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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 26816-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS SANCHEZ, JR.

Appellant.

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

The Honorable James P. Hutton

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT IN REPLY

Appellant Jose Sanchez's high-profile trial was conducted in the jail based upon complaints from jail officials that the additional security needed to hold the trial in the courthouse would be onerous and expensive. In ruling that the jail was the appropriate facility for the trial, the trial court did not make a finding that Sanchez posed a compelling threat of injuring people in the courtroom, engaging in disorderly conduct, or escaping. Instead, although Sanchez's in-court behavior for the two-and-a-half years that the case was pending had been exemplary, the court relied upon unverified and unsubstantiated representations regarding Sanchez's potential risk and general factors such as Sanchez's criminal history and the nature of the current charges. The Supreme Court has held that holding a trial in a jail rather than a courthouse is inherently prejudicial and, absent a showing of manifest necessity, unconstitutional. No showing of manifest necessity was made here. Sanchez's convictions should be reversed.

In addition, the order disqualifying Sanchez's counsel was not required by any rule of professional conduct and violated Sanchez's Sixth and Fourteenth Amendment rights to counsel of his choice and equal protection; Sanchez was denied a public trial and his right to be present when he was excluded from an in-chambers hearing; the admission of

unreliable eyewitness identification testimony denied Sanchez his due process right to a fair trial; the trial court erred in denying his motion to suppress evidence and substitute counsel rendered ineffective assistance of counsel when they did not move for suppression at the commencement of the proceedings; and the trial court's erroneous rulings on the admission of evidence denied Sanchez his right to a defense.¹ Each of these errors separately and cumulatively denied Sanchez a fair trial.² His convictions should be reversed.

B. ARGUMENT IN REPLY

1. HOLDING SANCHEZ'S TRIAL IN THE JAIL VIOLATED HIS RIGHTS TO DUE PROCESS AND THE PRESUMPTION OF INNOCENCE AND WAS CONTRARY TO THE SUPREME COURT'S HOLDING IN *JAIME*, REQUIRING REVERSAL OF SANCHEZ'S CONVICTIONS.

a. Holding a trial in a jail courtroom is inherently prejudicial and erodes the presumption of innocence. “[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity

¹ In the interest of space, and because the State's contentions on appeal offer no new or helpful information on the trial court's evidentiary rulings, Sanchez relies upon his arguments in his opening brief with regard to assignments of error 11-13.

² Each of these issues must be decided in the event of remand.

essential to ‘the integrity of the trial’ process.’” State v. Jaime, 168 Wn.2d 857, 862, 233 P.3d 554 (2010) (quoting Estes v. Texas, 381 U.S. 532, 561, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Warren, J., concurring)). In Jaime, the Court held that holding a trial in a jailhouse courtroom was “inherently prejudicial.” Id. at 863. In ruling it “self-evident” that a juror’s impartiality would be affected by attending proceedings in a jail, the Court noted that a jail is “singularly utilitarian. Its purpose is to isolate from the public a segment of the population whose actions have been judged grievous enough to warrant confinement.” Id.

A juror’s experience with jail is very likely limited to what our societal discourse tells us of jails: they are high-security places that house individuals who need to be in custody. That the average juror would draw a corresponding inference from that experience is reasonable to surmise.

Id. at 864. Referring specifically to the Yakima County Jail, and quoting from Sanchez’s opening brief, the Court described it as a “monolithic concrete building.”³ Id.

In Jaime, a prosecution for second-degree murder, the Yakima County Prosecutor sought to try Jaime in the jail for substantially similar reasons as in Sanchez’s case:

³ That the Court not only was aware of the existence of Sanchez’s appeal but had reviewed the appellant’s opening brief prior to issuing its decision indicates that the Court was well aware that its decision in Jaime could well result in reversal of Sanchez’s convictions.

The prosecution argued that Jaime presented a serious security concern and should be tried in the jail. The prosecution also argued that this actually benefited Jaime because he would otherwise need to be handcuffed for transport between the jail and the courthouse and there was a risk the jury might see him during transport; a jailhouse trial eliminated that possibility.

Id. at 860.

In approving the State's request, the trial court:

noted allegations concerning threats by Jaime or his friends against the witnesses and alluded to Jaime's history of violent behavior in jail and escape attempts, explaining that there was better security in the jail courtroom. The court also considered the convenience of holding the trial in the jail courtroom in that it was much easier to usher the jury in and out of the jail courtroom in a timely fashion because the jury room was just across the hall from the courtroom. The court explained that it agreed with the State that there was less chance the jury would see Jaime in handcuffs if the trial took place in the jail. Finally, the court noted the jailhouse courtroom was designed to accommodate jury trials and was in design comparable to other courtrooms.

Id. at 860-61.

The Supreme Court found this rationale deficient in two respects: first, the allegations that Jaime presented a security concern and escape risk were based on unverified representations by the prosecutor. Id. at 866. Second, the Court concluded that the trial court's order was impermissibly based upon concerns of convenience "as well as general concerns that would be applicable to any defendant who is in custody during trial," such as the likelihood that jurors would see Jaime being

transported to the courthouse in restraints. Id. The Court quoted approvingly from State v. Gonzalez, 129 Wn. App. 895, 120 P.3d 654 (2005), in which this Court reversed another Yakima County conviction: “where ‘juror views of restrained defendants are inevitable in this county ... then it is the transport procedures which must change, not the constitutional presumption of innocence.’” Jaime, 168 Wn.2d at 866 (quoting Gonzalez, 129 Wn. App. at 905). The Court reiterated:

We erect courthouses for a reason. They are a stage for public discourse, a neutral forum for the resolution of civil and criminal matters. The unique setting that the courtroom provides “is itself an important element in the constitutional conception of trial, contributing a dignity essential to ‘the integrity of the trial’ process.” The use of a space other than a courthouse for a criminal trial, particularly when that space is a jailhouse, takes a step away from those dignities. We hold that the setting of Jaime’s trial infringed upon his right to a fair and impartial trial[.]

Id. at 867.

The State contends that the trial court appropriately exercised its discretion in ruling that Sanchez’s trial should be held in the jail. To sustain its argument, the State mischaracterizes the record, exaggerating and in some instances misrepresenting the facts adduced before the trial court. The State concedes, however, that with the use of a metal detector and the deployment of additional personnel during the trial, it would have been possible to try Sanchez in the courthouse. See Br. Resp. at 61, 64-

66. In light of the State's concession, Sanchez's convictions must be reversed.

b. The State misrepresents the facts regarding Sanchez's in-custody behavior. In an apparent effort to portray the "security concerns" about Sanchez as legitimate, the State overstates and occasionally outright misrepresents the facts adduced at the hearing. For example, the State notes that Sanchez was "involved in another incident that placed him back into a disciplinary unit. That incident involved a weapon . . . a shank, found in his cell." Br. Resp. at 62. However the State fails to mention that Sanchez was in fact found not guilty of possessing a weapon in his room. 10/23/07 RP 50, 53.

