chambers occurred at the same place (on the trip to Harborview).

In summary, police did not "scrupulously honor" Chambers' invocation of silence where he invoked his Miranda rights following arrest, did so concerning the events of January 21, 2012, homicide detectives nonetheless had him transported to headquarters and placed in an interview room for the express purpose of interrogation, Chambers again invoked his right to silence in their

presence, and detectives nonetheless attempted to change his mind shortly thereafter. All of his statements to detectives should have been suppressed. Mosley, 423 U.S. at 104.

The trial court erred when it concluded otherwise. The trial court's findings of fact are reviewed for substantial evidence and its legal conclusions are reviewed de novo. See State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008).

The court concluded there was a knowing, voluntary, and intelligent waiver (conclusion of law 6), concluded detectives' conduct fell within the requirements of Mosley (conclusions of law 7, 15), concluded detectives made no efforts to change Chambers' mind about whether to talk (conclusion of law 8), and concluded significant time passed between Chambers' assertion of his right to silence and detectives' attempt to speak with him (conclusion of law 15). For all of the reasons just discussed, these conclusions are not sustainable under Mosley and Miranda.[7]

[7] Conclusions of Law 10-14 and 16 appear to deal with voluntariness of Chambers' statements in terms of his physical and mental condition, along with detectives' tactics, *during the taped interview once back inside at police headquarters.* See CP 2281. They do not appear to address admissibility under Mosley.

The court also concluded that "detectives reinitiated contact with the defendant after he talked to them about the incident." (conclusion 9). This appears to be a finding of fact rather than a conclusion of law. Finding or conclusion, however, it lacks support. The evidence clearly shows that detectives reinitiated contact after Chambers had once again invoked his right to silence on the way to Harborview. He did not say anything to detectives until *after* Detective Steiger – desiring to ask him questions – attempted a conversation to find out "his side of the story." See 5RP 162-165; 6RP 27-28, 90-91; pretrial exhibit 25, at 4. Indeed, the court's other findings of fact bear this out. See CP 2278 (undisputed findings 17-18 – Detective Steiger initiates); CP 2279 (conclusion as to disputed fact 3 – finding Detectives Kasner's recollection that Detective Steiger initiated conversation credible); see also 11RP 142 (court finds that Chambers did not initiate conversation).

Constitutional errors such as this one are harmless only if the untainted evidence is so overwhelming that it necessarily leads to the same outcome. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); Reuben, 62 Wn. App. at 626-627. The error was not harmless in this case.

The State played a recording of the interrogation for jurors. 32RP 127-129; 33RP 14. That recording shows Chambers misleading detectives about what happened. He initially told them he had no memory of events after leaving the bar. Exhibit 137, at 7, 9-10, 14-16. Subsequently, he told them he remembered Vause and Hood harassing him, but recalled nothing after Vause attempted to enter his car. Exhibit 137, at 21-72. Detective Steiger became confrontational with Chambers and both detectives made their beliefs clear during the interrogation that Chambers was a liar. 33RP 161; 34RP 74; exhibit 137, at 27, 30-31, 38-42, 46-47, 53-54, 59-61, 64, 66, 71.

Although the defense attempted to explain the interview as a product of Chambers' mistrust of law enforcement, including a discussion of his past history in the criminal justice system, that explanation should never have been required. In a case that turned on Chambers' credibility, evidence he was not truthful with law enforcement shortly after the incident was prejudicial. The untainted evidence was far from overwhelming, since the prosecution's case otherwise depended largely on jurors' opinions of Vause's credibility.

3. THE TRIAL COURT ERRED WHEN IT DENIED A MOTION TO SUPPRESS FRUITS OF THE WARRANTLESS SEARCH OF CHAMBERS' HOME.

The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." Article 1, § 7 of Washington's Constitution provides, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Together, these provisions provide a bulwark against governmental intrusion in the absence of a warrant based on probable cause.

Nowhere are these protections deemed more important than in the home, which receives "heightened constitutional protection." State v. Young, 123 Wn.2d 173, 175, 867 P.2d 593 (1994). Warrantless searches are per se unconstitutional unless the State can demonstrate the search falls within one of the few jealously and carefully drawn exceptions to the warrant requirement. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001).

The defense moved under CrR 3.6 to suppress all evidence, and the fruits of that evidence, obtained during a warrantless

"protective sweep" of the interior of Chambers' home immediately following his arrest outside the home. See CP 19-146; 9RP 131-175; 10RP 3-11. The State opposed the motion. See Supp. CP ___ (sub no. 181, State's Response To Motion To Suppress Evidence); 9RP 175-196. Similar to the trial court's CrR 3.5 ruling, although the trial court erroneously denied the defense motion under CrR 3.6, its written findings of fact summarize the evidence presented. See CP 2270-2273.

