

No. 26816-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

FILED

JAN 23 2009

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Respondent,

v.

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Appellant.

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

The Honorable James P. Hutton

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

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A. SUMMARY OF APPEAL

Drug dealer Ricky Causor was robbed by two armed Hispanic men. In the course of the robbery, Causor and his young daughter were shot and killed. Surviving victim Michelle Kublic initially was only able to identify one of the gunmen, Mario Mendez, although she was able to provide a detailed description of the man who shot Causor. After being subjected to numerous suggestive influences by law enforcement, however, Kublic thoroughly revised her description of the shooter and decided appellant Jose Sanchez was the assailant. Meanwhile, Mendez and another suspect, Manuel Sanchez, fled to Mexico.

Charged initially with capital offenses, Sanchez was appointed counsel who represented him for 19 months, investing thousands of hours in mitigation and investigation, and who were successful in persuading the State not to seek the death penalty. Mendez was arrested crossing the Mexican border and immediately began negotiating a plea bargain with the State. Upon Mendez's motion and over Sanchez's objection, the court disqualified his attorneys and appointed new ones.

The court found Kublic's identification admissible despite the strong evidence that it was the product of improper suggestion and ruled, over Sanchez's objection, that he should be tried in a courtroom in the county jail. The court admitted evidence that was a product of his

unlawful arrest and barred him from presenting evidence key to his defense theory of mistaken identity. Each of these errors standing alone merits reversal of Sanchez's convictions; viewed cumulatively they created an enduring prejudice that deprived him of his due process right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in disqualifying Sanchez's counsel under RPC 3.7 and RPC 1.8(e).¹

2. The order disqualifying counsel violated Sanchez his Sixth Amendment right to the assistance of counsel and impermissibly intruded into his protected attorney-client relationship.

3. The disqualification of Sanchez's appointed counsel over his objection and that of his counsel violated his Fourteenth Amendment right to equal protection and article I, section 12, of the Washington Constitution, the privileges and immunities clause.

4. The trial court denied Sanchez his Sixth Amendment right to be present at a critical stage of the proceedings when it excluded him from an in-chambers discussion regarding the status of his appointment of new counsel.

¹ A copy of the court's order on motion for sanctions is attached as Appendix A. A copy of the court's order denying reconsideration is attached as Appendix B.

5. The trial court violated the right to a public trial provided by the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution when it held a closed proceeding on the appointment of Sanchez's new counsel.

6. In violation of Sanchez's right to due process safeguarded by article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the trial court erred in admitting witness Michelle Kublic's identification of Sanchez.

7. In violation of Sanchez's right to due process and to the presumption of innocence safeguarded by article I, section 3 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the trial court erred in denying Sanchez's motion to transfer venue from the "jail courtroom" to a regular courtroom.

8. Contrary to the rights secured by article I, section 7 of the Washington Constitution, the trial court erred in denying Sanchez's CrR 3.6 motion to suppress evidence.

9. The trial court erred in entering conclusions of law 4, 5, and 6, pertaining to the CrR 3.6 motion to suppress evidence.²

² A copy of the court's findings of fact and conclusions of law pursuant to CrR 3.6 is attached as Appendix C.

10. Sanchez was denied the effective assistance of counsel guaranteed by the Sixth Amendment and article I, section 22 when his defense attorneys failed to move to suppress evidence pursuant to CrR 3.6 prior to trial on counts 1-6.

11. In violation of Sanchez's right to due process, and contrary to ER 403 and ER 404(b), the trial court erred in admitting evidence of a nine millimeter handgun unrelated to the charged crime and evidence of Sanchez's post-arrest conduct.

12. In violation of Sanchez's Sixth Amendment right to present a defense and to the effective assistance of counsel, the trial court erred in barring Sanchez from inquiring or arguing that Manuel Sanchez was a "jacker" and in instructing the jury to disregard testimony to this effect, and in barring the defense from introducing evidence of the blue truck owned by Ramon Marmalejo.

13. Cumulative error denied Sanchez the right to a fair trial secured by the Fourteenth Amendment and Wash. Const. art. I, § 3.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RPC 3.7, the "advocate-witness" rule, a judge may only grant a motion to disqualify counsel if the court finds that the lawyer is a necessary witness to material, contested facts, the testimony cannot be obtained elsewhere, and disqualification would not work a substantial

hardship on the client. Because of the risk that the rule will be misused for tactical reasons by an adverse party, disqualification should not be ordered absent compelling circumstances. Where defense counsel interviewed Sanchez's unrepresented co-defendant in the presence of an investigator, consistent with the standards enunciated by the American Bar Association and counsel's duty to provide effective assistance, and the investigator was available to testify about the substance of the interviews, did the trial court err in finding counsel's presence at the interviews merited his disqualification under RPC 3.7? (Assignment of Error 1)

2. Counsel assisted two child witnesses living in a dangerous drug house without heat or running water, under the 'care' of two methamphetamine addicts, to move to California to live with their father. Counsel asserted their reason for providing this assistance was entirely humanitarian and the children confirmed that counsel had never tried to influence their testimony and, further, that Sanchez played no part in the move. Where the State's detectives were able to contact, interview, and subpoena the children, and in fact did so, and the co-defendant never even tried to interview the children, did the trial court err in finding counsel should be disqualified under RPC 3.7 because their assistance was probative of "bias?" (Assignment of Error 1)

3. RPC 1.8(e) prohibits an attorney from advancing financial assistance to his client save for costs connected with litigation. The rule has been narrowly construed by the Supreme Court and Washington State Bar Association to bar attorneys from entering into business transactions with clients during the litigation because of the potential for a conflict of interest. The rule has never been invoked to impute an attorney-client relationship to a witness, even if the witness has a personal association with a party. Did the trial court err in finding that by providing assistance in purchasing plane tickets to California for child witnesses, with the expectation that the cost would be returned, defense counsel engaged in a prohibited transaction under RPC 1.8(e) because one of the witnesses allegedly was Sanchez's girlfriend? (Assignment of Error 1)

4. Where the State failed to allege any facts that would support the filing of criminal charges against defense counsel for their conduct, did the trial court err in finding the "specter" of a future hearing in which they were charged with crimes and the court would be obligated to decide whether they should be permitted to continue with the representation also supported disqualification? (Assignment of Error 1)

5. The Sixth Amendment recognizes the right of a criminal defendant to counsel of choice and safeguards the attorney-client relationship. While an indigent defendant may not have the right to

choose his counsel, he nonetheless has the right to have an existing attorney-client relationship protected. Did the order disqualifying counsel who had obtained Sanchez's trust and confidence over both his objection and that of his counsel absent a showing of necessity violate the Sixth Amendment right to counsel? (Assignment of Error 2)

6. To the extent that the result would have been different if counsel had been retained, did the order violate the equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington Constitution, the privileges and immunities clause? (Assignment of Error 3)

7. An accused person has the due process right to be present at all critical stages of the proceedings. Was Sanchez's right to be present violated when the court held an in-chambers conference regarding the appointment of new counsel with interim 'counsel' whose own conflict of interest prohibited him from acting as Sanchez's advocate? (Assignment of Error 4)

8. Did the in-chambers conference violate Sanchez and the public's right to a public trial provided by the Sixth Amendment and article I, section 22 of the Washington Constitution? (Assignment of Error 5)

9. Under the Fourteenth Amendment's due process clause, an identification must be excluded where there is a showing that the identification was tainted by suggestive procedures and the identification is not otherwise reliable. The sole surviving witness gave a description of the shooter that was completely different from Sanchez and then twice failed to pick him from a montage. At the same time, the police engaged in a variety of suggestive procedures widely condemned by empirical research as likely to irreparably taint an identification. After these improper techniques and after seeing Sanchez in jail garb and shackles, the witness asserted he was the shooter. Should the identification have been suppressed as violative of due process? (Assignment of Error 6)

10. The reliability of evidence protection provided by article I, section 3 of the Washington Constitution, the state due process clause, is broader than that secured by the Fourteenth Amendment. Applying an independent state constitutional analysis, should this Court conclude that in light of the empirical research correlating wrongful convictions to flawed identifications, the federal standard for admission of identification testimony violates article I, section 3 of the Washington Constitution? (Assignment of Error 6)

11. Requiring an accused person to appear before the jury in physical restraints or prison garb is inherently prejudicial, in violation of

the Fourteenth Amendment guarantee of a fair trial and the presumption of innocence, and is prohibited absent a showing of manifest necessity that outweighs the risk of undermining the right to a fair trial. Where the court ordered that Sanchez be tried in a courtroom in the jail despite the absence of an adequate showing of necessity, was Sanchez denied the right to a fair trial and the presumption of innocence? (Assignment of Error 7)

12. Where probable cause is based on an informant's tip, under article I, section 7, the State must establish the informant's veracity and basis of knowledge. Yakima Police arrested Sanchez based on the tips from two anonymous informants. The State presented no evidence to establish the informants' veracity or basis of knowledge. Did the trial court err in denying Sanchez's motion to suppress the evidence obtained from his unlawful arrest? (Assignments of Error 8 and 9)

13. The Sixth Amendment protects the right of an accused person to the effective assistance of counsel. Even though the motion probably would have resulted in the suppression of prejudicial evidence, Sanchez's counsel did not move to suppress evidence before he was tried on the most serious charges against him, instead waiting until his bench trial on the last, severed count. Where no legitimate strategy could justify this omission, should this Court conclude Sanchez was denied the effective assistance of counsel? (Assignment of Error 10)

14. Highly prejudicial evidence admitted in violation of ER 404(b) and ER 403 may deny an accused his Fourteenth Amendment right to a fundamentally fair trial. Courts recognize that evidence of guns, particularly where they are unconnected to the charged offense, is highly prejudicial and that such evidence should not be admitted unless it is plainly relevant to proving an essential ingredient of the charged offense. Should this Court conclude that evidence about a nine millimeter handgun that was found in the car in which Sanchez was arrested which had nothing to do with the charged crimes was likely to prejudice the jury, in violation of Sanchez's right to a fair trial, and should have been excluded? (Assignment of Error 11)

15. For evidence to be probative of consciousness of guilt, the State must show a nexus between (1) the evidence and consciousness of guilt, (2) consciousness of guilt and consciousness of guilt of the charged crime, and (3) consciousness of guilt of the charged crime and actual guilt of the charged crime. Where there was no indication tending to connect Sanchez's post-arrest conduct in a holding cell to consciousness of guilt, the conduct was, at most, probative of consciousness of guilt of a different crime, and the State relied on the evidence to extreme prejudicial effect, was the court's ruling finding the evidence admissible reversible error? (Assignment of Error 11)

16. An accused person has the Sixth Amendment right to present a defense, which comprehends the right to present evidence relevant to the defense theory of the case. Did the trial court violate Sanchez's Sixth Amendment right to a defense when it barred him from introducing evidence that (1) prime suspect Manuel Sanchez robbed people to support his methamphetamine habit and (2) another person implicated in the crime possessed a car similar to the vehicle used in the commission of the crime, which the police did not investigate? (Assignment of Error 12)

17. Cumulative error may deprive an accused person of a fundamentally fair trial, in violation of the Fourteenth Amendment. Should this Court conclude that the cumulative effect of the many errors in this trial denied Sanchez a fundamentally fair trial? (Assignment of Error 13)

D. STATEMENT OF THE CASE

1. The robbery and shooting of Ricky Causor. In mid-February 2005, Carlos Orozco, a petty drug dealer, started discussing a plan to rob Ricky Causor with his friends and associates. Trial RP 1644, 1652-53, 1674.³ Orozco frequented a drug house on Ninth Street in Yakima, as did many of his friends, and the subject of "jacking" Causor came up often.