The State also intimates that Sanchez was "involved in a general disturbance linked to gang activities," including a flooding incident. Br. Resp. at 62. In actuality not a single incident report linked Sanchez to gang activity,⁴ and there was no evidence that he participated in the "general disturbance." 10/23/07 RP 49. In fact, there were no founded allegations of misbehavior regarding Sanchez, nor was there any incident report linking Sanchez to gang activity in the jail, nor was there any indication that Sanchez was an escape risk. 10/23/07 RP 39-40, 53-54.

⁴ At the same time that the State insinuates that there was a link between Sanchez and gang activity in the jail, the State acknowledges that "there was no reported gang activity involving Sanchez." Br. Resp. at 63.

The State further claims that Detective Kellett testified that Sanchez threatened him at the time of his arrest. Br. Resp. at 63. This is not true. Detective Kellett actually testified that when Sanchez was arrested, he told Sanchez he wanted to speak with him, and Sanchez responded, “get the fuck out of my face.”⁵ 10/23/07 RP 59. Kellett also testified to a “rumor” that Sanchez had threatened Mendez, but as in Jaime, this unverified representation does not support the conclusion that Sanchez presented a security concern. Cf., Jaime, 168 Wn.2d at 866.

The State last notes that Sanchez was classified as “maximum security” in the jail, but this classification was based on general factors – his age, criminal history,⁶ and the current charges – rather than any specific intelligence concerning potential risk. 10/23/07 RP 41-42. In State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), the Court cautioned that the seriousness of the current charges and prior criminal history do not supply a constitutionally adequate basis for restraints. 137 Wn.2d at 849-50. Likewise, the State’s witnesses conceded that the indication that Sanchez had, several months earlier, expressed suicidal thoughts (also mentioned by the State in its response, Br. Resp. at 63) had no bearing

⁵ This statement can be considered an invocation of Sanchez’s right to silence.

⁶ Sanchez’s prior criminal history was relatively minor: he had been convicted of second degree assault, third degree assault, and three counts of malicious mischief. 10/23/07 RP 59.

upon courtroom security. 10/23/07 RP 51. Compare Finch, 137 Wn.2d at 851-52 (“Mr. Finch did attempt suicide while in custody; however, this does not evince a need for physical restraints . . . The State does not cite to, and this court cannot find any case which has allowed physical restraints in such circumstances.”).

Finally, it was uncontested that during the two-and-a-half year life of the case Sanchez had appeared at multiple court hearings and had always conducted himself properly and appropriately.⁷ Indeed, when the motion to hold the trial in the courthouse was heard, the court had just concluded a lengthy identification hearing at which Michelle Kublic – who the State alleged was one of Sanchez’s victims – had testified without incident. Cf., Finch, 137 Wn.2d at 853 (considering fact that defendant’s alleged victim testified at pretrial hearing without incident, and finding court abused its discretion in ordering security measures where Finch had never been disruptive in the courtroom, did not pose an escape risk, and was not a threat to anyone except, possibly, his victim).

⁷ The State notes that at Sanchez’s arraignment there was a fight in the hallway. Br. Resp. at 60. As discussed below, a restraint order must be based upon “evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom.” Finch, 137 Wn.2d at 850 (emphasis added). There is no indication that the fight was at Sanchez’s instigation or even that it was connected to him. Further, as the court admitted, to the extent the record supported the inference that people involved in the case had “altercations” with each other, “it did happen a while ago.” 10/23/07 RP 80. Thus, if the “fight” is even relevant, it carries little weight in light of the many subsequent hearings that took place without incident.

c. The ruling that the trial should be held in the jail was based on unverified representations and generalized concerns, rather a compelling individualized threat that Sanchez posed an imminent risk of escape, intended to injure someone in the courtroom, or could not behave in an orderly manner. “If the court determines the need for security measures that cannot be concealed from the jury, the judge must make a record of a compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape.” Gonzalez, 129 Wn. App. at 901-02 (citing State v. Hartzog, 96 Wn.2d 383, 391-92, 635 P.2d 694 (1981)); see also Finch, 137 Wn.2d at at 846 (noting, “[a]ll cases which have upheld the trial court’s decision to handcuff or shackle a defendant have only done so where the defendant presented a threat of escape, a threat of injury to others, or had disrupted the trial court proceedings,” and citing cases). A shackling order that is not based on these grounds is an abuse of discretion. Id. at 850.

“Courts have specifically found reversible error where the trial court based its decision solely on the judgment of correctional officers who believed that using restraints during trial was necessary to maintain security, while no other justifiable basis existed on the record.” Finch, 137 Wn.2d at 853. Given Sanchez’s exemplary conduct throughout the proceedings, there was no justifiable basis on the record for the court’s

order . Rather, the State’s “security concerns” were based upon unverified representations from correctional officers and general factors such as the nature of the charged offenses and Sanchez’s criminal history. See 10/23/07 RP 35 (Yakima County Department of Corrections Chief Will Paulakis admits he had no direct knowledge why Sanchez was considered an elevated security risk); 10/23/07 RP 50 (sole founded allegation against Sanchez was that he had threatened another inmate); 10/23/07 RP 59 (Kellett aware of “rumor” of threats). Under Jaime and Finch these second-hand, unverified reports were not constitutionally sound bases for the Court’s order. In short, the court’s order was not based upon the “compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape” that is required in order for such a serious infringement of an accused person’s right to be presumed innocent to be constitutional. Sanchez’s convictions must be reversed.

d. The true motivation for holding Sanchez’s trial in the jail was cost and convenience, not necessity. A court must consider alternatives to restraints, such as “the reasonable use of additional security personnel,” and “the use of metal detectors or other security devices.” Hartzog, 96 Wn.2d at 401. The State’s witnesses conceded that it would be possible to hold the trial in the county courthouse if additional law enforcement personnel were deployed and a metal detector or hand-held

wand used to screen people entering the courthouse. See 10/23/07 RP 16 (Sergeant Joel Clifford agrees that it would be possible to coordinate courtroom security with the jail to hold trial in courtroom); 10/23/07 RP 18-19, 27-34 (Paulakis details the security measures that would be utilized if the trial were held at the courthouse).

