

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

MARCO ANTONIO GALLEGOS, Petitioner.

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ANSWER TO PETITION FOR REVIEW

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**I. IDENTITY OF RESPONDENT**

The Respondent is the State of Washington.

**II. COURT OF APPEALS DECISION**

At issue is the published court of appeals decision filed on October 13, 2016 in Division Three of the Court of Appeals.

**III. ISSUE PRESENTED FOR REVIEW**

1. Does the unpublished court of appeals decision meet the criteria for review under RAP 13.4(b)?

**IV. STATEMENT OF THE CASE**

On February 6, 2013, Marco Antonio Gallegos was charged with two counts of aggravated first degree murder, an alternative count of first degree murder, and unlawful possession of a firearm. CP 1-2. He was charged jointly with three codefendants, Troy Whalen, Jose Pineda, and Heriberto Villa. CP 1-2. The charges stemmed from the following facts:

Jose Pineda, also known as “Loks,” was Michael Eby’s drug supplier. RP 641, 1385, 1398, 1409, 1171. They saw each other on a weekly basis and had known each other for about eight months. RP 1385, 1394. Pineda developed a plan to confront Mr. Eby when he learned that Mr. Eby solicited a rival Sureño gang member, David Campos, to set up Pineda to get robbed. RP 1413. Pineda used a ruse in order to confront Mr. Eby. He told Mr. Eby he had \$600 that he owed him and got Mr. Eby

to agree to meet him at Troy Whalen's garage. RP 1450-77. The garage was a place where gang members spent time together and did drugs. RP 1255, 1263-4.

On the way to Whalen's home, Pineda brought his good friends Marco Gallegos, aka "Dabs" or "Sir Loco," and Heriberto Villa as backup. RP 1447, 1449, 1545, 1606, 1609, 1173. Pineda and Gallegos were in the same gang, "La Raza XIV." RP 1253. Within the La Raza gang, Gallegos was a "soldier" and one of the people you called if you wanted something handled. RP 1732, 1744. Gallegos went along with Pineda's plan to assault Mr. Eby. RP 1456. All three went into Whalen's garage after they got to the house. RP 1301, 1304. Both Pineda and Gallegos were armed. RP 1460.

Mr. Eby showed up with a friend, Ryan Pederson. RP 1306. Pineda led Mr. Eby into the garage where they smoked and talked. RP 1456. Pineda then asked Villa to bring Mr. Pederson into the garage and Villa complied. RP 1458. When confronted with the allegation, Mr. Eby acted surprised but admitted that he might have made a comment before he knew Pineda. RP 1463. Mr. Campos was called on the telephone and confirmed the Mr. Eby tried to get him to set up Pineda. RP 1465-6. Pineda told Mr. Eby that he was "gonna mess him up." RP 1662-3. Pineda testified that Mr. Eby knew what was going to happen to him

because he had seen a prior attack on someone who stole pot plants from Pineda. RP 1477. After Pineda's comment, Mr. Eby started punching Pineda. RP 1455.

Gallegos, who had been standing and blocking the door, walked to within two feet of Mr. Eby and shot him. RP 1664-7. At that point, Pineda then felt the weight of Mr. Eby's body on top of him and Mr. Eby stopped moving. RP 1471-2. Gallegos then pulled Mr. Eby off of Pineda, and proceeded to shoot Mr. Eby multiple times while he was on the ground. RP 1471-2, 1551, 1664-7, 1750. Mr. Eby had a total of three gunshot wounds: one to the right side of his head, one to his right upper arm, and one to his chest. RP 552-3, 556. He died as a result of these wounds. RP 552, 556, 559-60, 1551.

Gallegos then took control of the situation and told others what to do. RP 1487. He was calm the whole time. RP 1746. They wrapped Mr. Eby's body in a sheet, plastic bags, rope, wire, and duct tape. RP 439-441. Gallegos's plan was to put Mr. Eby's body in the trunk of Mr. Eby's own car and dump the car near Rosa Dam in the canyon. RP 1488, 1490-1, 1504.

Gallegos also ordered Villa to "smoke that fool," referring to Mr. Eby's friend, Mr. Pederson, so there would not be any witnesses. RP 1494. The plan was to get Villa more involved in order to keep him quiet.

RP 1493-4. Villa held Mr. Pederson at gunpoint inside of the house and then forced him into Mr. Eby's car. RP 1499. Everyone got into Mr. Eby's car except for Whalen, who drove Pineda's car. RP 1502.