Chambers was arrested at 10:49 p.m. by multiple members of the Seattle Police Department's Anti-Crime Team ("ACT") after he stepped out of his home and on to his front porch. CP 2270, 2272; 5RP 25-30, 65. He was handcuffed, taken down the front porch steps, patted down, and read his rights. CP 2272; 5RP 30-39. Officers found no weapons. CP 2272; 5RP 38-39. Through the open front door, officers could see Sara Chambers in the living room, sitting on the couch and watching television. CP 2272; 6RP 183-186. Although she was cooperative and informed them that no one else was in the home, multiple officers entered and performed a sweep of the entire house to look for any other suspects or victims. CP 2273; 5RP 31, 68-70; 6RP 186; 8RP 49-50, 88-89, 92-93, 139-140, 162-163, 180. In the kitchen – which is beyond the

living room, connected by two separate doorways, and about 20 feet from the front door – one of the officers located Chambers' .45 caliber handgun, along with an ammunition magazine and his BMW car keys, sitting on a table. CP 2272-2273; 6RP 188-189; 8RP 50-59, 141, 165; pretrial exhibits 35-38. Officers then secured the house until a search warrant was obtained. CP 2273; 6RP 189; 8RP 166, 172-173. Pursuant to that warrant, these items were collected as evidence against Chambers. CP 2273; 6RP 193.

The trial court upheld the initial warrantless entry and search of Chambers' home under Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), which permits post-arrest warrantless "protective sweeps" under very limited circumstances. CP 2273-2274. Although Buie authorizes these limited searches when a suspect is arrested within his home, the trial court believed the exception should be expanded to include arrests like Chambers' occurring outside the home. CP 2273-2274. The trial court erred.

To be precise, the issue in Buie was "what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless

protective sweep of all or part of the premises." Buie, 494 U.S. at 327.

Buie and an accomplice robbed a pizza restaurant. Suspecting Buie's participation, police obtained a warrant for Buie's arrest, which they executed at his home. Id. at 328. Buie was found in the basement, from which he emerged only after an officer repeatedly ordered him to show his hands and come upstairs. Id. After Buie was arrested, searched, and cuffed, an officer entered and searched the basement to ensure no one else had been with Buie in that room. While there, he found a red running suit that matched the description of a suit worn during the robbery. Id. In assessing the constitutionality of the basement search, the Supreme Court adopted the following rules:

> We agree with the State, as did the court below, that a warrant was not required. We also hold that as an incident to arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . .

Id. at 334 (footnotes omitted).

Thus, under Buie, there are two categories of authorized protective sweeps. For the first category, once an arrest is made inside a home, police may look in areas immediately adjoining the place of arrest from which a person could launch an attack. No further justification is necessary. The second category involves a protective sweep of any other area inside the home and requires a reasonable articulable suspicion that the area harbors an individual dangerous to law enforcement.

Buie did not provide authority for police to search Chambers' home because he was arrested outside, not inside, his home. In concluding otherwise, the trial court relied on State v. Hopkins, 113 Wn. App. 954, 55 P.3d 691 (2002), for the notion Buie should be expanded in Washington to authorize warrantless home searches even where the defendant is arrested outside the home. CP 2273-2274. But Hopkins stands for no such thing. The issue in Hopkins was whether the defendant's lawful arrest inside her home authorized a protective sweep under Buie of separate outbuildings on the property. Hopkins, 113 Wn. App. at 956. The Hopkins Court held that it did not. Id. at 959-961. In a footnote, the Hopkins Court noted that some courts had expanded Buie's

rationale to include situations where the defendant was arrested just outside the residence. Id. at 959 at n.3 (citing United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995)). But the Hopkins Court expressly indicated it was not addressing that issue. Id.

In U.S. v. Archibald, 589 F.3d 289 (6th Cir. 2009), the Sixth Circuit Court of Appeals followed other courts in rejecting the notion that – under the first Buie rationale – an arrest just outside the home can be treated as an arrest inside the home authorizing a search of all immediately adjoining spaces. Id. at 297. Instead, where a defendant is arrested just outside the home, Buie only authorizes a protective sweep under the second rationale, i.e., where there is reasonable suspicion to believe the home harbors a dangerous person. Id.; accord U.S. v. Paopao, 469 F.3d 760, 766 (9th Cir. 2006) (requiring reasonable suspicion of danger inside building where defendant arrested just outside building), cert. denied, 550 U.S. 938, 127 S. Ct. 2249, 167 L. Ed. 2d 1097 (2007).