Paulakis complained, however, that although he could secure the additional staff necessary to conduct Sanchez's trial in the courthouse, because of the cost involved it would be "robbing Peter to pay Paul." 10/23/07 RP 29. But where the lack of suitable procedures or personnel infringes upon an accused person's right to be presumed innocent, then "it is the . . . procedures which must change, not the constitutional presumption of innocence." Jaime, 168 Wn.2d at 866; Gonzalez, 129 Wn. App. at 905.

Here, as in Jaime, the trial court "considered impermissible factors involving convenience in making its decision." See Jaime, 168 Wn.2d at 866. The court attempted to justify its decision, as the State does on appeal, by noting that the use of a metal detector might suggest to jurors that there was something unusual about Sanchez's case, and that additional guards would have a similar deleterious effect to holding the

trial in the jail.⁸ 10/23/07 RP 811-83; Br. Resp. at 64-66. Neither rationale has merit.

The use of metal detectors as screening devices in government facilities such as courthouses, airports, and civic administration buildings is commonplace. Further, the Supreme Court has rejected the contention that the deployment of additional jail guards is equivalent or even comparable to restraint orders that the Court has found inherently prejudicial:

While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status.

Holbrook v. Flynn, 475 U.S. 560, 579, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

Unlike the potentially salutary effect of guards during a trial,

⁸ The court also observed that in the event of a threat of violence to Sanchez, if the trial were held in the jail, jail security would be able to remove him to a holding cell, which would not be possible in the courthouse. To the extent that Sanchez's trial posed such a risk (a contention that Sanchez disputes), its likelihood would be greatly reduced or eliminated by the use of metal detectors.

conducting a trial in the jail is an “unmistakable indication[] of the need to separate a defendant from the community at large.” See Jaime, 168 Wn.2d at 864 (“[h]olding a criminal trial in a jailhouse building involves such a probability of prejudice that we must conclude it is “inherently lacking in due process.””) (citation omitted); State v. Cavan, 98 P.3d 381, 389 (Or. 2004) (“convening a trial in a prison . . . and not in a courthouse forcefully conveys to a jury the overriding impression of a defendant’s dangerousness and we think, by extension, his or her guilt”) (cited with approval in Jaime, 168 Wn.2d at 865).

There is no legitimate comparison between the precautionary security measures that would accompany a high-profile trial in a courthouse and requiring the defendant to stand trial in the “monolithic concrete building” used solely for sequestering dangerous persons away from society at large. Nevertheless, the trial court assessed these measures and either found that they would be burdensome to the county or conspicuous. These are not permissible justifications for infringing on Sanchez’s right to be presumed innocent. Sanchez’s convictions must be reversed.

e. The fact that a hearing was conducted does not insulate the court’s legally erroneous ruling from appellate review. The State’s last-ditch argument is that because the trial court “conducted a hearing” its

legally erroneous exercise of discretion should be affirmed. Br. Resp. at 66-68. However “application of an incorrect legal analysis or other error of law can constitute abuse of discretion.” State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).⁹ The trial court’s ruling was based largely on unverified representations of potential security concerns, general factors such as criminal history and the current charges, and considerations of convenience, rather than Sanchez’s due process rights. But in order for the court to take the draconian measure of conducting the trial in the jail, the State had to show a “compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape.” Hartzog, 96 Wn.2d at 391-92. This was not shown here. Holding Sanchez’s trial in the jail was inherently prejudicial, and not shown to be manifestly necessary. Sanchez’s convictions must be reversed.

2. NO BASIS EXISTED FOR DISQUALIFICATION OF SANCHEZ’S COUNSEL UNDER RPC 3.7 OR 1.8.

The State contends that the trial court’s disqualification of Sanchez’s counsel of choice was appropriate under the lawyer as witness and conflict of interest rules. However the State has failed to correctly apply either rule. The State has failed to show that Witchley’s interview of an unrepresented co-defendant in the presence of an investigator made

⁹ If the State’s argument were correct, then the mere fact of holding a hearing and taking testimony would be sufficient to insulate any shackling order from appellate review. But this is clearly not the standard.

Witchley a necessary witness. The State has similarly failed to identify any relevant or admissible evidence regarding the Carrillo children's relocation to California that would create a conflict of interest. Most importantly, the State has failed to show that the motion to disqualify was anything other than the abusive misuse of the ethical rules by co-defendant Mendez's counsel, or that the court did not commit an error of law in granting the motion.

a. Counsel's interview of Mendez in the presence of an investigator did not render Witchley a necessary "witness" requiring his disqualification.¹⁰ The State acknowledges that before a lawyer may be disqualified under RPC 3.7, four predicates must be established. First, there must be a showing that the attorney "will give evidence material to the issues being litigated." P.U.D. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994) (citation omitted). Second, the evidence must be "unobtainable elsewhere." Id. Third, the court must find the testimony to be given is or may be prejudicial to the testifying attorney's client. Id. Finally, even if these criteria are met, the court may still refuse to disqualify counsel if disqualification would work a substantial hardship on the client.

¹⁰ The State conflates its analysis of the Mendez interview with the counsel's assistance to the Carrillo children. For clarity, the State's arguments are discussed separately in this reply.

i. The investigator's presence during the interview prevented Witchley from being a necessary witness. The State only attempts to address the first of the criteria for disqualification, see Br. Resp. at 15, and even so the State mistakes the analysis. For an attorney to be disqualified under the lawyer-as-witness rule, the evidence to be given by the attorney must be material. Thus, the fact that the interview concerned the charges is not dispositive of whether any evidence that might be given by Witchley would be material.

Of key significance to the analysis is the fact that the interview of Mendez was conducted in the presence of an investigator who was available to testify should it be necessary to impeach Mendez at trial with his prior statements. CP 490. In a recent decision, this Court addressed this very issue. American States Ins. Co. ex rel. Kommavongsa v. Nammathao, 153 Wn. App. 461, 468, 220 P.3d 1283 (2009). Regarding the requisite finding concerning the importance of the lawyer's testimony, this Court noted, "perhaps others with firsthand knowledge might exist who could testify in lieu of [the lawyer]." Id. at 468 n. 5; cf., also, Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 267 (5th Cir. 2001) (lawyer not necessary witness where other witnesses could testify to the same information). Here, the purpose of the investigator's presence was to ensure that a witness other than Witchley could be called to testify in the

event that it became necessary to impeach Mendez with inconsistent statements. CP 490. Witchley's testimony was not necessary or material.

ii. The State's faulty logic would require prosecutors not to interview witnesses. The State appears to advocate a different standard for defense attorneys than for prosecutors. Prosecutors conduct or are present for witness interviews all the time, and it is well understood that the presence of a law enforcement officer or other witness at the interview is what prevents the prosecutor from becoming a potential impeachment witness. For example, the ABA Standards for Criminal Justice provide that a prosecutor should conduct interviews of a prospective witness in the presence of a third person unless the prosecutor "is prepared to forgo impeachment of a witness by the prosecutor's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony...." ABA Standards for Criminal Justice, Prosecution Function Standards (3rd ed. 1993) 3-3.1(g) (including commentary).