³ The jury trial in this matter was transcribed in 22 consecutively paginated volumes that are referenced herein as "Trial RP" followed by page number. Other transcripts are cited by date followed by page number.

Trial RP 1606, 1644, 1674. Causor was considered a “big time dealer” and was believed to have a lot of marijuana and money at his house. Trial RP 1767. Causor was also believed to be weak and an “easy come up” for a “jack move” because he had been robbed once before and had not retaliated. Trial RP 1548-49, 1675, 1813.

Luz Carrillo and Albert Vasquez, both methamphetamine addicts, lived at the house on Ninth Street with Carrillo’s children. Trial RP 1300, 1360. A number of people also stayed at the house or hung around there to use methamphetamine and marijuana. Trial RP 1595. At various times Orozco’s close friend Mario “Gato” Mendez, Manuel “Puppet” Sanchez, Rene Sanchez, Ramon Marmelejo, Filiberto “Ben Davis” Montes, and appellant Jose “Junior” Sanchez participated in discussions regarding the planned robbery.⁴ Trial RP 1599, 1601, 1656, 1674.

On the evening of February 20, 2005, Michelle Kublic, Causor’s girlfriend, decided to leave the duplex she shared with Causor on South 18th Avenue to buy cleaning supplies. Trial RP 1005. Their car, a Chevrolet Suburban, was parked at the foot of the stairs leading to the duplex. Trial RP 1006. As she started the car, Kublic paused to replace the detachable face on the car stereo. Trial RP 1008. She looked up and

⁴ In light of the shared surnames of several of the individuals involved in this case, first names are used as necessary to avoid confusion.

saw a Mexican man with a gun in front of the car, and then another Mexican man opened the door, pulled her out by her hair, and put a gun to her head. Trial RP 1010-11. He instructed her to walk to the door and to tell Causor to open it. Trial RP 1011.

When Causor opened the door, the man pointed the gun at him. Trial RP 1013. At this point, Kublic panicked and tried to take the gun, but Causor told her to stop and that everything would be all right and they would give the men what they wanted. Trial RP 1014. They all walked inside and the second man, now wearing a mask, followed them. Trial RP 1015, 1017. Kublic was ordered to kneel in the living room with her two children, while the men rifled through the kitchen cupboards. Trial RP 1015-17. She heard them say they wanted everything. Trial RP 1018.

Causor then kneeled in front of Kublic with their daughters between them. Trial RP 1022. The man who was not wearing a mask walked behind Causor and shot him and then Kublic. Trial RP 1022-23. Both Causor and his three-year-old daughter, Meya, perished. Trial RP 890-91, 924, 1032, 1190, 1199, 1200, 1207, 1209. Kublic was shot through a lung and also sustained injuries below her jaw and on the back of her neck. Trial RP 1280-81. Angelica Causor, Kublic's younger daughter, suffered a minor injury on her forehead. Trial RP 881.

2. The slipshod investigation. Police officers who arrived at the scene of the shooting made little effort to preserve evidence that could have identified the shooters or established key facts about what had taken place. Kelly Williard, the Yakima Police Department Sergeant who was the first officer to respond, did not instruct anyone to preserve the scene. Trial RP 907. Approximately five officers entered the apartment before photographs were taken, and Williard could not say whether items had been moved before then. Trial RP 905-06, 939-40.

Although the kitchen cupboards were open and ransacked and the available evidence tended to suggest a robbery had taken place, Kristen Drury, the forensic laboratory manager for the Yakima Police Department, did not process the scene for fingerprints. Trial RP 994, 1246-47. Drury also did not document or look for blood spatter evidence. Trial RP 1251. Drury collected neither the bloodstained carpet or couch, nor the broken blinds suggestive of bullet trajectories. Trial RP 2335-36. Although Drury recovered a set of keys from the walkway leading to the house, which were later connected to the Suburban, these were never tested for the presence of DNA or fingerprints, and ultimately were returned to their owner. Trial RP 974, 996-97.

Following the shooting, Mario Mendez and Manuel Sanchez, aware that police were looking for them in connection with the crime, fled

to Mexico. Trial RP 1611, 2168. Within a few days of the shooting, police began receiving anonymous telephone calls alleging that appellant Junior Sanchez was the shooter. Trial RP 1296-97, 1333-34, 1354. One of these callers, later identified as Alberto Vasquez, when contacted by police, told officers he had gathered Sanchez's clothing. Subsequently, pursuant to a search warrant for the Ninth Street house, the clothing was collected and turned over to the crime laboratory for examination. Trial RP 1360, 1372-74, 2009-10, 2013, 2024-25. Pursuant to the same search warrant, police recovered a Kimber .45 handgun hidden in the liner of a couch that was ultimately determined to be the weapon used in the shootings, and was alleged to be Sanchez's gun. Trial RP 1383-85, 1268. Sanchez was taken into custody based on the anonymous tips. Trial RP 1394.

Although Drury swabbed the .45 for DNA, she did not bother to do any fingerprint testing on the weapon. Trial RP 1260. The laboratory testing of the DNA on the gun evinced several profiles, but Jose Sanchez was excluded as a contributor to these. Trial RP 2315-17. The main contributor was identified as Roberta "Christina" Carrillo, Luz Carrillo's daughter and allegedly Sanchez's girlfriend, but both Rene Sanchez and Albert Vasquez could not be excluded as contributors. Trial RP 2315-17. Because police did not obtain DNA samples from Carlos Orozco, Ramon

Marmelejo, or Manuel Sanchez, the crime laboratory's forensic scientist was unable to ascertain whether their DNA was on the gun. Trial RP 2310.

The clothing Vasquez claimed Jose Sanchez wore on the night of the shooting had not been washed since it was worn. Despite being subjected to extensive forensic testing, none of the items of clothing – which consisted of blue jeans, a sweatshirt, and shoes – yielded any evidence of blood.⁵ Trial RP 2319-24. In fact, no biological or scientific evidence whatsoever connected Jose Sanchez to the shooting, even though it was very probable, based on the configuration of the crime scene, the bullet trajectories, and the likely close proximity of the shooter to the victims, that there would have been traces of blood on the shooter's clothing. Trial RP 2476.

3. The tainted identification of Sanchez. Following the shooting, on February 21, 2005, Yakima Police Officer David Cortez went to see Michelle Kublic at the hospital to obtain a description of the shooters. She told him that there were two men involved, both of whom she described as “wabs,” or Mexicans. 10/3/07 RP 84, 144. She believed Ricky knew both men. 10/3/07 RP 144. The first she described as a man in his twenties,

⁵ Washington State Patrol Crime Laboratory forensic scientist James Currie found a stain on the left shoe that he thought at first might be blood, but after forensic testing opined he “would be surprised” if it were blood, and stated that many organic materials can trigger a false positive test. Trial RP 2321-23.

with a wide nose, about 5'5" in height, and a lighter complexion than the second man. 10/3/07 RP 84-85. This man wore a mask. 10/3/07 RP 85. The second man, who did not wear a mask, she described as 5'1" tall, thinner than the first, with a "sucked in face." 10/3/07 RP 87, 168. She said this man was "small and dingy looking," with uncombed, matted hair. Id. This man forced her out of her vehicle and back to her residence at gunpoint, and was the man who shot Ricky. 10/3/07 RP 87-88.

Based on Kublic's identification and internal police files, several montages were prepared at Cortez's direction. 10/3/07 RP 49, 54, 90. Cortez then returned to the hospital and showed the montages to Kublic. 10/3/07 RP 95. Kublic recognized several of the people in the montages as men she knew either through Ricky or because of their gang affiliation. 10/3/07 RP 101-02, 105. Kublic was able to identify one man as someone who had come to see Ricky 30 minutes before the robbery and shooting. 10/3/07 RP 111.

After Cortez learned of additional persons of interest, he prepared another photo montage, which randomly included appellant Jose Sanchez. 10/3/07 RP 134-35; CP 665-66. Kublic was shown this montage on February 22, 2005, and did not identify Sanchez as one of the suspects. 10/3/07 RP 136.

Kubic was contacted independently by David Kellett, the lead investigator in the case. Kubic told him the first suspect wore a mask and that she did not remember him well. 10/3/07 RP 154. She said the second suspect never wore a mask and she did have a good memory of him. 10/3/07 RP 154; 10/4/07 RP 393. She provided a similar description of this person to Kellett as she did to Cortez, describing him as a Hispanic man who was thin and gaunt-looking, with long unkempt hair, a thin or short mustache, and hollow cheeks. 10/3/07 RP 154.

Kellett worked with Kubic to build a composite image of the man using the FACES program. 10/3/07 RP 155-56; CP 661-62. Kubic was engaged in this process; she made a point of telling Kellett that the suspect had longer hair than initially depicted in the program, and she also told Kellett that the suspect's cheeks were hollower than shown in the composite, and that the chin was not right. 10/3/07 RP 156-57; 10/4/07 RP 394-95. The composite image of the second suspect was generated before Kubic was ever shown Sanchez's photograph. 10/3/07 RP 158.

Neither Kubic's two descriptions of the shooter nor the composite image she generated with Kellett resembled Sanchez. Sanchez was approximately 5'6" tall and stocky in build, and at the time of his arrest weighed about 140 pounds and had close-cropped hair. 10/11/07 RP 572, 1810. Sanchez did not have a gaunt or "sucked in" face.

On February 23, 2005, Kellett again visited Kublic in the hospital to show her a serial montage. 10/3/07 RP 161-62; CP 667-87. She was alert and in good spirits during this visit. 10/3/07 RP 162. At page three, which depicted Mario Mendez, Kublic gasped and exclaimed, "That looks like him." 10/3/07 RP 163, 186. Kellett continued to flip through the photographs. 10/3/07 RP 167. Kublic also asked if the person depicted on page 16 was short, and whether he was in jail already. 10/3/07 RP 165. Although page 14 was a photograph of Junior Sanchez, Kublic did not pause at this photograph or ask to see it again. 10/3/07 RP 166.