In Archibald, multiple officers arrived at the defendant's residence to execute warrants for his arrest. Archibald, 589 F.3d at 291. Officers positioned themselves on and around a front porch to the residence and knocked on the front door repeatedly. Id. at 291-292. Officers could hear the defendant inside and even made

verbal contact with him, but he would not open the door for a significant period of time. Id. at 292. When he eventually did, an officer pulled him from the apartment, onto the porch, and then away from the porch as other officers entered the residence to conduct a "protective sweep." Id. at 292-293. Although the front door led directly to a living room, officers proceeded to look in other rooms, including the kitchen (just off the living room), where they found drugs and paraphernalia. Id. at 293. With that information, officers obtained a search warrant and, during a subsequent search, found a firearm that led to a federal firearm charge. Id.

Because the defendant was arrested just outside his residence, the Archibald Court rejected the notion Buie authorized a protective sweep inside the home under its first rationale. Id. at 296-297. Moreover, even if that rationale could apply, the sweep had not been limited to the area "immediately adjoining" the place of arrest, since only the living room immediately adjoined the front porch. Police had also searched the kitchen, which – despite adjoining the living room and being separated from that room merely by a "bar counter" – was not "immediately adjoining" the front porch. Id. at 293, 298.

The Archibald Court also rejected the search under Buie's second rationale, i.e., reasonable suspicion that someone else in the home posed a danger to officers. The court distinguished the situation from one where police have good reason to believe a criminal accomplice is still at large and possibly on the premises. Id. at 298-299. And the court rejected the notion that the defendant's delayed response to officers, noises from inside the home, or the fact officers could not rule out the possibility of a second dangerous person met the requirement for "articulable facts." Id. at 299-302.

Washington has not extended Buie to arrests outside the home. And nothing in Buie supports such an extension. Thus, this Court should find that Buie did not authorize a protective sweep in Chambers' case. To the extent this Court finds that Buie does apply, however, this Court should follow the Sixth Circuit Court of Appeals' opinion in Archibald. Archibald properly limited Buie's first rationale, allowing warrantless searches of areas immediately adjoining the place of arrest, to arrests inside the home. Moreover, even if it were expanded to include arrests outside the home, as in Archibald, the kitchen in Chambers' home did not immediately adjoin the front porch. Only the living room met that requirement.

Compare U.S. v. Lemus, 582 F.3d 958, 963-964 (9th Cir. 2009) (whether defendant was standing entirely in his living room or standing at the doorway and partially in his living room, living room immediately adjoined place of arrest and properly searched under Buie), cert. denied, 562 U.S. 858, 131 S. Ct. 129, 178 L. Ed. 2d 78 (2010).

Nor can the search of Chamber's home be justified under the second Buie rationale because – as in Archibald – officers possessed no articulable facts suggesting a second dangerous person inside the home. To the contrary, all information they possessed indicated that Chambers, and only Chambers, shot Hood and drove away from the scene alone. There was no suggestion of any additional suspects or victims. 5RP 60-61, 111; 8RP 78-79, 115, 145, 151, 170. At Chambers' home, officers merely saw Sara Chambers, whom they already knew lived there, sitting on the couch in the living room and watching TV. 6RP 183; 8RP 78-79. Officers had no information she was involved, and she was entirely cooperative. 6RP 186; 8RP 78-79, 92-93.

Because the trial court erroneously found the warrantless search of Chambers' home lawful under Buie, it never examined

the impact of that unlawful search on issuance of the subsequent warrant.

Evidence obtained during an unconstitutional search must be excluded. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). Where, as here, "information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, that information may not be used to support the warrant." Id. (quoting State v. Ross, 141 Wn.2d 304, 311-312, 4 P.3d 130 (2000)). This Court must review the warrant affidavit without the offending evidence and determine if the remaining facts still present probable cause for the warrant. If not, all evidence seized pursuant to that warrant must be suppressed. Id.

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Notably, probable cause requires "a nexus between the item to be seized and the place to be searched." Id.

(quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

The affidavit submitted in support of the warrant to search Chambers' home relied heavily on the fact that, during the warrantless "protective sweep" inside Chambers' home, officers saw the .45 caliber handgun sitting next to the BMW keys on the kitchen table, which matched the caliber of the rounds found at the scene. See CP 142-143. The officer writing the affidavit noted that, following Chambers arrest outside the home:

> The Southwest Anti-Crime Team cleared the house for any other victims. I cleared the kitchen and located a Wilson combat .45 Caliber handgun sitting on top of the kitchen table. Right next to the gun was a spare magazine with .45 caliber bullets loaded in it & car keys to a BMW. A female was located inside, she said her name was Sara Chambers and was Lovett's wife. She told Sergeant Strand of the Southwest Anti-Crime Team that yes her husband was at the Feedback Lounge tonight and he got back around 8:30-9pm. She stated that her husband drove his blue BMW tonight and parked it in the garage when he got home. She told me that yes the .45 caliber gun sitting on top of the kitchen table was her husband's.

CP 143.

When all information gained during the illegal warrantless sweep is removed from the warrant affidavit, it fails to establish probable cause to search Chambers' home. As defense counsel

argued below, the affidavit fails to identify by name any of the "witnesses" who claimed knowledge of the shooting. See CP 142-143. Thus, they were akin to anonymous tipsters and subject to the Aguillar-Spinelli test. See CP 38-49; State v. Ibarra, 61 Wn. App. 695, 698-703, 812 P.2d 114 (1991). "The 'Aguillar-Spinelli test" holds that probable cause will exist only if the informant's basis of knowledge and veracity has been demonstrated or if the substance of the tip has been verified by independent investigation." State v. Murray, 110 Wn.2d 706, 711, 757 P.2d 487 (1988).

The affidavit fails to establish basis of knowledge or veracity for any of the witnesses. See CP 142-143. Moreover, even if officers independently verified some information at the scene – i.e., there had been a shooting, Chambers was involved, and he left the scene in his BMW – the affidavit utterly fails to establish a reasonable inference that Chambers' gun would be found in a search of his home. The nexus between the item to be seized and the place to be searched "must be grounded in fact" and not based merely on suspicions, beliefs, or conclusory predictions. Thein, 138 Wn.2d at 146-151. The surviving evidence in support of the search warrant in this case falls well short of that necessary to

establish that a weapon used in a crime would be found at a particular location.

In State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987), the Supreme Court upheld a warrant to search defendant's car despite exclusion of defendant's illegally obtained statement used in the warrant affidavit. There, however, the independent evidence established that the knife would be found in the car: (1) the victim was stabbed twice, (2) following the stabbing, the victim immediately returned to his car and stayed there until his arrest, (3) no knife was found on defendant when he was arrested, and (4) defendant had also been in possession of a knife earlier that day. Id. at 888-889. There was no similar independent information concerning the firearm used on California Ave.

The State cannot show the improper use of evidence gained during the warrantless search was harmless beyond a reasonable doubt. It ultimately led to collection of the firearm used to shoot Hood, a critical piece of evidence in the prosecution's case. Detectives used it during their interrogation of Chambers to obtain his statement. See exhibit 137, at 18 (detective notes gun was found at his house, it will be matched to casings, "so, there's no

question you shot him."). And it confirmed beyond any doubt that Chambers was the shooter.

One final point on this issue. If this Court were to find the warrantless search unlawful, but also find the warrant affidavit sufficient without information gained during that search, the matter should be remanded so that the trial court can hear evidence and enter findings on whether the decision by police to seek a search warrant was prompted by what they saw during the initial entry. If it was, the subsequent search with a warrant was not truly independent of the earlier constitutional violation and would require suppression of all evidence obtained in Chambers' home. See Murray v. United States, 487 U.S. 533, 542-544, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988); State v. Miles, 159 Wn. App. 282, 292-298, 244 P.3d 1030, review denied, 171 Wn.2d 1022, 257 P.3d 663 (2011).

4. CHAMBERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL DURING THE PRESERVATION DEPOSITION OF PROSECUTION WITNESS BRIAN KNIGHT.

Prosecution witness Brian Knight, an eyewitness to the shooting, was going to be out of the country for trial. 16RP 5. Prosecutors felt he was a very important witness. 45RP 59-60.

They proposed, and defense counsel agreed, Knight's testimony could be preserved with a videotaped deposition to be played for jurors at trial. 16RP 5; pretrial exhibit 57, at 6-7. When Chambers arrived in a courtroom for the deposition, however, he was restrained with chains on both ankles and around his middle, which were then attached by additional chain links – a mere 4 or 5 inches long – to handcuffs around his wrists. Pretrial exhibit 57, at 5-6.

Jail guards refused to remove the restraints. 16RP 6; pretrial exhibit 57, at 5. Prosecutors had no objection to their removal, however, and the parties submitted to Judge Michael Hayden an agreed order removing them. 16RP 6-7; pretrial exhibit 57, at 7; pretrial exhibit 58, at 1, 3. Judge Hayden signed the order, but before the restraints could be removed, Nancy Balin, an attorney for the jail, moved to quash the order. 16RP 7; pretrial exhibit 57, at 7; pretrial exhibit 58, at 3. This resulted in a hearing before Judge Hayden. See Pretrial exhibit 58.