On the way to the canyon, Gallegos warned, "the world's gonna end for some people." RP 1505. When they got there, everyone but Mr. Pederson got out of the car. RP 1509. At the time, Gallegos was standing just a few feet away from Mr. Pederson with his gun out. RP 1510-1, 1702, 1703. Villa was being boxed in by both Pineda and Gallegos. RP 1701. Pineda threw his gun at Villa and told him he had to do it. RP 1704. Villa felt that he if did not comply, he would have been shot by Gallegos. RP 1703. Villa then shot Mr. Pederson two times, striking him in the head and killing him. RP 1512, 1704. They left Mr. Eby's car there, along with the bodies of Mr. Eby and Mr. Pederson, and left the canyon in Pineda's car. RP 1333, 1337.

The trial lasted 11 days and included 33 witnesses being called by the State. CP 1230, 1259. Three of these witnesses were participants Whalen, Villa, and Pineda. Gallegos did not call any witnesses. RP 1873.

On September 26, 2014, Gallegos was found guilty of two counts of first degree premeditated murder, second degree (intentional murder) and second degree (felony) murder, first degree unlawful possession of a

firearm, as well as numerous sentencing enhancements.<sup>1</sup> CP 1204-1219. He was sentenced to life imprisonment without the possibility of release or parole. CP 1238. This appeal followed.

**V. ARGUMENT WHY REVIEW SHOULD BE DENIED**

**A. GALLEGOS FAILED TO PROVE THAT HIS ATTORNEY’S DECISION TO FORGO WPIC 6.05 WAS INEFFECTIVE ASSISTANCE OF COUNSEL.**

In *Strickland v. Washington*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466 U.S. 668; 104 S. Ct. 2052 (1984). Under *Strickland*, the analysis begins with a “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). It involves a two-pronged inquiry:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ...

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<sup>1</sup> The State had amended the charge prior to trial. Gallegos was convicted as charged.



resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. at 687.

Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” *Strickland*, 466 U.S. at 696 (“Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”).

A lawyer’s performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.

Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 332, 335, 889 P.2d 1251 (1995).

**1. Counsel’s performance can be characterized as legitimate trial strategy.**

“When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Kyllo*, 166 Wn.2d at

863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics.’” (quoting *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982))). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Finally, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

WPIC 6.05 states as follows:

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

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.05, at 184 (3d ed. 2008) (WPIC). WPIC 6.05 should be given “if requested by the defense.” Note on Use to WPIC 6.05. Here, it was not requested.

But the defense counsel’s decision to forgo a cautionary accomplice instruction could have been a reasonable trial strategy. Although the codefendants testified for the State, some of their testimony also helped Gallegos. Villa testified that it was Pineda who was calling the shots. RP 1724. He testified that Gallegos did not say anything before or after the first shooting or at the dam. RP 1724. He also testified that Gallegos was the only one not doing drugs in Whalen’s garage. RP 1739. Pineda testified that he only planned on confronting Mr. Eby and “checking” him.<sup>2</sup> RP 1420. He admitted on cross-examination that he only initially identified Mr. Eby’s shooter as “some dude.” RP 1535-6.

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<sup>2</sup> “Checking” someone means means holding someone accountable and the level of violence used will be greater if an outsider is getting checked. RP 1837-8.

Furthermore, Whalen testified that he did not see the shootings but only heard gunshots. RP 1307, 1333. He testified that Pineda was the one directing things after the shooting. For example, Whalen said Pineda asked for a sheet, handed Villa a pistol, asked Whalen to help lift the body into the trunk, asked Whalen to drive his car to the Canyon and then to another's house, and told everyone "this stays between us 4." RP 1308, 1318. All of this testimony, while it came from State's witnesses, was helpful for the defense, who wanted to point to Pineda as more culpable than Gallegos. And each party is entitled to the benefit of the evidence regardless of whether it comes from the State or the defense. *See* WPIC 1.02. As such, in view of this testimony, it was a legitimate tactical decision to forgo the instruction. Defense counsel would not want to undermine all of the codefendants' testimony by adding a cautionary instruction regarding their testimony.

The fact that parts of the codefendants' testimony helped Gallegos is also apparent from his attorney's closing argument. In closing argument, Gallegos's attorney relied on the testimony of Villa to bolster his client's defense. RP 1977. He stated:

There's no evidence that anybody testified to other than well this is what we hear whatever that Mr. Gallegos threatened anybody in this case. Heriberto Villa went so far as to say he'd never been threatened

by anyone in this case. The only thing that he was saying about Mr. Gallegos talking to him was tell him I wasn't there. Didn't say he threatened him. Tell them I wasn't there. Why else would he be saying tell them I wasn't there?