At the end, Kellett asked Kublic if there was any page she wanted to see again. 10/3/07 RP 164. She took the book from him, returned to page three, and again said, "That looks like him." Id. Then she said, "That's him. He's the one without a mask." Id. Kellett told Kublic that if she was sure, she should circle the photograph, and she did so. 10/3/07 RP 164.

Following his contacts with Kublic in the hospital, although Sanchez was already in jail and substantial publicity was being generated about the case, Kellett did not admonish Kublic not to look at media. 10/3/07 RP 170. Further, while she was still in the hospital, one of the police officers told Kublic that Sanchez had been arrested in connection with the crime. 10/4/07 RP 241; 10/5/07 RP 428, 432-33.

Kellett conducted a tape-recorded interview of Kublic after she was discharged from the hospital, at the police station. 10/3/07 RP 174. By this time, Sanchez's image – both his booking photo and his filmed arraignment, in shackles, in Yakima County Superior Court – had been on the news repeatedly. Id.; 10/4/07 RP 356-57, 366, 368. In response to Kellett's question, "What did these guys look like that came up while you were in the Suburban?" Kublic responded, "The guy, I thought he had hair. But after I seen him in the news, he's the one with the shaved head, the one that they have." 10/3/07 RP 178.

Based on these events, on February 28, 2005, the Yakima County Prosecuting Attorney filed an information charging Sanchez and Mendez with seven criminal counts relating to the robbery and murders: two counts of aggravated murder, and in the alternative felony murder, with respect to the deaths of Ricky and Meya Causor, attempted first-degree murder of Michelle Kublic, and in the alternative assault in the first degree, attempted first-degree murder of Angelica Causor, and in the alternative assault in the first degree, robbery in the first degree of Ricky Causor, and unlawful possession of a firearm (UPFA) in the first degree. CP 974-78.

Because the State had charged Sanchez with capital offenses, requiring the appointment of SPRC 2 qualified counsel, the Yakima

County Public Defender had a conflict precluding representation of Sanchez, and the court initially wanted to set a cap on the funds available to the defense, it took nearly two months after Sanchez's arraignment for counsel to be appointed.⁶ 3/25/05 RP 7; 3/28/05 RP 11; 11/17/06 RP 67; CP 1020. Ultimately, on April 22, 2005, Jacqueline Walsh and Steven Witchley entered a notice of appearance for Sanchez.

On approximately October 22, 2005, Mendez attempted to cross the Mexican-American border under a false name and was immediately arrested. Trial RP 1736; CP 1044.⁷ Mendez was placed in a federal detention center in California and charged with illegal reentry, and was appointed counsel on his federal immigration matter, but not on the charges related to the Yakima shootings. CP 1045.

After Mendez's arrest, and while he was still without counsel on the Yakima matter, Witchley and his investigator Larry Freeman traveled to the federal detention center to interview him. CP 911, 1025-26. Although no ethical rule prohibits contact between an attorney and an unrepresented individual, RPC 4.2,⁸ newly-appointed counsel for Mendez

⁶ Dan Fessler, head of the Yakima County Public Defender, told the court that a conflict of interest disqualified his entire office from representing Sanchez. 3/25/05 RP 4; 12/21/06 RP 5.

⁷ A number of documents pertaining to the ultimate disqualification of Sanchez's appointed counsel Walsh and Witchley were filed only in Mendez's file, and are designated for purposes of this direct appeal pursuant to RAP 9.6.

⁸ RPC 4.2 provides:

alleged Witchley and Walsh had “obstruct[ed] and pervert[ed] justice” by interviewing their client prior to their appointment. CP 1030. They also alleged that Walsh and Witchley had acted improperly by assisting the Carrillo children to move out of Luz Carrillo’s drug house to live with their father, their legal custodian, in Stockton, California.

On August 11, 2006, the State indicated it would not seek the death penalty against Mendez, and on October 27, 2006, the State abandoned its effort to seek the death penalty with respect to Sanchez. CP 855. Following the State’s decision regarding their client, Mendez’s attorneys, eager to negotiate a plea bargain, stepped up their attacks on Sanchez’s counsel and filed a motion to disqualify Walsh and Witchley as counsel. CP 1030-43. The State also took advantage of this opportunity to demand a “judicial inquiry into potential defense conflict of interest.” 11/17/06 RP 14, 24; CP 891-98.

The State claimed there was a meeting between Walsh and Dan Fessler, the director of the Yakima County Department of Assigned

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RPC 4.2 (emphasis added).

The comment to the rule further clarifies: “This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.” Comment, RPC 4.2.

Counsel, in which Walsh told Fessler that it would be unethical for him to appoint himself for Mendez⁹ and allegedly threatened to file a bar complaint against him should he do so, and that this contact “should be investigated as Intimidation of a Public Servant.” CP 892. The State also speculated, based solely on Mendez’s own declaration in which he claimed that Witchley had told Mendez not to cooperate with an investigation into an unrelated homicide,¹⁰ that Witchley might be subject to investigation for witness tampering. CP 892-93. These were the sole bases that the State could muster in support of its claim of a conflict.

A hearing on the motion to disqualify counsel was held on November 17, 2006.¹¹ On November 29, 2006, by written ruling, the court granted the motion to disqualify Walsh and Witchley and reappointed Fessler, despite his actual conflict of interest, until substitute counsel could be identified. CP 850-74. The court denied Sanchez’s motion for reconsideration filed by pro bono counsel Rita Griffith without a hearing. CP 795-98, 799-849.

Mendez ultimately was successful in negotiating a favorable plea bargain with the State, in exchange for his agreement to testify against

⁹ Fessler’s conflict of interest disqualified his whole office from representing both defendants.

¹⁰ This outrageous claim was refuted by the sworn declaration of Witchley’s investigator, Freeman. CP 490 (Declaration at 4).

¹¹ Further facts relating to the disqualification of counsel are contained in argument 1, *infra*.

Sanchez.¹² At trial, Mendez claimed that he and Jose Sanchez robbed Ricky Causor without assistance from any of their co-conspirators, and that Sanchez was the person who shot Causor and his family. Trial RP 1682-86, 1690-94, 1700-01. The court denied Sanchez's pretrial motion to exclude Kublic's identification,¹³ and she testified that she was "one-hundred percent sure" that Sanchez was the armed assailant who shot Ricky. Trial RP 1023.

Sanchez asserted Manuel "Puppet" Sanchez was the real shooter, and presented testimony that he was at the home of another girlfriend near the time of the crime as well as evidence tending to controvert Mendez's claim that Sanchez's truck had been used in the commission of the crime. Trial RP 1608, 1646, 1994-2001, 2200-67. But the court barred Sanchez from eliciting evidence regarding Puppet's likely involvement, prevented him 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. The jury ultimately convicted Sanchez of all counts as charged. Sanchez appeals.

¹² Mendez pleaded guilty to the reduced charges of felony murder in the first degree and assault in the second degree, moving from consecutive sentences of life without the possibility of parole to the State's promise to recommend 30 years and eligibility to earn good time. Trial RP 1741-43.

¹³ Further facts regarding the motion to suppress Kublic's identification are contained in argument 4, *infra*.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING CO-DEFENDANT MENDEZ'S MOTION TO DISQUALIFY SANCHEZ'S COUNSEL UNDER RPC 3.7, THE ADVOCATE-WITNESS RULE, AND RPC 1.8, THE CONFLICT OF INTEREST PROVISION.

- a. The erroneous ruling disqualifying Walsh and Witchley.

At the hearing on the motion to disqualify counsel, Witchley emphatically denied committing any misconduct or violating the Rules of Professional Conduct. 11/17/06 RP 59-60, 62-64. Witchley noted that not only did he make it very, very clear to Mendez from the outset of his contacts with him that he was Sanchez's attorney, given the gravity of the charges and potential capital punishment faced by Sanchez, he would have rendered deficient performance had he not attempted to interview an unrepresented co-defendant. 11/17/06 RP 62-63; CP 490 (Freeman Declaration).

Witchley further noted, with respect to the Carrillo children, that Mendez had failed to present any evidence of harm he had suffered as a result of their relocation to Stockton, California, or even that he had tried to interview them. 11/17/06 RP 69, 74-75.

Witchley disputed that there was any impropriety arising from the assistance he and Walsh provided the Carrillo children:

The children in that house were living in absolute and utter squalor. There was rampant drug use in the house by [Luz Carrillo], by Albert Vasquez, and eventually by the kids

themselves. There were kids from the neighborhood coming by crashing out there, using drugs. The back door was off the hinges. Anybody could have just walked in off the street. There's no heat in the apartment. There were rats. We also knew something else, we knew that Romero [Carrillo], Senior, was the actual custodial parent of these children. And we knew something in addition to that, and this is in the discovery as well. That [Luz Carrillo], who was using drugs and the kids weren't going to school. The kids were using drugs as well. We knew that she not only [did not have] custody. We knew she didn't have a right to visitation for these kids.

We had contact with Mr. [Carrillo], Senior. He said he would like to have the kids come home to him. He was the custodial parent. And he had verified that. And yes, we assisted them. Is that – does that maybe look bad? Well, that's why we're here talking about [it]. Was it the right thing to do morally? Yes, it was. Were we trying to hide witnesses or influence their testimony? No. In fact, we were hoping that witnesses would be able to stay alive long enough to be able to testify in this trial because those kids were living under conditions that really would have led to them being killed. And that's not an exaggeration.

11/17/06 RP 72-73.

Witchley pointed out that not only were all of the children available to be interviewed, two of them had since returned to Yakima.

11/17/06 RP 74. He asserted, “[N]ot a one of them will ever tell this court or anyone else that we ever told them to say anything.” *Id.* Witchley requested that if the court were inclined to resolve factual issues, the court should hold an evidentiary hearing to further develop the record. 11/17/06 RP 81-82. Witchley further requested that should the court find a conflict existed, independent counsel be appointed to advise Sanchez so he could

determine whether he wished to waive the conflict, as it would be inappropriate for Witchley and Walsh to do so under the circumstances. 11/17/06 RP 86.

The court did not order an evidentiary hearing. Nor did the court appoint independent counsel to advise Sanchez. Instead, the court simply issued a written ruling granting the motion for disqualification. CP 850-74.

The court found that Witchley and Freeman's actions in seeking and conducting the interviews with Mendez while he was unrepresented were "aggressive, unusual, and controversial," but the court was constrained to admit that they were consistent with Sanchez's attorneys' obligation to represent him zealously, and that had counsel not attempted to interview Mendez while he was unrepresented, they may very well have rendered ineffective assistance of counsel. CP 862. For this reason, the court was unwilling to disqualify counsel based solely on the Mendez interviews. Id.