At the hearing, prosecutors deferred to Balin. Pretrial exhibit 58, at 1. Balin knew this was a murder case, but conceded she knew nothing about the facts. Pretrial exhibit 58, at 5-6. She made three arguments in support of restraints. First, she argued the right to be free from restraint was intended to avoid tainting jurors and

there were no jurors for the deposition. Second, she argued jail policy required Chambers' restraint. Third, Balin noted that Chambers had a history of "escape by force" and kidnapping. Pretrial exhibit 58, at 4-5.

Chambers was not present for the hearing. 16RP 9-10. Defense counsel pointed out that Chambers was a 69-year-old man suffering from hypertension and serious back issues requiring two surgeries. The escape to which Balin referred occurred 47 years earlier. Counsel also pointed out that the current case involved what the defense believed to be lawful self-defense involving a firearm. Pretrial exhibit 58, at 6-7. Counsel explained that Chambers had been placed in both ankle and waist restraints, argued that the restraints interfered with his confrontation rights, and noted the defense never would have agreed to such a procedure had it known in advance. Pretrial exhibit 58, at 9-10.

Judge Hayden was openly skeptical that the restraints could interfere with Chambers' constitutional rights. Pretrial exhibit 58, at 10. But defense counsel began to explain that Chambers was not able to move his hands more than several inches from his body and noted he would be unable to review discovery materials during the deposition or take notes. Pretrial exhibit 58, at 10-11. Judge

Hayden then cut counsel off mid-sentence and asked if Balin had anything further, to which she replied, "separation of powers, just a short little phrase." Pretrial exhibit 58, at 11. Judge Hayden then ruled:

> Alright, counsel. I didn't know all this when I signed the order. He may be restrained if as long as he's not restrained behind his back you can restrain him comfortably, give him a notepad, set him up so that he can take notes. But, I'm not here to overrule the safety policies of the jail. Uh, and so long as he has his Constitutional Rights, and I suggest he does, as long as he's present personally um, then I will abide by the jail policies.

Pretrial exhibit 58, at 11.

When the parties returned to the courtroom for the deposition, defense counsel placed on the record what had just occurred before Judge Hayden. Pretrial exhibit 57, at 5-6. Counsel also placed on the record the manner of Chambers' restraint and objected to the deposition under these circumstances. Pretrial exhibit 57, at 6-7.

The defense subsequently moved to preclude use of the deposition based on a violation of Chambers' constitutional rights to confrontation and the effective assistance of counsel. CP 930-934, 1594-1597. The defense argued that, not only could Chambers not review materials during the deposition or take notes,

he could not move for fear his chains would rattle and be heard by jurors on the recording. CP 933, 1594. Moreover, the placement of a microphone during the deposition made it impossible for Chambers and counsel to speak and confer without being recorded. CP 933, 1594. The prosecution opposed the motion. See Supp. CP ___ (sub no. 192, State's Response To Motion To Suppress Video Deposition).

A hearing on the motion was set before the Honorable Jim Rogers, who listened to argument from both parties, watched the video deposition, and reviewed a transcript of the hearing before Judge Hayden. 16RP 4-54. Judge Rogers assumed the restraints left Chambers unable to write despite Judge Hayden's contrary belief. 16RP 48, 53. He also recognized the sound of rattling chains would have been "a real concern." 16RP 52. And he could hear some whispering at one point as defense counsel told Chambers to be still, but he could not make out what was said. 16RP 13, 52.

Judge Rogers rejected the notion that Chambers should have simply asked for a recess every time he wanted to speak with counsel, noting there was nothing in the record indicating he was even told of such an option. 16RP 54. But Judge Rogers felt that

defense counsel had control over the microphone at the table and, for example, could have covered it with his hands every time he spoke with Chambers. He concluded the failure to do so meant there was no constitutional violation. 16RP 55. Judge Rogers suggested the parties agree to edit out any sounds that could be interpreted as the sound of restraints. 16RP 56. Instead, the very beginning of the video, which noted Chambers' presence at the deposition, was simply deleted, reducing the possibility jurors might identify what they were hearing as the chains used to restrain him. 24RP 119-120.

Judge Hayden erred when he deferred to the jail and left Chambers shackled during the deposition. Judge Rogers erred when he denied the motion to exclude the deposition based on a violation of Chambers' right to counsel. In combination, these errors require reversal of Chambers' conviction.