Later on, he relied on more testimony of Villa:

Although Villa said that Pineda was not the shot caller. He did everything. Gallegos didn't really say anything not on the drive, not at the house, nothing until prompted he, he said he walked out and had a gun in his hand as Pederson was walking out but as, as he's telling the story he doesn't say that Gallegos did anything. There's a good, good reason for that because Mr. Gallegos didn't do anything.

And yet another time, he referred to Villa's testimony in support of his case:

But Villa says that those dudes would have shot me. He doesn't say Dabs would have shot me. He doesn't say Gallegos would have shot me.

RP1921. He also pointed out that the witnesses across the board, testified that Gallegos was "not into meth." RP 1982. In closings, the defense attorney multiple times referred to Pineda's testimony that he used Gallegos's name in the past to get out of a charge. RP 1984, 1979. This was all clearly helpful to the defense case.

**2. Where substantial corroborating evidence exists, the instruction need not be given.**

Appellant argues that the testimony of the accomplices was not substantially corroborated. However, it is not necessary for the State to present corroborating evidence for every part of the accomplice's testimony; it is sufficient if corroborating evidence tends to connect the defendant with the commission of the crime. *State v. Calhoun*, 13 Wn. App. 644, 648, 536 P.2d 668 (1975) (quoting *State v. Gross*, 31 Wn.2d 202, 216-17, 196 P.2d 297 (1948)). It is sufficient if the accomplice testimony is substantially corroborated by testimonial, documentary or circumstantial evidence. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984).

In this case, the testimony of each individual accomplice was cross-corroborated by the testimony of two other participants. This case did not rest solely on one person's word.

Mr. Eby's father and daughter, as well as David Campos and Ashli Pineda, also corroborated the testimony of the accomplices. Ashleigh Eby, Mr. Eby's daughter, confirmed that her father was going to meet "Loks" the night he disappeared. RP 641, 804. She testified that "Loks" owed her dad \$600. RP 677-8. And that on the night of the murder, "Loks" was trying to get ahold of her dad and she relayed that to him. RP

679. When she spoke to her dad, she could hear Mr. Pederson in the car with him. RP 702. Mr. Eby's father also confirmed that his son went to Whalen's house to see a person that owed him money. RP 729-31.

Mr. Campos confirmed that Mr. Eby solicited him to "jack Loks." RP 1792. He also confirmed that he was called on the night of the murder to confirm what Mr. Eby had asked of him. RP 1793-4. Phone records showed that Mr. Eby and Pineda were calling Mr. Campos around the same time, 10:34 p.m. RP 1797, 1802. Both were calling from the same vicinity. RP 1797. Phone records showed that after the phone call to Mr. Campos, Mr. Eby's phone stopped receiving calls eight minutes later. RP 1804.

Ashli Pineda, Pineda's wife, testified that Gallegos was at her house when she and Pineda got back from Walmart on the evening of the murder. RP 1051. She said that Gallegos left with her husband. RP 1053. She then heard them later that night after she had gone to bed. RP 1053. Villa was with them as well and possibly another person. RP 1053-4. They came inside her home and were talking. RP 1053. They were there for about 30 minutes and then everyone left except for her husband. RP 1055.

In addition to lay testimony, there was physical evidence that corroborated the testimony of the accomplices. The forensic pathologist

testified that Mr. Eby's cause of death was three gunshot wounds, each of which could be capable of causing death. RP 560. One gunshot wound was mid-chest, one was to the right upper arm, and one was to his head. RP 548-556.

He also testified about Mr. Pederson's cause of death. He observed a gunshot wound to Mr. Pederson's head and shoulder. RP 508-521. He gave an opinion that the gunshot wound that impacted the eye and the brain, and caused skull fractures was the lethal wound. RP 521. The description of the gunshot wounds by the forensic pathologist was consistent with the testimony given by witnesses Whalen, Pineda, and Villa.

Furthermore, cell phone tower data was consistent with the testimony of the accomplices. That data showed that Mr. Eby and Pineda were in the general area of Whalen's garage. RP 800-802. Mr. Eby's phone stopped emitting a signal at 10:41 pm the night he was murdered. This is consistent with testimony that his phone was tossed into the fireplace in Whalen's garage. Pineda's last phone call was at 11:57 pm, consistent with testimony that his phone was tossed out the window of the car on the way back from the canyon. RP 802, 1707.