Numerous courts that have considered the question have rejected the contention that a prosecutor's participation in or presence at a witness interview, or participation in case investigation, renders the prosecutor a necessary witness. See e.g. United States v. Starnes, 157 Fed. Appx. 687, 693 (5th Cir. 2005) (AUSA's participation in two searches relevant to case

did not require his disqualification); United States v. Marshall, 75 F.3d 1097, 1106 (7th Cir. 1996) (AUSA's cross-examination of a witness whose interview he attended did not violate advocate-witness prohibition because other witnesses were available for impeachment); United States v. Watson, 87 F.3d 927, 932 (7th Cir. 1996) (lawyer-witness rule did not bar AUSA who interviewed the defendant from representing the government at trial because the interview was conducted in the presence of a third person who could later testify to the government's version of the conversation).

The Court in Marshall articulated the policy reasons why crediting the argument that the prosecutor should be disqualified would be harmful:

We note that if Marshall's argument were successful it would bar prosecutors from cross-examining a defendant if that prosecutor had participated in an interview with the defendant prior to trial. Thus, if the AUSA conducted a fact-finding interview of a suspect before authorizing the issuance of a formal charge, he or she would be barred from prosecuting the defendant at trial. A result of this nature strikes us as an inaccurate application of "the advocate-witness rule, ... misstates the reasons underlying that rule ... and it misstates the common sense of the situation presented to the jury," . . . and this is not the law.

Id. (internal citation omitted).

In the context of people accused of crimes, the State's proposed rule has an even more deleterious effect. Accused persons have the Sixth Amendment right to the effective assistance of counsel. Strickland v.

Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 1984). The extension of the advocate-witness prohibition to lawyers who, consistent with their obligations as zealous advocates, attend or participate in witness interviews will have a chilling effect on their ability to provide competent representation. Accused persons will be forced to make a Hobson's choice between effective, prepared counsel and counsel who have not attended critical interviews because of fear of disqualification.

In sum, the State has not established materiality, necessity, or prejudice to Sanchez, as required for disqualification under RPC 3.7. As the trial court acknowledged, had Witchley not interviewed Mendez, he could well have rendered ineffective assistance of counsel. CP 862. This Court should reject the contention that this interview provided a basis for counsel's disqualification.

iii. The State would not have been "prejudiced" by Witchley's cross-examination of Mendez. The State suggests that the State would be "prejudiced by the implication to the jury that Witchley's questions represented the truth based on his personal knowledge of what had occurred."¹¹ Br. Resp. at 16-17. Similar claims have been flatly rejected by the appellate courts. In Marshall, the defendant claimed that

¹¹ It must be remembered that prejudice to the opposing party is not a component of the analysis under the advocate-witness prohibition, so the State's contention is not germane to this Court's consideration of the issue on appeal.

her cross-examination by the AUSA regarding a meeting that he, Marshall, and an FBI agent attended violated the advocate-witness prohibition. 75 F.3d at 1106. Marshall contended that the AUSA's cross-examination amounted to "subliminal testimony" that vouched for the truth of the statements of the FBI agent who attended the interview. Id.

The Court found this argument meritless. The Court noted that the AUSA phrased his questions impartially and made no assertion that he believed Marshall was lying; he simply contrasted her testimony with that of the agent. Id. The Court further noted that because the AUSA did not testify, the advocate-witness prohibition was not violated. Id. The Seventh Circuit reached a similar result in United States v. Toliver, 374 Fed. Appx. 655, 659-60 (7th Cir. 2010) (finding "frivolous" argument that prosecutor's use of "we" to refer to meetings with cooperating witness during direct examination violated advocate-witness prohibition, and rejecting contention that such questioning vouched for witness).

These cases establish that the State's speculation about "prejudice" to the State from Witchley's examination of Mendez is unfounded. Further, the State's concerns could easily be addressed by an in limine order requiring Witchley to phrase his questions impartially, as in Marshall.

iv. The authority cited by the State is off-point. In his opening brief Sanchez identified the concerns with applying the advocate-witness rule to disqualify lawyers who attend or participate in witness interviews with investigators. Br. App. at 38-41. Rather than responding to the authority cited in Sanchez's brief, the State submits two pages of block quotation from United States v. Basham, 561 F.3d 302 (4th Cir. 2009). Br. Resp. at 17-18. The State falsely claims that Basham is "a case that is similar to that of the present." Br. Resp. at 17. It is not. In fact, the facts of the case are entirely disparate to those presented by Witchley and Freeman's interview of Mendez.

Basham and another individual escaped from prison and were subsequently implicated in the disappearance of two women whose bodies were not recovered. 561 F.3d at 310-11. Through appointed counsel, Basham agreed to provide federal investigators with assistance in locating the women's bodies. Id. at 313. Counsel made multiple representations to law enforcement regarding the possible location of evidence related to the murders based purportedly on representations from Basham himself. Id. at 313, 321-22. The government contended the lawyer's statements were admissible as party admissions and that counsel should be disqualified. Id. at 323.

In granting the disqualification motion, the court noted that:

(1) because of the cost of capital litigation, it wished to avoid “expensive and cumbersome post-verdict issues” . . . (2) Basham's case was in its “infancy” and removal would “work no substantial hardship” and “eliminate a thorny issue that could arise later” . . . (3) the statement might be admissible at trial under several scenarios; (4) other conflicts of interest existed, because Basham argued that he never authorized [his attorney] to make the statement to the FBI agents; and (5) although Basham currently wanted to retain [his attorneys], it was foreseeable that if Basham was sentenced to death, he would blame those attorneys for his situation and raise their potential conflict of interest on appeal.

Id. at 322-23.