The court noted that Witchley's investigator, Freeman, would likely be called as a witness if Mendez were to testify at trial, but acknowledged that Witchley was at most a potential witness. Id. But, even though the court found the interviews did not warrant disqualification, the court mused that there might be "jury confusion about

Witchley's dual role as both advocate and witness" and speculated that Witchley might make himself an "unsworn witness" in cross examination or argument to the jury. CP 862-63.

The court did find that Walsh and Witchley's assistance to the children warranted disqualification. CP 871. While conceding that there was no indication that Walsh and Witchley influenced the children's testimony, the court wondered "what additional information might the Carrillo children have given to YPD if they had not been removed from the state or if they had not had such close, continuing contact with Walsh and Witchley?" CP 865.

The court further determined that "Walsh and Witchley's act of paying for all or part of the airfare and other expenses of the Carrillo children is tantamount to a prohibited transaction under RPC 1.8(e)." Id. The court reasoned, "[t]he payment for airplane tickets, in whole or in part, by Walsh and Witchley, is advancing financial assistance to their client; at least as it pertains to Roberta Christina Carrillo and the infant child they have together." Id.¹⁴ The court concluded,

The removal of material witnesses from this jurisdiction with the assistance of defense counsel creates an appearance that Sanchez wanted them removed,

¹⁴ It is not clear what evidence the court relied on to assume the child was Sanchez's child, as there was no evidence presented regarding the identity of the child's father.

particularly his girlfriend with whom he has a child and over whom one might presume he has some influence. The Court finds that RPC 1.8(e)(1) has been violated in this case.

CP 865-66.

The court found a “serious potential for conflict” with respect to the Mendez interview and “an actual conflict as to the actions relating to the movement of the Carrillo children.” CP 871 (court’s emphasis). The court concluded disqualification was required, finding that Witchley’s alleged “dual role he has as both advocate and witness” with regard to the Mendez interviews was compounded by “the issue of the Carrillo children and the possibility that criminal charges against counsel may be investigated.” CP 873. Ironically, the court reappointed as interim counsel Dan Fessler, of the Department of Assigned Counsel, who had told the court repeatedly that his office had an actual conflict which barred him from representing Sanchez. CP 875.

In disqualifying Walsh and Witchley, the trial court misapplied the relevant legal standards under RPC 3.7 and 1.8, and consequently ruled disqualification was appropriate despite the absence of a showing of materiality, necessity, actual conflict, and absence of substantial hardship to Sanchez required to justify such an extraordinary sanction. Further, although Sanchez informed the court not only that Witchley and Walsh

were his counsel of choice, but that he would be willing to waive any conflict or claim under the RPCs in order to preserve his relationship with them, the court failed to adequately weigh Sanchez's Sixth Amendment rights in granting the motion. The structural error requires reversal of Sanchez's convictions and reinstatement of disqualified prior counsel.

b. The court improperly failed to find necessity and compelling circumstances as required for disqualification under RPC 3.7, the lawyer-as-witness rule. Under RPC 3.7, a lawyer may only be disqualified as counsel if the moving party shows that the lawyer is (1) a necessary witness on a contested matter, and (2) disqualification will not work a substantial hardship on the client. RPC 3.7;¹⁵ State v. Nation, 110 Wn. App. 651, 659, 41 P.2d 1204 (2002). Because of the possibility that

¹⁵ RPC 3.7 provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work substantial hardship on the client; or

(4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

an adverse party may abuse the lawyer-as-witness rule by making a disqualification motion in order to remove competent counsel, disqualification should not be ordered absent compelling circumstances. P.U.D. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994) (“P.U.D. No. 1”) (noting potential for “unseemly tactics” in upholding trial court’s refusal to disqualify counsel); Franklin v. Clark, 454 F. Supp. 2d 356, 364-65 (D. Md. 2006) (citing cases); see also id. at 365 (“courts are hesitant to grant disqualification motions ... because they can be abused for tactical reasons.”).

A court considering a disqualification motion must find that three criteria have been met before disqualification of counsel may be ordered. P.U.D. No. 1 124 Wn.2d at 812 (citing Smithson v. United States Fid. & Guar. Co., 186 W. Va. 195, 199, 411 S.E.2d 250 (1991) and Cottonwood Estates Ins. v. Paradise Builders, Inc., 128 Ariz. 99, 105-06, 624 P.2d 296 (1981). First, there must be a showing that the attorney “will give evidence material to the issues being litigated.” Id. 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. See e.g. D.J. Inv. Group. L.L.C. v. DAE/Westbrook L.L.C.,

147 P.3d 414, 419-24 (Ut. 2006). None of the criteria for disqualification of counsel were established here, and thus the court abused its discretion in granting the motion to disqualify Walsh and Witchley.

i. The evidence was neither material nor contested.

Regarding Witchley's interviews of Mendez before he was appointed counsel, Mendez did not invoke RPC 3.7, but rather believed Witchley had violated other Rules of Professional Conduct. As the court rightly found, Witchley did not violate any ethical prohibition by conducting these interviews. RPC 4.2; CP 856-59, 861-62.

With respect to the Carrillo children, both Mendez and the State claimed that the removal of the children was "evidence of Sanchez's guilt," and the court apparently endorsed this theory when it ruled their removal created "an appearance that Sanchez wanted them removed." CP 866, 1040. Mendez hypothesized that (1) either Sanchez or his lawyers believed that the Carrillo children would offer damaging testimony to Sanchez and (2) by assisting them to live with their legal custodian in Stockton, California, either Sanchez or his lawyers hoped the children would become unavailable to testify at the trial. CP 1042. But Mendez did not advance a rule or evidentiary principle under which this evidence would be admissible, make an offer of proof regarding the anticipated

testimony to be elicited from Sanchez's counsel, or cite a single case tending to support this novel and aggressive theory of disqualification.

Mendez cited an opinion finding evidence that a witness was threatened could be relevant to proving consciousness of guilt. CP 1040 (citing State v. McGhee, 57 Wn. App. 457, 460-61, 788 P.2d 603 (1990)). In McGhee, however, the Court cautioned that the threat by the defendant – i.e., his bad act – was subject to the stringent requirements of ER 404(b), and noted that in federal cases dealing with the issue, the courts had identified the strong potential for prejudice from the admission of evidence of death threats. There was no evidence that Sanchez or his lawyers had threatened the children. Nor was there a shred of evidence that either Sanchez or his lawyers had offered the children an inducement in order to testify favorably, or had discussed their anticipated testimony with them.

Mendez also cited a prerule case in support of the contention that Walsh and Witchley's assistance to the children was relevant to proving Sanchez's guilt. CP 1040 (citing State v. Kosanke, 23 Wn.2d 211, 160 P.2d 541 (1945)). But Kosanke did not support but rather undermined Mendez's arguments.

The Kosanke Court held,

Conduct on the part of an accused person, or that of someone acting in his behalf at his request or with his knowledge and consent, having for its purpose the prevention of witnesses appearing and testifying at his trial, is a circumstance for the jury to consider as not being likely to be the conduct of one who was conscious of his innocence, or that his cause lacks truth and honesty, or as tending to show an indirect admission of guilt.

23 Wn.2d at 215 (emphasis added).

Assuming this sixty-year-old case to still be good law, every key foundational piece identified by the Court in Kosanke to support admission of the evidence was missing here. Mendez could not show Walsh and Witchley acted either at Sanchez's request or with his knowledge and consent. Nor could Mendez show that their purpose was to prevent testimony, rather than the humanitarian reason supplied in their sworn statements and testimony: to remove the children from the dangerous, filthy home of Luz Carrillo. And again, the court apparently chose not to hold an evidentiary hearing to further develop these claims.

Mendez alternatively accused Walsh and Witchley of having "ferried the witnesses out of the jurisdiction to prevent access by Mendez and/or the prosecutor." Id. But this allegation was nothing more than bald, inflammatory conjecture. The children's location was not a secret from either Mendez or the prosecutor. Mendez did not, and could not, claim that he had tried to interview the children and was somehow

thwarted by their move to California to live with their father.¹⁶ And the State's investigators were able to easily contact, interview, and subpoena them.¹⁷ CP 854.

In finding Witchley and Walsh were likely to be necessary witnesses, the court relied heavily on Gonzalez v. State, 117 S.W.3d 831 (Tex. 2003). CP 871-73. But the facts of that case were very different

¹⁶ Although Mendez's investigator was immediately provided the children's phone numbers, Mendez did not ever try to contact and interview them, further supporting the conclusion that the motion was brought for the improper tactical reason of wanting to remove Sanchez's competent counsel, or as reprisal for the interviews Witchley conducted of Mendez before counsel was appointed. CP 816-24.

That the motion likely was retaliatory is confirmed by the rather heated comments by Mendez's counsel at the November 17, 2006, hearing:

We definitely believe these people tampered with witnesses as part of a broader pattern of contacting my client without him being represented. And making [it] worse than that, preventing him from being represented so they could take advantage. Dance around it and claim to the court they are seeking justice. And oh, my God, we want to zealously represent our client, Mr. Sanchez. Oh, my God, can't you understand it. This is all a deliberate effort to silence us. Where was all that concern when they were down there developing evidence against Mr. Mendez, a co-defendant?

11/17/06 RP 88.

¹⁷ The court speculated that the children might have given YPD additional information "if they had not been removed from the state or if they had not had such close, continuing contact with Walsh and Witchley." CP 865. This latter concern does not raise the specter of impropriety: it is hardly surprising that competent counsel in a capital case would devote significant energy to cultivating the trust of their client's family members and associates as part of the process of developing a mitigation package. See generally, American Bar Association, Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) (available at http://www.abanet.org/deathpenalty/resources/docs/2008_July_CC1_Guidelines.pdf, last accessed December 26, 2008). Further, this relationship would exist regardless of whether the children were in Yakima or Stockton.

from the case at bar, and thus the court's reliance on Gonzalez was misplaced.

In Gonzalez, the appellant and several other individuals were indicted for their participation in a sophisticated insurance fraud scheme. 117 S.W.3d at 835. The appellant's attorney had several meetings with the State's key witness in which he agreed, on appellant's behalf, to pay the witness \$10,000 and in fact transferred \$3,000 to the witness. Id. Appellant was present for at least one of these meetings. Id. The State moved to disqualify appellant's attorney because he had direct knowledge regarding the transactions and thus would be a necessary witness at the trial, and the trial court granted the motion. Id. at 835-36.

A critical distinction between Gonzalez and this case was that the witness himself claimed appellant paid him the money in order to buy favorable testimony. Id. In such a circumstance, only the attorney – or the appellant himself – could rebut this claim. Here, by contrast, the evidence the State and Mendez claimed they hoped to elicit by calling Walsh and Witchley was entirely born of conjecture and speculation.

The Carrillo children disputed that Witchley and Walsh ever discussed the subject of their testimony or tried to influence them to testify in a certain way. CP 816-24. Roberta Carrillo signed a sworn affidavit stating she had no contact with Sanchez regarding the move to Stockton.