Under article 1, section 22,[8] criminal defendants have the right to appear before a jury free from physical restraints. State v. Williams, 18 Wash. 47, 51, 50 P. 580 (1897). This right is not, however, limited to proceedings in the jury's presence. Short of

[8] Article 1, section 22 provides, "In criminal prosecutions the accused shall have the right to appear and defend in person."

"evident danger of his escape," the defendant has a right to appear in all proceedings "unfettered." State v. Walker, 185 Wn. App. 790, 794-795, 344 P.3d 227 (quoting Williams, 18 Wash. at 49-50), review denied, ___ P.3d ___ (Sept. 4, 2015). Shackling and handcuffing a defendant "restricts the defendant's ability to assist his counsel during trial" and "offends the dignity of the judicial process." State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

"[R]estraints should 'be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.'" Finch, 137 Wn.2d at 846 (quoting State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981)). Jail administrators do not possess the authority to decide whether restraints should be used. Rather, "regardless of the nature of the court proceeding or whether a jury is present, "it is particularly within the province of the trial court to determine whether and in what manner, shackles or other restraints should be used." Walker, 185 Wn. App. at 797.

Courts may not order restraints based on general concerns or policies; any restraint must be based on the particular individual

and circumstances. Hartzog, 96 Wn.2d at 400-401. Factors to consider include:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Id. at 400 (quoting State v. Tolley, 290 N.C. 349, 368, 226 S.E.2d 353 (1976)). This Court has required a lesser showing to justify restraints in a non-jury setting. Walker, 185 Wn. App. at 802. The trial court's decision is reviewed for abuse of discretion. Hartzog, 96 Wn.2d at 401.

Judge Hayden abused his discretion. He failed to consider almost all of the above factors before deciding to leave Chambers' restrained. Although this was a murder case, Chambers was a 69-year-old man with chronic health issues. Moreover, there was no evidence he had caused any problems for jail personnel at any time. And although he had once escaped from custody, that

escape took place in 1966, when Chambers was a very young man.

Ultimately, Judge Hayden concluded that so long as Chambers was present for the deposition, comfortable, and could take notes, he would defer to "the safety policies of the jail." Pretrial exhibit 58, at 11. This was not the proper analysis. Indeed, for subsequent pretrial hearings, Judge Doyle ordered all restraints removed based on the absence of any evidence demonstrating concern that Chambers posed a safety or flight risk. 2RP 4-7; see also 49RP 3-5 (restraints ordered removed for sentencing despite jail policy).

Judge Hayden's error carried serious consequences because it infringed on Chambers' constitutional right to counsel by interfering with his ability to communicate with counsel during the trial deposition, one of the potential consequences of shackling expressly identified in State v. Finch, 137 Wn.2d at 845.

Both the Sixth Amendment and article 1, section 22 of the Washington Constitution guarantee counsel "at every critical step in the adjudication process." State v. Ulestad, 127 Wn. App. 209, 214, 111 P.3d 276 (2005) (citing Coleman v. Alabama, 399 U.S. 1,

7, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970)), review denied, 156 Wn.2d 1003, 128 P.3d 1240 (2006). As this Court has recognized:

> The constitutional right to assistance of counsel includes the "opportunity for private and continual discussions between defendant and his attorney during the trial." *State v. Hartzog*, 96 Wash.2d 383, 402, 635 P.2d 694 (1981); *see also Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). And except for a limited right to control attorney-client communication when the defendant is testifying, any interference with the defendant's right to continuously consult with his counsel during trial is reversible error without a showing of prejudice. *Perry*, 488 U.S. at 279-80, 109 S.Ct. 594.

Ulestad, 127 Wn. App. at 214-215.

In Ulestad, the defendant, judge, and jury remained in the courtroom while the attorneys and an alleged molestation victim were placed in a separate room for the victim's testimony. Ulestad, 127 Wn. App. at 211-213. Ulestad was required to watch that testimony via closed circuit television and was told that if he wanted to speak with his attorney, he could simply ask to stop the proceedings and he would be given that opportunity. Id. at 212-213. This Court reversed Ulestad's convictions without a showing of prejudice because he had been denied his right to constant communication with counsel during trial. Id. at 214-215. What he

had been offered – delayed communication – does not suffice. Id. at 215.

As in Ulestad, Chambers was denied his constitutional right to the opportunity for private and constant communication with his attorneys during trial.[9] The restraints imposed upon him at the deposition made this impossible, violating his rights under the Sixth Amendment and article 1, section 22.