This case is different in every material respect. First, Sanchez’s attorneys made no representations to the State implicating Sanchez in the crime which the State sought to admit. Second, Sanchez’s case was far from being in its infancy. Counsel had expended several thousand hours working on the case.¹² CP 835. Third, there was no suggestion that in interviewing Mendez, Witchley acted contrary to Sanchez’s interests, so there was no likelihood that the fact of the interview would be a basis for Sanchez to later challenge his conviction. Indeed, Sanchez expressly wished to waive any conflict. Fourth, as noted, the State identified no “statement” to be offered through Witchley (and still fails to do so). Moreover, if any “statement” were to become admissible – i.e., if it became necessary to impeach Mendez – Freeman attended the interview

¹² Between April 2005 and November 2006, Walsh had devoted more than 2,800 hours to the case, and Witchley 2,741.1 hours. CP 835.

precisely to preclude Witchley's testimony from becoming necessary.

Fifth, Witchley and Walsh had succeeded in persuading the State not to seek the death penalty, so there was no prospect of Sanchez blaming his counsel for a death sentence.

As it did below, the State again cites to Gonzalez v. State, 117 S.W.3d 831 (Tex. 2003), but the State fails to mention a key difference between Gonzalez and this case. Br. Resp. at 19-20. In Gonzalez, a witness alleged that the defendant paid him for favorable testimony. 117 S.W.3d at 835-36. Only the lawyer and the defendant were present at the critical meetings with the alleged co-conspirator, and thus there was no one other than the attorney – save the defendant himself, who held a Fifth Amendment privilege – who could have impeached the co-conspirator's testimony. Gonzalez, 117 S.W.3d. at 835-36. In Gonzalez, only counsel could have impeached the witness with his own recollection of the events, and the State would not have been able to impeach counsel's credibility. Id. at 837. Here, again, an investigator was present for the Mendez interview precisely in order to eliminate this potential problem.

In short, the Mendez interview provided no basis for disqualification. Further, upholding the disqualification order under the lawyer-as-witness rule creates a perverse incentive for counsel to refrain from attending key witness interviews, undermining their ability to be

zealous advocates, and encourages opposing parties to abuse the rule for tactical reasons.

b. The State has failed to show that counsel's assistance to the Carrillo children was improper or created a conflict under RPC 1.8.

The State loosely asserts that the assistance provided by Witchley and Walsh to the Carrillo children in reuniting with their father in Stockton, California was "misconduct." Br. Resp. at 15, 20. In support of this claim, the State repeats arguments made below, but it makes no effort to respond to Sanchez's arguments addressing these contentions on appeal. Nor does the State respond to the many authorities from the Washington Supreme Court and Washington Bar Association establishing that RPC 1.8(e) was not violated. See Br. App. at 43-48.

The State again cites to State v. Kosanke, 23 Wn.2d 211, 160 P.2d 541 (1945) (or, rather, Karl Tegland's discussion of Kosanke) for the proposition that "relevant misconduct includes offers to bribe witnesses, other efforts to prevent witnesses from testifying." Br. Resp. at 15. This language is irrelevant to the facts at bar: there is no evidence that Witchley and Walsh were trying to bribe any witnesses. There is no evidence that they were trying to prevent testimony.

Further, as discussed in Sanchez's opening brief, under Kosanke, before Walsh or Witchley's testimony could be compelled, (a) the

children's testimony at trial would have to differ from their earlier statements to law enforcement; (b) this change would have to be proven to have resulted from Walsh and Witchley's assistance with the relocation and improper influence, rather than some other, unrelated reason, and (c) concrete evidence would have to establish the relocation was done at Sanchez's request, or with his knowledge and consent. Kosanke, 23 Wn.2d at 215. This showing is a mandatory predicate for admissibility. Id.

None of these factors can be established, nor has the State tried to do so. Indeed, the record supports the opposite inference: the witness to be called at trial, Roberta Carrillo, submitted an affidavit stating that she neither discussed her move with Sanchez nor relocated at his direction. CP 820-24. And Witchley and Walsh adamantly maintained that they provided assistance to the children solely for humanitarian reasons.

The State claims that "Sanchez's attorney Witchley and Walsh [sic] would have to testify in order to rebut the adverse impact that such evidence would have against Sanchez." Id. But the State never explains what "evidence" it believes would be adduced.¹³ Nor does the State

¹³ The State contends that it "would have inquired of the Yakima Police detectives as to the efforts they undertook to locate the Carrillo children, and the discovery that defense counsel whisked the children away without any notice." Br. Resp. at 20-21. Given that the State cannot show a violation of the RPCs or establish the

respond to Sanchez's extensive discussion in his opening brief regarding the proper application of RPC 1.8(e). See Br. App. at 43-48.

Instead, the State quotes the court's comment that "the fact that they assisted [the Carrillo children] leaves the clear appearance of impropriety." Br. Resp. at 16. But neither the Washington Supreme Court nor the WSBA has found a violation of RPC 1.8(e) arising from the advancement of funds to a potential witness. No disciplinary action has seen fit to impute an attorney-client relationship to the client's friends, significant others, or family, as the trial court did here. And, no disciplinary proceeding has found a violation of the RPCs alone merited disqualification absent an actual conflict of interest.

In sum, the State has failed to show that Witchley's participation in Mendez's interview with an investigator who was ready, willing, and available to testify merited disqualification under RPC 3.7. The State has further failed to demonstrate that Witchley or Walsh violated RPC 1.8. The disqualification order should be reversed.

predicate for admissible testimony set forth in Kosanke, it is far from clear that such questions would be permissible or the detectives' answers relevant.

3. THE STATE HAS FAILED TO ADDRESS
SANCHEZ'S ARGUMENTS REGARDING THE
VIOLATION OF SANCHEZ'S SIXTH
AMENDMENT AND EQUAL PROTECTION
RIGHTS.

Sanchez has argued that the trial court's ruling, "Sanchez has no right to continued representation by Walsh and Witchley," CP 796, 862, violated his Sixth Amendment right to counsel of his choice and his Fourteenth Amendment right to equal protection. Br. App. at 49-60. In response to Sanchez's argument under the Sixth Amendment, the State merely reiterates its opinion that the disqualification order was proper under RPC 3.7 and 1.8(e). Br. Resp. at 21-22. The State does not address United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), which is discussed extensively in Sanchez's brief, Br .App. at 49-54, or any of the other authorities cited.

The State offers no response whatsoever to Sanchez's argument that the disqualification order violated his right to equal protection. As argued in Sanchez's opening brief, this Court should conclude the order disqualifying Walsh and Witchley impermissibly intruded into Sanchez's protected Sixth Amendment relationship with his counsel and violated his right to equal protection.