CP 820-21. Walsh and Witchley submitted sworn declarations, and Witchley stated at the November 17, 2006, hearing, that their motives for assisting the children to live with their father were entirely humanitarian. CP 831-37; 11/17/06 RP 72-73.

Perhaps because of the holes in every evidentiary ‘theory’ to support the disqualification motion, Mendez never made an offer of proof regarding the anticipated testimony to be adduced at a trial where Walsh and Witchley might be called as witnesses. And the trial court did not require him to do so before determining the motion should be granted. In fact, the trial court inverted the inquiry, using the absence of evidence of wrongdoing, improper influence, or admissible testimony to support its ruling:

With respect to the Carrillo children, once the issue of bias or improper influence or witness tampering is raised, how else (or who else) is available to testify that “Nobody’s hiding anything” except Walsh and Witchley? The children are not shown to have knowledge of the financial arrangements or why they were removed from the State of Washington. The children are not shown to know what Walsh and Witchley knew about the consequences of their likely testimony when they were moved.

CP 869.

Mendez did not establish Witchley and Walsh were necessary witnesses, and the court erred in making this finding.

ii. The evidence was easily obtainable elsewhere.

The second criterion, that the evidence was “unobtainable elsewhere,” P.U.D. No. 1, 124 Wn.2d at 812, also was not established. Counsel has an ethical and constitutional duty to conduct a thorough investigation in a capital case, which includes the obligation to “seek out and interview potential witnesses.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 79 (2003) (hereafter “ABA Guidelines”);¹⁸ U.S. Const. amend. 6; see also, Wiggins v. Smith, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); In Re Fleming, 142 Wn.2d 853, 866, 16 P.3d 310 (1996) (“To provide constitutionally adequate assistance, ‘counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.’”) (citing Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (emphasis in original)).

A lawyer brings an investigator to a witness interview to ensure that someone is available to impeach the witness should he or she testify inconsistently with his or her statements during the interview. “Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial.” ABA

¹⁸ Available at:

<http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf> (last accessed December 29, 2008).

Guidelines at 79; see also, ABA Crim. Just. Std. 4-4.3(e) (same).¹⁹ This was the precise reason why Witchley interviewed Mendez together with Freeman, the defense investigator. See CP 490 (Freeman declaration at 1-5). Yet, according to the court's reasoning, the specter of Witchley as a potential witness sufficed to warrant his removal as counsel. CP 871-72.²⁰

Surely there are key witnesses – such as an unrepresented co-defendant in a capital murder case – whose interviews counsel may be unwilling to entrust to an investigator, or for whose interviews counsel may wish to be present. But apparently, in order to avoid being disqualified as an “advocate and witness,” the cautious defense attorney should absent himself from these interviews, even if having an opportunity to observe the witness's demeanor would enable counsel to conduct a more effective cross-examination at trial.

This unworkable hypothesis, if taken to its logical conclusion, would similarly require prosecutors not to attend police interviews of informants and reluctant witnesses, or to abstain from conducting such interviews themselves even when a third party is present. But no court has

¹⁹ Available at http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.2 (last accessed January 7, 2009).

²⁰ Where counsel has failed to conduct an interview in the presence of a third person, the ABA offers an alternative to counsel's withdrawal or disqualification: that counsel forgo impeachment of the witness by his own testimony. ABA Crim. Just. Std. 4-4.3(e).

approved such a radical extension of the lawyer-witness rule.²¹ See United States v. Watson, 87 F.3d 927, 932 (7th Cir. 1996) (lawyer-witness rule did not bar assistant U.S. attorney who interviewed the defendant from representing the government at trial; rather, the correct procedure calls for the interview to be conducted in the presence of a third person who can later testify to the government’s version of the conversation). The court’s reliance on the advocate-witness prohibition as a basis for disqualification was gravely misplaced.

With respect to the murky allegations regarding the relocation of the Carrillo children to California, again, it is far from clear that either the State or Mendez could have elicited any admissible testimony from either Walsh or Witchley. Contrary to the court’s implied findings, CP 879, the mere hypothetical scenario of an alteration in the children’s testimony does not, without more, throw open the door to evidence of Walsh and Witchley’s assistance as probative of “bias.” See State v. Guizzotti, 60 Wn. App. 289, 293, 803 P.2d 808 (a trial court may refuse to permit cross-examination where the circumstances only remotely show bias or prejudice of the witness, or where the evidence is merely argumentative or

²¹ This is another reason why the trial court’s reliance on Gonzalez is inapposite: In Gonzalez, 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 holds a Fifth Amendment privilege – who could have impeached the co-conspirator’s testimony. Gonzalez, 117 S.W.3d. at 835-36.

speculative), rev. denied, 116 Wn.2d 1026 (1991); ER 403 (even where marginally relevant, to be admissible, court must find prejudicial effect of evidence is substantially outweighed by its probative value).

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.²²

Kosanke, 23 Wn.2d at 215. But even assuming this were the case, the substance of the testimony still would be obtainable elsewhere.

Specifically, the children themselves, or their father, or Detectives Kellett and Mendoza, or Sanchez's investigator, or the interpreter who assisted Sanchez's counsel, would have been able to testify regarding their contacts with Walsh and Witchley and the circumstances of the children's relocation. The second criterion of RPC 3.7 was not established.

²² Again, this foundational piece is a critical distinction between Gonzalez and this case, as in Gonzalez, the appellant was actually present when counsel made or discussed the controversial payments to the testifying co-conspirator, this it can safely be assumed that the payments were made with his knowledge and consent. 117 S.W.3d at 835. Here, the witness to be called at trial, Roberta Carrillo, submitted an affidavit stating she neither discussed her move with Sanchez nor relocated at his direction. CP 820-24.

iii. The ‘evidence’ – such as it existed – was not in the least prejudicial to Sanchez. The court’s ruling almost entirely omitted consideration of the third criterion for disqualification under RPC 3.7. The court glancingly referenced Gonzalez, again, for the following proposition:

Counsel’s dual role may also have prejudiced the defendant, especially if the State effectively impeached attorney Gonzalez on the stand. At the hearing for disqualification, the State discussed some evidence it intended to introduce, if necessary, to impeach counsel’s credibility.

CP 870 (citing Gonzalez, 117 S.W.3d at 841-42). But by failing to require either the State or Mendez to make an offer of proof regarding the anticipated testimony to be elicited from Witchley or Walsh, the court missed the mark on the prejudice requirement as well.

In Gonzalez, the witness to be cross-examined actually said that counsel had attempted to bribe him, on the defendant’s behalf, to provide favorable testimony. Id. at 842. Thus, there was direct and admissible evidence of wrongdoing by the defense attorney, and, should counsel be effectively impeached (which the State claimed it could do), his client’s defense would be prejudiced. Here, by contrast, the children steadfastly maintained that Witchley and Walsh did not attempt to influence or persuade them in any way, and, further, that they had no contact with

Sanchez prior to the move. Had Witchley and Walsh been called to testify, they would simply have reiterated this testimony. There was no prejudice to Sanchez.

b. The court's finding of an "actual" conflict was contrary to pertinent Washington decisions, the intent behind RPC 1.8(e), and erroneously relied on a federal decision that both was not on point and had no precedential value. RPC 1.8(e)(1) provides a lawyer:

shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and cost of obtaining or presenting evidence, provided the client remains ultimately liable for such expenses ...

RPC 1.8(e)(1).

The comment to the rule indicates its scope is generally limited to civil matters and is intended to deter unnecessary litigation, improper influence by the lawyer, and actual conflicts due to the lawyer's personal financial interest in the proceeding:

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.

Comment 10, RPC 1.8. The rule’s primary objective is to deter lawyers from “making or guaranteeing loans to their clients.” Id.

This construction of the rule is supported by the Washington State Bar Association (WSBA)’s formal and informal opinions. For example, the WSBA has found no ethical violation arises when a lawyer posts bail for a client, provided the lawyer does not demand compensation for doing so. Wash. Bar. Assoc. Formal Opinion 33 (1954)²³ (finding that such conduct is consistent with the provision that a lawyer “may in good faith advance expenses as a matter of convenience, but subject to reimbursement”). And in an informal opinion,²⁴ the Rules of Professional Conduct Committee found a lawyer does not violate RPC 1.8(e) when the lawyer makes a bona fide gift with true donative intent to address a

²³ Available at <http://www.wsba.org/lawyers/ethics/formalopinions/33.htm>, last accessed December 30, 2008.

²⁴ The WSBA website provides the following advisory regarding informal opinions:

Informal Ethics Opinions are not individually approved by the Board and do not reflect any official position of the Association. Informal opinions reflect only the opinion of the Rules of Professional Conduct Committee. Informal opinions are generally concerned with less sweeping topics. Informal Opinions have been prepared for individual inquirers and contain confidential information; they have been edited for posting to the internet database.

client's emergency. Wash. Bar. Assoc. Informal Opinion 1959 (2001).²⁵
The Carrillo children not Witchley and Walsh's clients; moreover,
Witchley and Walsh certainly believed the children's squalid and
dangerous living conditions presented an imminent emergency justifying
their intervention. 11/17/06 RP 73.

The Washington Supreme Court's disciplinary decisions
addressing violations of RPC 1.8(e) have also remained faithful to the
narrow interpretation contained in Comment 10. For example, in
Discipline of Haley, 157 Wn.2d 398, 138 P.3d 1044 (2006), the lawyer
entered a business transaction with a current client involved in pending
litigation, the terms of which were unfair or unreasonable, did not advise
the client of the potential for a conflict of interest, and did not afford the
client an opportunity to consult with independent counsel. Id. at 402-03;
see RPC 1.8(a). The lawyer himself financed the litigation settlement
claim. Id. The Court found this transaction violated RPC 1.8(a) and RPC
1.8(e). Id. at 410.

Similarly, in Disciplinary Proceeding Against McKean, 148 Wn.2d
849, 64 P.3d 1226 (2003), McKean was retained to file a farm bankruptcy
petition. Id. at 855. Upon learning that his clients had not made the

²⁵ Available at
<http://pro.wsba.org/IO/searchresult.aspx?year=&num=1959&rpc=&type=%&key words=> (last accessed December 30, 2008).

payments required by the bankruptcy court, McKean advised the clients to dismiss the petition and create a corporation to shield them from their creditors, and agreed to joint ownership of the company, using monies from his own trust account to fund the transaction. Id. McKean withdrew over \$11,000 in funds to finance the corporation and continued in business with them even after learning the clients did not dismiss the bankruptcy as advised and had a history of other shady financial dealings. Id. at 856-58. Subsequently, McKean received payments on behalf of the company and used these to repay himself and his trust account. Id. at 857-58.