Physical evidence later found in Whalen's garage also corroborated the testimony of the accomplices. A photo was found



showing a blanket on a couch inside of Whalen's home. The blanket was the same one that was wrapped around Mr. Eby's body. RP 933. A sheet was found that also matched the one found on Mr. Eby. RP 939. What appeared to be part of an Apple iPhone was found in the fireplace and Mr. Eby's phone was an Apple iPhone. RP 941-2. There was a folding camp chair belonging to Mr. Eby's father that was found outside the garage. RP 946. The chair had been kept in the trunk of Mr. Eby's car and was likely moved to make room for Mr. Eby's body.

Officers also found multiple types of wire that were similar to that wrapped around Mr. Eby's body. RP 943. In addition, the matching end of a cut electrical cord that powered a fireplace fan was found. RP 943. The cord had been cut and wrapped around Mr. Eby. This, along with other facts, corroborated the testimony that Mr. Eby's murder occurred in Whalen's garage. RP 950. Furthermore, blood found on a chair was sent to the crime lab and confirmed to be that of Duane Martin, confirming Pineda's account that on a prior occasion, he beat Mr. Martin in his garage after learning that Mr. Martin stole marijuana plants from him. RP 1200-5, 1397-99.

Expert testimony was also consistent with the testimony of the cooperating witnesses. Forensic scientist Rick Wyant testified as an expert for the Washington State Patrol Crime Lab. RP 987. He examined

several bullets, bullet fragments, and fired cartridge cases. RP 997. His analysis supported the witnesses' testimony that two separate guns were involved in the killing of Mr. Eby and of Mr. Pederson.

Mr. Wyant examined a bullet and bullet fragments relating to Mr. Eby (Exhibits 99, 100, and 102) and found that they were all fired from the same non-Glock firearm. RP 1013-5, 1017-9, 1021, 1031. However, the fired bullet and fragments (Exhibits 93 and 105) relating to Mr. Pederson were both fired from a Glock-type firearm. RP 1007, 1031. Furthermore, Mr. Wyant concluded that the cartridge cases found in Mr. Eby's car (Exhibits 103 and 104) were fired from the same gun and consistent with the bullet and fragments recovered from the car. RP 584-90, 1031. In sum, because the testimony of each accomplice was substantially corroborated through other witnesses, cell records, expert testimony, and physical evidence, it was not reversible error for Gallegos's attorney to forgo seeking WPIC 6.05.

In summary, the State did not rely solely on the testimony of multiple accomplices. The testimony was extensively corroborated by other witnesses, and circumstantial evidence. The accomplices were also subject to a lengthy and detailed cross-examination. While inconsistencies were pointed out, the accomplices did not change their version of what happened.

**3. Gallegos failed to show that deficient performance prejudiced his defense.**

To satisfy the prejudice prong of the *Strickland* test, Gallegos must establish that “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Garrett*, 124 Wn.2d at 519. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” *Strickland*, 466 U.S. at 694-95.

To prove prejudice, Gallegos must prove the jury would probably have acquitted him if his lawyer had proposed WPIC 6.05. *See State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). Gallegos’s lawyer ably revealed the inconsistencies and biases of the witnesses. For example, he pointed out inconsistencies in each codefendant’s testimony, RP 1975-6, 1978-9, 1980-1, 1984. He described how they were all meth users. RP 1982. He talked about the deals that they made with the State and how they all had “a lot to lose.” RP 1984. Every inconsistency or

bias that could have been raised with these witnesses was raised and laid out for the jury to consider.

The fact that they entered into cooperation agreements was made clear. The defense attorney also told them to be skeptical of what the witnesses were saying. RP 1984. And the jury learned not only about the cooperation agreements, but also learned about the gang lifestyle of the witnesses and their using and selling drug. It was abundantly clear that the cooperating witnesses were involved in illegal activities. This testimony would cause reasonable jurors to be cautious about accepting their testimony. Furthermore, the jury was instructed to consider the biases and prejudices of the testifying witnesses. WPIC 1.02.<sup>3</sup> As such, a cautionary instruction in this case would not have caused the jury to acquit Gallegos.

## **VI. CONCLUSION**

This does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question

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<sup>3</sup> WPIC 1.02 states: “You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness’s memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.”

of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

Trial counsel for Gallegos was not ineffective in forgoing WPIC 6.05. The accomplice testimony was substantially corroborated, and Gallegos suffered no undue prejudice.

Respectfully submitted this 8th day of March, 2017,

\_\_\_\_s/Tamara A. Hanlon\_\_\_\_\_  
TAMARA A. HANLON, WSBA 28345  
Senior Deputy Prosecuting Attorney

## DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 8, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Janet Gemberling at admin@gemberlaw.com and jan@gemberlaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of March, 2017 at Yakima, Washington.

\_\_\_\_\_/s/Tamara A. Hanlon  
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