4. THE IN-CHAMBERS HEARING ON THE APPOINTMENT OF NEW COUNSEL, CONDUCTED WITHOUT ANALYSIS OF THE *BONE-CLUB* FACTORS OR ANY SHOWING OF MANIFEST NECESSITY, VIOLATED SANCHEZ AND THE PUBLIC'S RIGHT TO A PUBLIC TRIAL AND SANCHEZ'S RIGHT TO BE PRESENT.

It is undisputed that at a hearing scheduled to address Sanchez's need for new counsel, Judge Hutton and Dan Fessler – who had a conflict of interest that prevented him from acting as Sanchez's counsel – retreated into chambers for a private session. CP 754-55; 12/21/06 RP 22-23. Prior to taking this extraordinary action, Judge Hutton neither analyzed the necessity for a closed proceeding under State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), nor afforded Sanchez an opportunity to be present. Id.

a. The State fails to address or cite *Bone-Club* and its progeny. The Washington Supreme Court has issued more than a few significant decisions construing the right to an open courtroom. See e.g. State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009); State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005); In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). In its response brief, the State cites to none of these. “The purpose of the Bone-Club inquiry is to ensure

that trial courts will carefully and vigorously safeguard the public trial right.” Strode, 167 Wn.2d at 233; Momah, 167 Wn.2d at 148. The State does not mention Bone-Club or attempt to apply the five Bone-Club factors.

Instead, the State cites to a single 36-year-old decision from the Washington Supreme Court, Cohen v. Everett City Council, 85 Wn.2d 385, 535 P.2d 801 (1975). Cohen has little relevance to this case, as it was a civil, not a criminal proceeding, and involved a quite different question: whether a trial court’s order that a court record be sealed after deciding a case on the merits violates the right to a public trial. Id. at 386. Nevertheless, the Court found that this fairly discrete action violated article I, section 10. Id. at 389. Further, the Court emphasized that limitations on open judicial proceedings may only occur in “exceptional circumstances and conditions.” Id. at 388.

Although the Cohen decision does not help the State, the State relies on Cohen to argue that the closed hearing did not involve the “administration of justice” because the court “was not deciding the merits of a controversy.” Br. Resp. at 28-29. The State has not cited any case in which the court found that the public trial right was not implicated because justice was not being administered.

b. Myriad recent decisions establish that the closure violated the public trial right. In Easterling, the Court criticized Justice Madsen's concurrence, which opined that some closures may be de minimis. 157 Wn.2d at 182-83. The Court admonished, "a majority of this court has never found a public trial right violation to be de minimis." 157 Wn.2d at 180-81. The Court further noted that the cases relied upon by Justice Madsen were federal cases, and commented, "[a] 'triviality' standard may be appropriate where a federal court room is fully closed because the United States Constitution, unlike our state constitution, does not contain the open administration of justice in all cases requirement that is contained in article I, section 10 of our state's constitution." Id. at 180 n. 12.

In his separate concurrence, Justice Chambers echoed this conclusion:

[T]here is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis. Thus, I cannot agree that there could ever be a proper exception to the principle that a courtroom may be closed without a proper hearing and order.

Id. at 186 (Chambers, J., concurring).

In a recent decision, the Court of Appeals analyzed this discussion in Easterling and was "persuaded that no de minimis rule is applicable to a

public trial right violation.” State v. Lam, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1486018 at 3 (April 18, 2011). The State’s citation to Cohen is unavailing.

c. The State fails to acknowledge Sanchez’s public trial right. An accused person also has the right to a public trial, which is protected by the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution. Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); Bone-Club, 128 Wn.2d at 259. Sanchez submitted a sworn affidavit in which he affirmed:

I would have and asked if I could be a part of this discussion, but I guess I couldn’t be a part because it was at the judges chambers. I feel like I had a right to know what they were talking about. That was one of the main reasons for the court hearing. It just seemed unfair to me.

CP 754-55.

The State has also failed to recognize Sanchez’s personally-held right to open proceedings, which was violated by the court’s inexplicable decision to conduct the remainder of the hearing with Fessler in chambers. The closure order violated Sanchez’s right to public proceedings as well.

d. The closure order violated Sanchez’s right to be present. The State contends that Sanchez did not have the Sixth Amendment and article I, section 22 right to be present at the in-chambers conference between Fessler and Judge Hutton. Missing from the State’s discussion is

any appreciation of the fact that Fessler had an avowed conflict of interest that precluded his entire office from representing Sanchez. 12/21/06 RP 5. Thus “a fair and just hearing [was] thwarted by [Sanchez’s] absence[.]” United States v. Gagnon, 570 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1986).

The State ignores Fessler’s conflict in its discussion of the in-chambers hearing. But even the authorities the State cites are in accord with the proposition that Sanchez was denied the right to be present when he was excluded from the hearing. See e.g. State v. Corbin, 79 Wn. App. 446, 449, 903 P.2d 999 (1995) (“As long as the defendant is represented by counsel, he or she has no role at presentation and ordinarily would have no opportunity to speak.”) (emphasis added); United States v. Vasquez, 732 F.2d 846 (11th Cir. 1984) (bench conference attended by appellant’s counsel); United States v. Jorgenson, 451 F.2d 516, 521 (10th Cir. 1971) (“The two remaining conferences of which Jorgenson complains were attended by appellant’s counsel”), cert. denied, 405 U.S. 922 (1972).¹⁴

¹⁴ The State also cites to United States v. Howell, 514 F.2d 710 (5th Cir. 1975), cert. denied, 423 U.S. 914 (1975), in which the Court found that a judge’s private discussion with a juror, without counsel present, regarding alleged efforts to bribe him occasioned no violation of the right to be present. The State can cite to no Washington case that has approved such ex parte contact.

This Court should conclude that Sanchez was denied the right to be present when he was excluded from the hearing between Fessler and the court.

5. THE ADMISSION OF KUBLIC'S IDENTIFICATION OF SANCHEZ VIOLATED DUE PROCESS.

The State contends that the admission of Michelle Kublic's identification of Sanchez did not violate due process, but the State's analysis suffers from multiple deficiencies. First, the State attempts to portray the suggestibility of eyewitnesses as a controversial proposition. It is not. Second, the State fails to appreciate that the question is not whether Sanchez's due process rights were violated by State action in influencing Kublic's identification, but whether the identification itself was rendered so unreliable that its admission violated due process. Third, both the State's Gunwall analysis and assessment of decisional law regarding the correlation between eyewitness identifications and wrongful convictions are unsound. This Court should conclude that the admission of Kublic's unreliable identification of Sanchez violated due process.

a. Washington courts recognize the correlation between eyewitness misidentification and wrongful conviction. The Washington Supreme Court and Court of Appeals recognize that faulty eyewitness identification is a leading cause of wrongful conviction. "The vast

majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.” State v. Riofta, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (quoting Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008)); State v. Allen, __ Wn. App. __, __ P.3d __, 2011 WL 1745014 (May 9, 2011).¹⁵ “Eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries . . . Recognition accuracy is poorer when the perpetrator is holding a weapon.” Allen, 2011 WL 1745014.