While finding the most serious violations to be the misappropriation of funds from the trust account, the Court found violations of RPC 1.8(a) and/or RPC 1.8(e) stemming from McKean's advancement of funds to the clients during the representation and undeniable conflict because of his own stake in the corporation. Id. at 859, 865-66, 870-71.²⁶

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

²⁶ The Court found the more serious violation arose under RPC 1.8(a), from McKean's failure to disclose his conflict of interest arising from a business transaction with them, and failure to advise them "of the risks inherent in having their attorney as a business associate." Id. at 870-71.

family, as the trial court did here. And, most significantly, even assuming the court's ruling to be correct, no disciplinary proceeding has found a violation of the RPCs alone merited disqualification absent an actual conflict of interest. Cf., McKean, at 870-71.

The court alternatively found the possibility that Walsh and Witchley could be charged with a crime (a dubious proposition, given the dearth of evidence necessary to prove the elements of witness tampering or intimidation of a public servant²⁷), created a

specter of a future hearing, after these cases have moved closer to a trial date, where Walsh and Witchley are charged with a crime or crimes and the Court has to determine if, on that basis alone, they can or should continue to represent Sanchez, whether or not Sanchez executes a waiver of a conflict of interest.

CP 867.

²⁷ RCW 9A.72.120 provides:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.76.180 provides in pertinent part:

(1) A person is guilty of intimidating a public servant if, by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.

But even in this inquiry, the court failed to apply the proper standard. The court relied on a federal decision that had been withdrawn by the Court. Id. (citing Campbell v. Rice, 265 F.3d 878, opinion withdrawn, 302 F.3d 892 (9th Cir. 2001)). The court failed to distinguish the prosecutor's bluster here from the facts of Campbell, where the lawyer actually had been charged with a crime (possession of methamphetamine) by the same agency prosecuting the defendant.

As the court was compelled to admit, unlike Campbell, no actual conflict was presented by the State's concerns. CP 867. At most, the allegations created a mere "specter" of a future hearing in which, if Walsh and Witchley were to be formally charged, the court might have to determine if Walsh and Witchley should continue to represent Sanchez. Id. And even in this instance, Sanchez could waive any potential conflict of interest. Id.

In sum, there was no credible indication that the State could or would charge Walsh and Witchley with a crime. The trial court's finding that Walsh and Witchley's assistance to the Carrillo children was a prohibited transaction under 1.8(e) was flatly contrary to both case authority and the WSBA's ethics opinions. Witchley acted consistently with the ABA standards governing the conduct of capital counsel and his duties to provide effective assistance to Sanchez under the Sixth

Amendment when, with his investigator, he interviewed Sanchez's unrepresented co-defendant. Mendez never identified any admissible testimony to be elicited from either Walsh or Witchley to warrant their disqualification under the advocate-witness rule. The disqualification order must be reversed, Walsh and Witchley reinstated as counsel, and Sanchez afforded a new trial.

2. THE ORDER DISQUALIFYING SANCHEZ'S COUNSEL IMPERMISSIBLY INTRUDED INTO THE ATTORNEY-CLIENT RELATIONSHIP PROTECTED BY THE SIXTH AMENDMENT AND VIOLATED HIS RIGHT TO EQUAL PROTECTION PROVIDED BY THE FOURTEENTH AMENDMENT.

a. The Sixth Amendment right to counsel protects the attorney-client relationship and safeguards the right of the accused to counsel of his choice. It is axiomatic that the right of an accused person to the assistance of counsel is constitutionally protected, and that this right includes the right to counsel of choice. U.S. Const. amend. 6; United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The right “commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best.” Gonzalez-Lopez, 548 U.S. at 146. “[T]he Sixth Amendment is violated when the erroneous

disqualification of counsel ‘impair[s] the assistance that a defendant receives at trial from the counsel that he chose.’” *Id.* at 146 n. 2 (emphasis in original).

In Gonzalez-Lopez, the Court held that unlike the right to the effective assistance of counsel, the right to counsel of choice does not derive from the Sixth Amendment’s guarantee of fair trial, but rather, “has been regarded as the root meaning of the constitutional guarantee.” *Id.* at 147.

It is for this reason that an erroneous deprivation of counsel of choice is a structural error:

Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Id. at 148.

“We have little trouble concluding that erroneous deprivation of the right to counsel of choice, “with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” *Id.* at 150 (quoting Sullivan v. Louisiana, 508 U.S. 275, 280, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).

As the Court acknowledged, this holding marked a departure from the Court's prior jurisprudence on the right to counsel of choice. See id. at 148 n. 2 (discussing Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). In Wheat, the Court had framed the question as one arising from and impacting the right to a fair trial. Wheat, 486 U.S. at 159. Reasoning that "the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial,'" id. (quoting Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 1984), the Court concluded,

while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant, rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Id.

In retrenching from Wheat, the Court in Gonzalez-Lopez observed, "It is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair." 548 U.S. at 148 n. 3.

The court did observe that the limits on the right to counsel of choice expressed in its prior decisions were still legitimate, and

commented, “[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.” *Id.* at 151.

But in relying on this dictum to rule that “Sanchez has no right to continued representation by Walsh and Witchley,”²⁸ CP 872 (emphasis added), the trial court wholly discounted the attorney-client relationship he had developed with them and his right, under the Sixth Amendment, not to have this relationship meddled with.

Where appointed counsel has the trust and confidence of the defendant and is willing to continue in the representation, these factors must be accorded significant weight if the Sixth Amendment guarantee is to have any substance at all. “Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.” *Patterson v. Illinois*, 487 U.S. 285, 290, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). “[T]he government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from ‘participat[ing] fully and fairly in the adversary factfinding process.’” *United States v. Stein*, 541 F.3d 130, 154 (1st Cir. 2008) (quoting *Herring v. New York*, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)).

²⁸ In denying Sanchez’s motion for reconsideration of the disqualification order, the court reiterated, “Sanchez does not have the right to be represented by counsel of his choice...” CP 796.

RPC 3.7 itself reflects the primacy of the attorney-client relationship in evaluating whether disqualification is required under the advocate-witness rule. The American Bar Association explains that the current MRPC 3.7²⁹ articulates a more stringent standard for disqualification than was contained in the predecessor Model Code, which allowed for disqualification if the moving party merely showed that it was “obvious” the lawyer “ought to be called as a witness.” ABA Center for Professional Responsibility, The Annotated Model Rules of Professional Conduct 361 (6th Ed. 2008) (hereafter “Annotated Model Rules”). Unlike its predecessor, MRPC 3.7’s current formulation “gives greater weight to the client’s choice of counsel.” *Id.*; see e.g. Brown v. Daniel, 180 F.R.D. 298, 300-02 (U.S. Dist. S.C. 1998) (discussing change in language and intent of rule, and finding “substantial hardship” would arise from disqualification due to loss of extensive knowledge about case arising from counsel’s long-term relationship with client and substantial discovery conducted in the actual litigation).

Here, defense counsel had represented Sanchez for 19 months. CP 835. Between April 2005 and November 2006, Walsh had devoted more than 2,800 hours to the case, and Witchley 2,741.1 hours. *Id.* They had

²⁹ The language of Washington’s RPC 3.7 is identical to that of MRPC 3.7.

familiarized themselves with more than 2,348 pages of discovery. Id. They had conducted over 40 interviews in the presence of the prosecutor alone, resulting in 1,536 pages of audio transcriptions, and had met with and prepared to call at trial pathologists, DNA experts, ballistics experts, a crime scene reconstructionist, an eyewitness identification expert, and a forensic mechanical expert. CP 835-36. Last but not least, they had gained the trust and confidence of their client, Junior Sanchez, a process which Sanchez stated “took time.” CP 829.

In sum, the trial court denied Sanchez the “particular guarantee of fairness” enshrined not only in the Sixth Amendment but in ethical rules aimed at protecting the attorney-relationship. Gonzalez-Lopez, 548 U.S. at 146; Annotated Model Rules at 361. The court trivialized the many thousands of hours Walsh and Witchley had devoted to zealously advocating for their client (a remarkable effort which resulted in the State agreeing to spare his life). The court paid little heed to the question of hardship and took no notice of Sanchez’s wish to continue to be represented by the lawyers he trusted. This Court should conclude that the trial court’s ruling violated Sanchez’s Sixth Amendment right to counsel, and reverse his convictions.

b. To the extent the court found Sanchez was not entitled to the same relationship with appointed counsel as he would have enjoyed with retained counsel, the order violated his right to equal protection.

According to the trial court's reasoning, the client's choice of counsel is only relevant if counsel is retained; if he is appointed, the court is free to disqualify counsel who, at best, may only be a potential witness regarding unconstested issues, and even if disqualification would disrupt a lengthy and harmonious attorney-client relationship and the client is willing to waive the conflict. CP 872. To the extent that the trial court found disqualification permissible under the theory that Sanchez had "no right" to continued representation by Walsh and Witchley, although both he and they wished the representation to continue, this Court should conclude the order violated Sanchez's right to equal protection.

The equal protection clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." U.S. Const. amend.14; Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); see also Const. art. I, § 12; Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004).

Where a fundamental right is at stake, the Supreme Court requires strict scrutiny analysis:

The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that . . . impinge upon the exercise of a “fundamental right.” With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.

Plyler v. Doe, 457 U.S. 202, 216-17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

The right to counsel is a fundamental right. United States v. Cronin, 466 U.S. 648, 653, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (“Without counsel, the right to trial itself would be of little avail.”). This is true for the indigent as well as the wealthy: “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Griffin v. Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956). As the Supreme Court has recognized in a slightly different context,

A rule which would apply one Fourteenth Amendment test to assigned counsel and another to retained counsel would produce the anomaly that the nonindigent, who must retain an attorney if they can afford one, would be entitled to less protection . . . The effect upon the defendant – confinement as a result of an unfair state trial – is the same whether the inadequate attorney was assigned or retained.

Cuyler v. Sullivan, 446 U.S. 335, 345, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (quoting United States ex rel. Hart v. Davenport, 478 F.2d 203, 211 (3rd Cir. 1973)).

Of necessity, the attorney-client relationship cannot be parsed out of this equation. As Justice Brennan wrote in his concurring opinion in Morris v. Slappy,

[A]n indigent defendant [has an] interest in continued representation by a particular attorney who has been appointed to represent him and with whom the defendant has developed a relationship. Nothing about indigent defendants makes their relationships with their attorneys less important, or less deserving of protection, than those of wealthy defendants.

Morris v. Slappy, 461 U.S. 1, 22, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (Brennan, J. concurring).

The ABA Standards for Criminal Justice state that “counsel should seek to establish a relationship of trust and confidence with the accused[.]” ABA Crim. Just. Std. 4-3.1. With respect to indigent defense systems, the ABA has, for the same reason, unequivocally endorsed “vertical representation,” where the same attorney represents the accused continually from arraignment through trial and sentencing. American Bar Association, Ten Principles of a Public Defense Delivery System 3

(2002).³⁰ Discounting an accused person’s relationship with his lawyer where counsel has been appointed, rather than retained, undermines the fundamental objectives of the Sixth Amendment as well as the standards of practice promulgated by the American Bar Association.