Below, the State relied heavily on a decision predating Ulestad – State v. Gonzales-Morales, 91 Wn. App. 420, 958 P.2d 339 (1998), aff'd, 138 Wn.2d 374, 979 P.2d 826 (1999), which involved the interplay between the right to counsel and use of an interpreter. See 16RP 36-39. Gonzales-Morales was provided an interpreter for trial, who sat at defense table to facilitate communication with his attorney. Id. at 422. When it became necessary to use an interpreter for a Spanish-speaking witness, the court simply asked the interpreter assisting the defense to interpret the prosecutor's questions into Spanish and the witness's answers into English. Id. At all times, however, the interpreter was to remain at the defense table and Gonzales-Morales was told that he

[9] Videotaped trial testimony is the constitutional equivalent of live testimony during trial. See State v. Hobson, 61 Wn. App. 330, 333-334, 810 P.2d 70 (1991).

could interrupt whenever he wished to speak with his attorney. The interpreter would immediately assist. Id. The trial judge observed Gonzales-Morales during the witness's testimony and noted that, not once, did Gonzales-Morales have any questions for his attorney requiring the interpreter. Id. at 423. As this Court noted, "the only barrier to the free-flow of information between Gonzales-Morales and his attorney was within Gonzales-Morales's control; he simply needed to request a recess." Id. at 427. Under these circumstances, there was no violation of the defendant's right to counsel. Id. at 428.

The differences between Gonzales-Morales and Chambers' case are obvious and important. The only barrier for Gonzales-Morales was a temporary loss of the interpreter's services. But this was hardly a barrier where the interpreter remained by his side and ready to return attention to him at any time he wished. He simply had to say something to make that barrier disappear. Moreover, presumably, unlike Chambers, Gonzales-Morales otherwise retained all avenues to the free-flow of information with counsel, including writing notes, reviewing discovery, and moving freely without fear of alerting jurors to restraints.

Judge Rogers concluded there was no violation of Chambers' rights because defense counsel could have placed his hand over the microphone or done "any number of things" regarding the microphone to allow adequate communication. 16RP 55.

But even if counsel had placed his hand over the microphone when speaking to Chambers, Chambers had no ability to do the same when *he* felt it important to speak with counsel. Chambers was still shackled with leg restraints, belly chains, and handcuffs, making it impossible for him to take notes,[10] navigate discovery materials, or cover the microphone with his own hand. Anything he said – even if aimed at alerting his attorneys to the need to consult – might be recorded by a microphone.

Although, perhaps, the microphone could have been moved somewhat from its location on the defense table, it necessarily had to be close enough to both counsel to record any defense questions and objections. Moreover, because Chambers was restrained in chains that rattled (as heavy chains do when moved), it was necessary that Chambers remain still throughout the testimony. This was true even if he wanted to nudge his attorney

to get his attention and would have been true so long as there was *any* microphone in the room that might record the sounds of chains. Otherwise, he might poison his trial with the fact of his improper restraint.

These conditions are inconsistent with the guarantee of private and constant communication to which Chambers was entitled. They violated his right to counsel and require reversal.

5. PROSECUTORIAL MISCONDUCT DENIED CHAMBERS A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 787 (1969).

It is serious misconduct to personally attack defense counsel, impugn counsel's character, or disparage defense lawyers as a means of convincing jurors to convict the defendant. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030, 877 P.2d 695 (1994). "Prosecutorial

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[10] Chambers made "copious notes" throughout trial, including notes for his attorneys during the examination of witnesses. 16RP 26-27.

statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014) (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920, 105 S. Ct. 302, 83 L. Ed. 2d 236 (1984)).

During its rebuttal closing argument, the State twice engaged in serious misconduct that disparaged defense counsel. On the first occasion, the deputy prosecutor argued:

> The defense in this case has clearly tried to make this case about race. They have portrayed Jonathan Vause and Travis Hood as racists, and yet strangely the defense has argued all along, has told you that the defendant was not troubled by the racist slurs that he claims those two men told him. That didn't bother him. He told the police, it was like water off a duck's back. It didn't bother him. So the question you need to ask is why then has the defense made this a case about race.
>
> The reason they have made it a case about race is because they're trying to pander to your prejudices.
>
> **Defense**: Objection, your Honor.
>
> **Prosecutor**: They're trying to make you –
>
> **Court**: I'll allow it.

The deputy prosecutor then continued:

> They're trying to make you not use your rational thought processes. They're trying to make it so that your prejudice against racism clouds your judgment.