In claiming that there is little potential for eyewitness identification testimony to be contaminated by improper suggestive influences, the State shrugs off uncontroversial authority, including publications from the United States Department of Justice and the American Psychology and Law Society. Br. Resp. at 36. The State instead cites to a single case, from Connecticut, in which the Court simply declined to exercise its supervisory authority to mandate specific procedures in identifications. See State v. Marquez, 967 A.2d 56, 84-85 (Conn. 2009). The State does not mention that the Court in Marquez encouraged law enforcement agencies “to maintain currency in the latest research in this field and to adapt their policies to implement the most accurate, reliable and practical

¹⁵ At the date of this writing, neither pin citations nor citations to star pages were available on Westlaw.

identification procedures available.” Id. at 85. Nor does the State acknowledge that the Court believed “scientific research and common sense suggest that the employment of double-blind procedures, whenever reasonably practicable, is preferable to the use of an interested administrator because such procedures avoid the possibility of influencing the witness, whether intentionally or unintentionally, and thereby tainting the accuracy of any resulting identification.” Id. The State’s citation to Marquez is unavailing.

b. Sanchez’s due process rights were violated by the admission of Kublic’s identification because it was unreliable. Kublic only identified Sanchez after (1) his photograph was included in a “six-pack” and then a sequential line-up; (2) Kublic was informed of his arrest¹⁶; (3) Kublic saw his photograph in a newspaper photograph on the bulletin board of a convenience store; and (4) Kublic viewed media reports showing him in custody. After these influences, Kublic altered her description of the man who shot Ricky Causor from a man who was 5’1” tall, thin, and “small and dingy looking” with a “sucked in face” and uncombed, matted hair, to identify Sanchez: “after I seen him in the news, he’s the one with the shaved head, the one that they have.” 10/3/07 RP 87-88, 154, 168, 178.

¹⁶ Kublic told counsel in a tape-recorded pretrial interview that an officer informed her Sanchez and Mendez were the persons “who did this.” 10/5/07 RP 432-33.

rise to habeas corpus relief because the exclusion of the challenged in-court identification will not serve any deterrent purpose. Although we recognize that there is no intentionally wrongful police conduct involved in an accidental encounter, we also recognize that the deterrence of such conduct is not the primary purpose behind judicial review of tainted identification testimony. Rather, a court reviews a challenged in-court identification essentially to determine whether the witness' testimony retains sufficient indicia of reliability.

Id.

The Court further explained:

[T]he accidental nature of a pre-trial encounter is important, not because there has been an absence of wrongful police activity, but only because the circumstances surrounding an accidental encounter are often directly relevant to the question of the reliability of the in-court identification. More specifically, the accidental nature of a pre-trial encounter plays a role in a court's consideration of identification testimony because the majority of accidental encounters do not involve any significant degree of suggestiveness. A witness who has been involved in an accidental encounter has generally seen a defendant in a seemingly innocent light, or as stated by the district court herein, ". . . an accidental confrontation usually gives no indication to the witness that 'this is the man.'"

Id. (citation omitted).

The Court noted three factors that distinguished the witness's encounter with the petitioner from the typical accidental confrontation: first, the setting of the encounter strongly suggested that the petitioner had been accused of a crime: "the confrontation in the jailhouse cell clearly

labeled petitioner as a criminal defendant.” Id. at 223. Second, an officer at the jail identified the petitioner as a suspect in the killing. Id. Third, “the encounter in the present case was a result of the state’s negligent exercise of its control over both the witness and the accused.” Id.

Numerous courts have adopted Green’s holding and rejected the rule endorsed by the trial court. See e.g. Raheem v. Kelly, 247 F.3d 122, 137 (2nd Cir. 2001) (“The purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of misidentification.”); Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986) (noting that deterrence of police misconduct is not the reason for excluding unreliable identifications, and holding, “[b]ecause it ‘is the likelihood of misidentification that violates a defendant’s right to due process,’ . . . only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive.”), accord United States v. Pickett, 278 Fed. Appx. 465, 467 (6th Cir. 2008); United States v. Ballard, 534 F. Supp. 749, 751 (D.C. Ala. 1982) (court adopts Ninth Circuit’s holding that “any unduly suggestive pre-trial confrontation, even if not caused by improper government action, triggers constitutional scrutiny”). These holdings accord with the Supreme Court’s decree in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140

(1977), “[R]eliability [is] the linchpin in determining admissibility of identification testimony.” Id. at 114.

Similar to Green, Kublic initially did not identify Sanchez as the shooter in two lineups,¹⁷ and instead described someone who looked different from Sanchez in every material respect, and who resembled Manuel “Puppet” Sanchez, who fled to Mexico with Mendez.¹⁸ After seeing Sanchez’s photograph in a newspaper clipping and powerful media images of Sanchez in shackles during his arraignment and being told by an officer that the police had arrested the persons “who did this,” however, Kublic altered her description and identification to conclude that Sanchez was the shooter.

Also similar to Green, although the trial court did not find that the police deliberately set out to corrupt Kublic’s identification, it was uncontested that the police never cautioned her to avoid media, and that an officer told her that the people “who did this” had been arrested. This conduct at a minimum was negligent. Finally, according to the testimony

¹⁷ During one of these, Kublic made a positive identification of Mendez, 10/3/07 RP 163, 186, which undermines the State’s assertion that Kublic’s ability to make an identification was somehow undermined by her physical condition when she was shown the montages. See Br. Resp. at 31, 35.