In his concurrence in Morris v. Slappy, Justice Brennan concluded, “[W]here an indigent defendant wants to preserve a relationship he has developed with counsel already appointed by the court, I can perceive no rational or fair basis for failing at least to consider this interest in determining whether continued representation is possible.” 461 U.S. at 23.

A number of courts have agreed. See e.g. Clements v. State, 817 S.W.2d 194, 200 (Ark. 1991) (holding that where a trial court terminates the representation of an attorney, “either private or appointed, over the defendant’s objection and under circumstances which do not justify the lawyer’s removal and which are not necessary for the efficient administration of justice, a violation of the accused’s right to particular counsel occurs”); Welfare of M.R.S., 400 N.W.2d 147, 152 (Minn. App. 1987) (“once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not

³⁰ Available at: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (last accessed January 7, 2009).

arbitrarily remove the attorney over the objection of both the defendant and counsel”); People v. Davis, 449 N.E.2d 237, 241 (Ill. App. 1983).

The California Supreme Court persuasively reasoned,

[W]e must consider whether a court-appointed counsel may be dismissed, over the defendant’s objection, in circumstances in which a retained counsel could not be removed. A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary; it involves not just the [casual] assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client’s life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney’s responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service. . . It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Smith v. Superior Court, 440 P.2d 65, 74 (Cal. 1968).

Although the California court has retreated somewhat from this position, the court nonetheless recognizes that “[t]he removal of an indigent defendant’s appointed counsel . . . poses a greater potential threat to the defendant’s constitutional right to counsel than does the refusal to

appoint an attorney requested by the defendant, because the removal interferes with an attorney-client relationship that has already been established.” People v. Jones, 91 P.3d 939, 946 (Cal. 2004) (emphasis in original); see also, id. at 948 (noting Wheat does not address the circumstance where the defendant has an existing attorney-client relationship) (Werdegar, J., concurring in result).

But the trial court either failed to recognize or discounted this distinction. To the extent that the result may have been different if counsel had been retained, rather than appointed, this Court should conclude that the order disqualifying counsel violated Sanchez’s right to equal protection.

3. IN VIOLATION OF SANCHEZ’S RIGHT TO BE PRESENT AND THE GUARANTEE OF A PUBLIC TRIAL SECURED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTIONS 10 AND 22 OF THE WASHINGTON CONSTITUTION, THE TRIAL COURT ERRED IN EXCLUDING SANCHEZ FROM AN IN-CHAMBERS STATUS CONFERENCE REGARDING THE APPOINTMENT OF NEW COUNSEL.

a. Sanchez was excluded from a discussion regarding the appointment of new counsel. After the court disqualified Walsh and Witchley, there was another lengthy delay before new counsel could be located. At a hearing on December 21, 2006, Fessler appeared on Sanchez’s behalf and again noted his own conflict of interest preventing

him from representing Sanchez. 12/21/06 RP 5. At the conclusion of this hearing, for unknown reasons, Fessler and the court retreated into chambers for a discussion regarding the status of new counsel. CP 754-55; 12/21/06 RP 22-23.³¹ Sanchez was excluded from this hearing, and submitted a sworn affidavit to his pro bono appellate counsel, Rita Griffith, regarding the exclusion, which Griffith filed with the court. Sanchez's affidavit read:

On 12-21-06 I had court. One of the reasons for this hearing was to discuss my status on getting a new lawyer. Well when the time came the judge (James Hutton) asked that he and Dan Fessler discuss this in his chambers. 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.

b. Sanchez's exclusion from the discussion regarding the appointment of new counsel violated his state and federal constitutional rights to be present at a critical stage of the proceedings. An accused person has the right to attend all critical stages of his trial. U.S. Const. amends. 6, 14; Wash. Const. art. I, § 22. "[T]his right entitles a defendant to be present at every stage of his trial for which 'his presence has a

³¹ The transcript of the December 21, 2006, hearing reflects that the court excused the prosecutors, Mendez, and his counsel to address the issue of finding new counsel for Sanchez. 12/21/06 RP 22-23.

relation, reasonably substantial, to the ful[ll]ness of his opportunity to defend against the charge.” State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008) (quoting, inter alia, Snyder v. Massachusetts, 291 U.S. 97, 105-08, 54 S.Ct. 330, 78 L.Ed. 2d 674 (1934)). Although this privilege of presence is not guaranteed when “presence would be useless, or the benefit but a shadow,” Snyder, 291 U.S. at 106-07, an accused “is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” Id.

“[The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence[.]” United States v. Gagnon, 570 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1986); accord State v. Berry Smith, 87 Wn. App. 268, 274, 944 P.2d 397 (1997). Although the Supreme Court has found that a defendant does not have an unqualified right to attend an in-chambers conference, his exclusion will violate his right to be present if presence is “required to ensure fundamental fairness.” Gagnon, 570 U.S. at 526.

The California Court of Appeals held that “When the court is receiving evidence or information upon which fundamental or important procedural rights will be determined, the better practice is to have the defendant present.” People v. Ebert, 199 Cal. App. 3d 40, 46 (1988). The

Washington Court of Appeals concurred with the analysis in Ebert to the extent that the right to be present may be violated by an in-chambers conference where counsel is not acting in the client's interest. Berrysmith, 87 Wn. App. at 274-75; see also, State v. Matt, 347 Mont. 530 (2008) (defendant's exclusion from in-chambers conference violated state constitutional right to appear and defend "in person").

Here, Sanchez's desired attorneys had been disqualified over his objection in unusually acrimonious proceedings on the motion of a co-defendant whose favorable plea bargain depended on his accusing Sanchez. Addressing the court on Sanchez's behalf was a lawyer who lacked the ability to advocate for him due to an admitted and unwaivable conflict of interest. See RPC 1.6, Comment 6.³² Counsel therefore was not acting in Sanchez's interest.³³ Sanchez was entitled to attend the

³² Comment 6 explains that RPC 1.6 prohibits a lawyer from undertaking representation directly adverse to a client without that client's informed consent. Examples of directly adverse conflicts include the advocacy for a person in one matter against a person the lawyer represents in another matter, and the cross-examination of a client who is a witness in a proceeding involving another client. RPC 1.6, Comment 6. It can be assumed that Fessler had a directly adverse conflict with respect to Sanchez as not only he but his whole office was disqualified from representing him.

³³ That Fessler was incapable of acting in Sanchez's best interest and in fact did not do so is underscored by the fact that pro bono counsel Griffith, not Fessler, documented Sanchez's complaint about his exclusion from the conference.

conference regarding the appointment of new counsel and his exclusion violated his right to be present.³⁴

c. The in-chambers proceeding violated the state and federal constitutional right to a public trial. Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. 6; Wash. Const. art. I, § 22. Public criminal trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). “A trial is a public event. What transpires in the court room is public property.” State v. Coe, 101 Wn.2d 364, 380, 679 P.2d 353 (1984) (quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947)).

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10; see also U.S. Const. amends. 1, 6. The clear constitutional mandate in

³⁴ Sanchez’s exclusion from the hearing is also consistent with the paternalistic view that an indigent defendant will be represented by whatever attorney the court decides should be appointed and his presence is irrelevant.

article I, section 10 entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. Federated Publications, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S. at 580 (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id. (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

i. Trial proceedings may be closed only if the court weighs the five *Bone-Club* factors, which the trial court did not do before the closed proceeding here. In order to protect the accused's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order." State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The five criteria are "mandated to protect a defendant's right to [a] public trial." Personal Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

The test requires:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)); accord, Dreiling v. Jain, 151 Wn.2d 900, 913-15, 93 P.3d 861 (2004) (test applied to motion to seal information filed in support of civil motions); Orange, 152 Wn.2d at 806-07; Ishikawa, 97 Wn.2d at 37-39.

The constitutional right to a public trial is not waived by counsel's failure to object. Easterling, 157 Wn.2d at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); (citing Press-Enterprise I, 464 U.S. at 510). Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id.

The trial court never applied the five Bone-Club factors before preventing both Sanchez and the public from attending the closed proceeding in chambers. There was no showing of a compelling interest in exclusion – particularly since the court had already excused the prosecutors and the co-defendant from the hearing. Since the court did not

consider the Bone-Club factors, no one was given an opportunity to object to the closure. The in-chambers discussion also was not the least restrictive means for protecting any threatened interests since adverse parties had left the courtroom. Because the court made no findings regarding the interest to be protected, the court did not weigh competing interests or enter a closure order that was narrowly tailored to serve its purpose.

ii. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. Easterling, 157 Wn.2d at 179-80. In Easterling, the court rejected the possibility that a courtroom closure may be de minimis, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 (“a majority of this court has never found a public trial right violation to be de minimis.”); accord, State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008); State v. Duckett, 141 Wn.App. 797, 809, 173 P.3d 948 (2007). The Easterling Court further emphasized, “[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” Easterling, 157 Wn.2d at 181; State v. Frawley, 140 Wn. App. 713, 721, 167 P.3d 593 (2007).

The trial court's error in closing part of the proceedings requires reversal of Sanchez's conviction.

4. IN VIOLATION OF SANCHEZ'S DUE PROCESS RIGHT TO A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 OF THE WASHINGTON CONSTITUTION, THE TRIAL COURT ERRED IN ADMITTING MICHELLE KUBLIC'S IDENTIFICATION OF SANCHEZ.

a. Sanchez moved pretrial to suppress Kublic's identification on due process grounds. Through substitute counsel, Sanchez moved pretrial to suppress Kublic's identification. At the hearing, he presented the testimony of Dr. Robert Shomer, a renowned forensic psychologist. 10/4/07 RP 201-310.

Shomer testified that the accuracy of an identification depends entirely on the validity and reliability of the procedures utilized by law enforcement. 10/4/07 RP 207. If an identification process is not performed correctly, unreliable results are irrevocably produced and the evidence is actually changed. 10/4/07 RP 208, 214.

Certain safeguards are essential to ensure that an identification process is not contaminated. First, the admonition which precedes the showing of montages or a lineup must be given to the witness each time she is asked to make an identification, regardless of whether the witness has previously engaged in an identification process. 10/4/07 RP 217. The

witness should be told that the suspect may not be in the photo array or lineup, and the person conducting the identification must make sure that the witness understands it is as important not to pick someone as it is to make a correct identification. 10/4/07 RP 218.

In addition, the entire session should be recorded for purposes of future forensic examination. 10/4/07 RP 219. Double blind procedures – especially during the showing of montages – are essential to promote accuracy in an initial identification and to eliminate the possibility of unconscious suggestion or confirmatory feedback. 10/4/07 RP 221-22, 227, 265. It is actually harmful to conduct a sequential identification procedure that is not a double blind process. 10/4/07 RP 265.