46RP 168-169 (emphasis added)

This argument was entirely improper. The issue of Vause and Hood's racism was relevant to their motive and intent to attack Chambers. The evidence tending to demonstrate they were racists made it more likely Chambers' version of events was the correct one. But the prosecutor's assertions converted this important evidence and fair argument into something sinister. According to the prosecutor, this whole inquiry was intentionally designed by defense counsel to "pander" to jurors' prejudices, cause them to abandon rational thought, and cloud their judgment.

The prosecutor's argument is reminiscent of misconduct in other recent cases, where defense counsel was accused of improper tactics. See Thorgerson, 172 Wn.2d at 450-452 (misconduct to describe presentation of case as "bogus" and to accuse counsel of using "sleight of hand," which implies clever deception); State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (misconduct to describe defense counsel's argument as a "classic example of taking these facts and completely twisting them

to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing"); Lindsay, 180 Wn.2d at 433-434 (misconduct to refer to defense counsel's arguments in closing as a "crock," which implies deception and dishonesty).

The deputy prosecutor was not done, however. A short time later, she argued:

> Regarding Dr. Cunningham, you know, large parts of what Dr. Cunningham testified to really went to they were trying to make it into an equity defense. The defendant's had a rough life.
>
> . . . .
>
> Dr. Cunningham testified that it was terrible things that happened to the defendant and his years in prison. He suffers from PTSD, and then you heard that the man that was killed was a racist. Don't be fooled.
>
> **Defense**: Objection, your Honor. That's misconduct to make an argument like that.
>
> **Court**: Overruled.
>
> **Prosecutor**: Don't be fooled. Look at the evidence that you actually have in front of you, and what does the defendant's past, the defendant's hard life, and even if Jonathan and Jamie did use the N word among themselves, what does that really have to do with what happened on the 21st of January, 2012? What does it really have to do?

46RP 184-185 (emphasis added).

Once again, the deputy prosecutor was permitted to disparage the defense. This time, the deputy told jurors they should not be "fooled" by defense efforts at an "equity defense," where Chambers' rough life is weighed against Hood's life as a racist to decide Chambers' fate.

Contrary to the prosecutor's assertions, evidence of Chambers' rough life was relevant and admissible because it helped explain his lack of cooperation with police and provided cause and context for his PTSD. At no time did defense counsel imply that Chambers should be acquitted because his background made him more sympathetic or somehow better than Hood. The prosecutor's accusation of an "equity defense" was based on nothing. Yet, it once again turned evidence properly presented and considered into something sinister and off limits. And the prosecutor's repeated warnings to jurors they should not be "fooled" by defense counsel's arguments were additional accusations that counsel was using improper deception on Chambers' behalf.

Misconduct requires a new trial if there is a substantial likelihood it affected the jury's verdict. Lindsay, 180 Wn.2d at 440. Through improper arguments disparaging the defense, the State

improperly neutralized key aspects of the defense case while simultaneously making it seem as though *defense attorneys* were the ones breaking the rules. This was undoubtedly a close case for jurors, as they were unable to reach a verdict on the charged offense, and the State's case depended largely on jurors believing the rather unbelievable Vause. In such a case, argument of this sort can make the difference between conviction and acquittal.

The prejudice from the prosecutor's arguments was further magnified by two circumstances. First, the improper arguments were made in the State's rebuttal closing argument. See Lindsay, 180 Wn.2d at 443 (statements during rebuttal closing increase their prejudicial effect). Second, the trial court overruled defense counsel's objections. Not only did the court's rulings do nothing to mitigate the misconduct's prejudicial effect, by overruling the objections the court essentially put its imprimatur on the prosecutor's statements. Jurors were effectively told that the prosecutor's accusations against the defense were not unreasonable, which "lent an aura of legitimacy" to the misconduct. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

Because there is a substantial likelihood serious misconduct impacted the result at Chamber's trial, reversal is required.

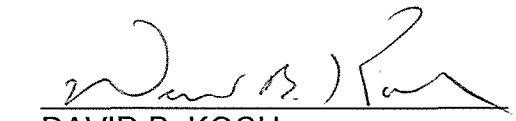
D. CONCLUSION

There was no factual basis supporting an instruction on manslaughter. Chambers' statement to detectives was taken in violation of Miranda. Evidence gathered at Chambers' home was the product of an illegal warrantless search. The shackling and cuffing of Chambers during the preservation deposition denied him his right to effective representation. And the prosecution resorted to serious misconduct during closing arguments. For all of these reasons, Chambers' manslaughter conviction should be reversed.

DATED this 30th day of September, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72093-7-I
	)	
LOVETT CHAMBERS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LOVETT CHAMBERS
DOC NO. 375239
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2015.

X Patrick Mayovsky