¹⁸ The State claims that “there was no testimony that the composite sketch prepared by Detective Kellett and Michelle Kublic resembled Manuel Sanchez.” Br. Resp. at 80. The trial court did not permit the defense identification expert to overlay a transparency of the composite over a photograph of Mendez, however both of these were admitted as exhibits. See Ex. 165 (composite), 179 (photograph of “Puppet”); compare Ex. 178 (Sanchez’s booking photograph).

of Sanchez's expert, which the State did not rebut and which the court found forthright, credible and persuasive, 10/11/07 RP 652, the combined circumstances created a substantial likelihood of irreparable misidentification.

c. The "totality of the circumstances" did not otherwise support admission of the identification. The State contends that this Court should look to "other evidence as it relates to the identity of the killer" to corroborate Kublic's identification, but the only direct evidence the State can point to is the testimony of Mario Mendez, who pleaded guilty to an agreed thirty years of confinement plus good time in exchange for his favorable testimony. The State notes that a gun located at the Carrillo residence that was determined to be the murder weapon was identified as belonging to Sanchez, however given that the "jacking" of Ricky Causor was planned at the residence, this fact carries little weight. The State also notes that Sanchez owned a blue pick-up truck which was consistent with the description of the vehicle used during the crime, but the court prevented Sanchez from inquiring about another blue truck reportedly owned by Ramon Marmelejo, which the police did not investigate, and refused to issue a missing witness instruction regarding Marmelejo. Trial RP 1617-20, 2181, 2189, 2543, 2560, 2564-65. Sanchez also presented testimony that he was at the home of another girlfriend on the night of the

shooting, and that because of noisy “glass packs” and mechanical issues with his truck it was unlikely it was used during the shooting. Trial RP 1608, 1646, 1994-2001, 2200-67.

Finally, in discussing the “totality of the circumstances,” the State neglects to mention the abundant evidence that tended to exculpate Sanchez. Sanchez was excluded as a contributor to several of the DNA profiles found on the murder weapon. Trial RP 2315-17. Although the crime scene was very gruesome and there was extensive blood spatter, the clothing Sanchez wore the night the shooting occurred, which was turned over to the police by Alberto Vasquez, did not yield any biological evidence whatsoever. Trial RP 2319-24, 2476.

d. The State’s *Gunwall* analysis is deficient. Relying principally on State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994), the State contends that there are no independent state constitutional grounds for a heightened standard of the reliability of evidence under article I, section 3. Br. Resp. at 54-56. The State apparently, and incorrectly, believes that if the Supreme Court has determined that a state constitutional provision does not provide greater protection than its federal counterpart in a particular context, then the provisions must be read identically in all contexts. However, the scope of the protection afforded by the state constitution depends on the issue presented. See State v.

Ladson, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999); State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

In Wittenbarger the Court only considered the question whether the State's destruction of potentially exculpatory repair records of DataMaster breath test machines violated article I, section 3. 124 Wn.2d at 476-77. Importantly, the Court determined other evidence established the accuracy of the breath test results and so did not consider the question presented here: whether article I, section 3 requires a heightened standard of reliability.

The State does not respond to the authorities cited in Sanchez's opening brief, in particular State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984), in which the Court found "particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." Id. at 640. In Bartholomew, the Washington Supreme Court held that the reliability of evidence standard embodied in the state constitutional provision provides broader protection than the federal due process clause, and it has never retreated from this holding. Marriage of King, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (citing Bartholomew, 101 Wn.2d at 639).

This Court should conclude that article I, section 3 of the Washington Constitution provides greater protection against unreliable

evidence than its federal counterpart. This Court should further hold that the admission of Kublic's tainted identification denied Sanchez due process.

6. SANCHEZ WAS ARRESTED WITHOUT PROBABLE CAUSE OR AUTHORITY OF LAW.

a. Sanchez was arrested. The State attempts to argue that the trial court did not find that Sanchez was arrested, notwithstanding its written finding that Sanchez "was ordered out of the car and placed in custody." CP 22 (Finding of Fact 4). The State has not filed a cross-appeal or assigned error to this finding of fact; therefore, the State is precluded from now challenging it on appeal. "It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003). The State may not now challenge the court's finding that Sanchez was in custody.

The State further asserts that "there is nothing to indicate that Sanchez was immediately transported to the police department prior to the police obtaining the information regarding Sanchez's involvement in the homicides." Br. Resp. at 71. To the contrary, this is the only reasonable

inference from the testimony. See Trial RP 1300, 1394-96, 1418-21. Further, to the extent that the testimony is ambiguous in this regard (a proposition that Sanchez contests), the “lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof.” In re Welfare of A.B., 168 Wn.2d 908, 927, 232 P.3d 1104 (2010); State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (“In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed sustain their burden on this issue.”). This Court should not accept the State’s speculative, 11th-hour suggestion that the police acquired evidence establishing probable cause prior to Sanchez’s arrest.

b. The anonymous informants’ tips violated *Aguilar-Spinelli*. As it did below, the State alleges that the reliance upon informants’ tips without establishing the informants’ veracity or basis of knowledge was proper because “the observation of the blue pickup truck . . . corroborates the tip provided to the police.” Br. Resp. 74. The State is wrong.

“The fact that the anonymous tipster accurately described the defendant’s vehicle is not such corroboration or indicia of reliability as to make reasonable the officers’ action.” State v. Lesnick, 84 Wn.2d 940, 943, 530 P.2d 243 (1975); accord, State v. Jackson, 102 Wn.2d 432, 438,

688 P.2d 136 (1984) (“Merely verifying ‘innocuous details’, commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong.”).

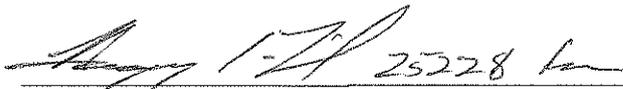
In short, Sanchez was arrested without probable cause or authority of law. The evidence obtained from his arrest should have been suppressed and, further, counsel was ineffective for delaying the suppression motion until after the court tried counts 1-6.

C. CONCLUSION

Jose Sanchez's convictions must be reversed because he was tried in the inherently prejudicial setting of a "jail courtroom" without the showing of manifest necessity required to infringe so grievously upon his due process rights. On remand, the court should order that he be permitted to proceed to trial with counsel Witchley and Walsh, that Michelle Kublic's unreliable identification must be excluded, and that prejudicial and irrelevant post-arrest evidence be suppressed. Sanchez should also be permitted to introduce evidence that Manuel "Puppet" Sanchez was a "jacker" and that Ramon Marmalejo owned a truck similar to the truck used to commit the crimes. Finally, Sanchez's conviction for unlawful possession of a firearm, as charged in count 6, should be reversed and dismissed.

DATED this 16th day of May, 2011.

Respectfully submitted:


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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 26816-1-III
)	
JOSE SANCHEZ, JR.,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	KENNETH RAMM, JR., DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2 ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X]	JOSE SANCHEZ, JR. 812184 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF MAY, 2011.

X _____

[Handwritten Signature]