An initial description by a witness serves as a baseline, and demonstrates how the witness has processed information about a subject. 10/4/07 RP 231. People tend to start with the head and move downward, taking into account the head shape, hairline, and hair. *Id.* According to Shomer, a change in description, such as occurred in this case, cannot occur without outside contaminating influence. 10/4/07 RP 233.

Shomer noted numerous significant problems with the Yakima Police Department's process of obtaining an identification from Kublic. These included the failure to record the sessions, the failure to admonish Kublic each time she was shown a montage that the suspect might not be

in the lineup, and the failure to use double-blind procedures. 10/4/07 RP 219-24. Chief among the factors that Shomer believed “deadly for accuracy” of the identification was the effect of repetition – using Sanchez’s image in multiple identification procedures – which in turn created “source confusion.”³⁵ 10/4/07 RP 224, 234, 243, 256, 275-76, 307.

Shomer believed that the issue of repetition was integrally related to the problem of media influence. 10/4/07 RP 243. No one admonished Kublic not to read the news or watch television. 10/4/07 RP 241. Further, one of the police officers informed Kublic when she was in the hospital of Sanchez’s arrest. 10/4/07 RP 241, 10/5/07 RP 428, 432-33.³⁶ The combination of viewing Sanchez in a ‘six-pack’ montage, then in an improperly-administered serial montage, then in a newspaper clipping, and finally in the news media, irrevocably tainted Kublic’s memory of the primary suspect. The poorly-run identification procedure irreparably undermined the validity of Kublic’s identification. 10/4/07 RP 234, 256, 297, 307, 310.

³⁵ Shomer explained that source confusion may occur when a witness becomes familiar with a suspect because of repeated exposure to his image during police identification procedures or media taint, but confuses the source of the familiarity to believe he is familiar from the crime scene. 10/4/07 RP 224-25.

³⁶ 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.

Shomer noted that not only did Kublic's identification change after being repeatedly exposed to Sanchez's image, including the powerful images of Sanchez in court, but she acknowledged she believed that if a police officer arrests someone, "I'm pretty sure that, yeah, they did something." 10/4/07 RP 239. This case, Shomer testified, presented the "most egregiously dangerous danger signal" – because of its correlation to wrongful conviction – that of the witness who has failed to make an identification initially but, after numerous improper influences, does identify a suspect. 10/4/07 RP 257.

The court found Shomer forthright, credible, and persuasive, commenting, "I can honestly say that in my years on the bench I've seldom heard from an expert witness who is as well-versed in this field and as persuasive, frankly, as Dr. Shomer." 10/11/07 RP 652. Despite this, the court ruled that nothing the police did was "unduly suggestive," even while acknowledging the many missteps of the police investigators described by Shomer. 10/11/07 RP 652-55. The court concluded that admission of the unreliable identification would not violate due process, and further ruled that there can be no due process violation when the taint

to an identification has not been caused by government action. 10/11/07
RP 655-58.³⁷

b. Reliability is the cornerstone of due process, which is fundamental to a fair trial. An accused person has the due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. U.S. Const. amend. 14; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also, State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence, although relevant and helpful to accused's defense, given "the State's legitimate interest in excluding inherently unreliable testimony.").

"[R]eliability [is] the linchpin in determining admissibility of identification testimony" under a "standard of fairness that is required by the Due Process Clause of the Fourteenth Amendment." Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); State v. Michaels, 642 A.2d 1372, 1380 (N.J. 1994). The Supreme Court has also recognized that the "power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence

³⁷ The court did not enter written findings of fact and conclusions of law following its ruling.

and the burden of persuasion” may be subject to proscription under the Due Process Clause if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Patterson v. New York, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The courts have the authority and the duty to “ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence.” Michaels, 642 A.2d at 1380.

i. Unreliable or mistaken eyewitness identification testimony is recognized by courts and commentators alike as a leading cause of wrongful convictions. The limitations and weaknesses of eyewitness identification testimony are firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as peer review literature. Henry F. Fradella, Why Judges Should Admit Testimony on the Unreliability of Eyewitness Testimony, 2006 Fed. Cts. L. Rev 1, 3 (June, 2006).

Eyewitness errors are the leading cause of wrongful convictions in Great Britain and North America. The Innocence Project, Understand the Causes: Eyewitness Misidentification,³⁸ Steven M. Smith et al.,

³⁸ Available at <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last accessed December 27, 2008).

Postdictors of Eyewitness Errors, 7 Psychol. & Pub. Pol'y & L. 153

(2001). There are two phenomena associated with such testimony: first, that an eyewitness "identification" may be dangerously unreliable, and second, that an identification by a purported eyewitness is ascribed inordinate weight by jurors, who mistake witness confidence for accuracy. Fradella, at 23; see also Brooke Whisonant Patterson, The "Tyranny of the Eyewitness", 28 Law & Psychol. L. Rev. 195, 202 (2004); 10/4/07 RP 253.

The United States Supreme Court as well has recognized the compelling influence of a confident in-court identification, and for this reason has sought to limit the introduction of such testimony unless that evidence has aspects of reliability. Manson v. Brathwaite, 432 U.S. at 112.

[Eyewitness] testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'

Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (internal citation omitted, emphasis in original).

A pretrial identification is “peculiarly riddled with innumerable dangers and variable factors which seriously, even crucially, derogate from a fair trial.” United States v. Wade, 388 U.S. 218, 230, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Witnesses who have been exposed to suggestive pre-trial identification procedures “are quite likely to be absolutely convinced of the accuracy of their recollection” and for this reason “their credibility, understood as their obvious truth-telling demeanor, is unlikely to betray any inaccuracies or falsehoods in their statements.” Michaels, 642 A.2d at 1382.

In light of the empirical research demonstrating systemic problems with the procedures utilized by law enforcement agencies as well as the innate limitations of human memory, both the American Psychology and Law Society and the United States Justice Department have published guides in order to reform the way that the criminal justice system approaches eyewitness identifications. Fradella, 2006 Fed. Cts. L. Rev. at 21 (citing Gary L. Wells, M. Small, & S. Penrod et al, Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law and Hum. Beh. 603, 620 (1998) and U.S. Dep’t of

Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement (Sept 2003)^[39]) (hereafter "Eyewitness Evidence").

Relying on these recommendations, a number of states have begun to mandate that all police agencies implement practices to promote accuracy and minimize taint during eyewitness identification procedures, such as sequential lineups and blind administration procedures. Fradella, 2006 Fed. Cts. L. Rev. at 22. As discussed in argument 4(b)(iv), infra, a number of states have also required either exclusion of the identification, the implementation of a different standard for assessing suggestiveness, the issuance of cautionary instructions to the jury, or some combination of all of these to reduce the likelihood that an innocent person will be convicted based on a misidentification.

ii. The identification procedures utilized by the Yakima police were unduly suggestive. In weighing Sanchez's challenge to the identification procedures, the trial court believed the issue turned on whether the police deliberately utilized procedures to identify suspects that were unduly suggestive. 10/11/07 RP 653. Although this is certainly part of the inquiry, in focusing on police action, the trial court mistakenly concluded its ruling turned on whether the police officials involved engaged in some kind of malfeasance. 10/11/07 RP 653-55. This analysis

³⁹ Available at <http://www.ncjrs.org/nij/eyewitness/188678.pdf>

was incorrect. “A series of events that is suggestive and creates a substantial risk of misidentification is no less a due process violation, even absent evil intent on the part of the government.” United States v. Emanuele, 51 F.3d 1123, 1129 (3rd Cir. 1995); see also Manson v. Brathwaite, 432 U.S. at 114; Michaels, 642 A.2d at 1381. Having found Shomer’s testimony credible and persuasive, the court was compelled to conclude that Kublic’s identification of Sanchez was irreparably tainted by the suggestive procedures employed.

The court relied on several cases in support of its ruling, but two of these pre-date the bulk of empirical research establishing the harmfulness of the procedures utilized here, as well as the Justice Department’s report. 10/11/07 RP 655-56 (citing United States v. Peele, 574 F.2d 489 (9th Cir. 1978); United States v. Briggs, 700 F.2d 408 (7th Cir. 1983)). In Briggs, moreover, the witness picked the defendant although he was seated at a table with several other co-defendants, and there was no significant showing of suggestive procedures preceding the identification.

The third case, Johnson v. McCaughtry, 92 F.3d 585 (7th Cir. 1996), is readily distinguishable. Johnson did not offer any expert testimony in support of his claim that the identification procedure was unduly suggestive or that the in-court identification was unreliable; thus, at most, Johnson’s challenges amounted to little more than bare

allegations. 92 F.3d at 595-97. Perhaps for this reason, the Court did not reach the question of improper suggestiveness because it found the identification was otherwise reliable. Id. at 596. The Court also noted that at bottom, Johnson's "gripe" with the first witness was not misidentification arising from a mistake in recognition, but rather a deliberately false allegation. Id. at 597.

The Circuit Court agreed that the second witness's identification – an in-court identification after the witness initially was unable to pick out a suspect – was more problematic, but again appeared unwilling to hold this identification should have been suppressed absent substantive evidence that the identification was “so unreliable that it violates due process to allow the jury to hear it.” Id.

In Michaels, the court noted that where the reliability of testimony has been called into question by other suggestive influences, such as, for example, hypnotically-induced recollection, such testimony may be subject to exclusion. Michaels, 642 A.2d at 1382; accord State v. Herrera, 902 A.2d 177, 184 (N.J. 2006); see also, e.g., People v. Hults, 556 N.E.2d 1077, 1078 (N.Y. 1990) (to the extent post-hypnotic testimony is affected by the prior hypnosis, it is inherently unreliable and thus inadmissible), accord People v. Schreiner, 573 N.E.2d 552 (N.Y. 1991)

(reversing murder conviction where primary evidence against defendant was unreliable hypnotically-induced confession).

Here, a number of factors establish that the procedures used were unduly suggestive, casting doubt on the reliability of the identification. First, Kellett failed to admonish Kublic before showing her photographic arrays that the perpetrator might not be included in the photographs. See G. Wells, M. Small & S. Penrod et al., supra, 22 Law & Hum. Behav. at 615, 622; Dep't of Justice, Eyewitness Evidence, supra at 28; State v. Ledbetter, 881 A.2d 290, 314 (Conn. 2005) (agreeing that “[t]he scientific research supports [the] contention” that without a warning, the witness feels obligated to select a photograph, regardless of whether the perpetrator is one of the choices).

Second, Kellett did not record any of the identification procedures, thereby preventing any meaningful assessment whether he provided subtle cues to Kublic regarding his belief about the identity of the suspects. 10/4/07 RP 219; Eyewitness Evidence at 30.

Third, Kellett failed to use double-blind identification procedures. 10/4/07 RP 222-23, 265; G. Wells, & A. Bradfield, ‘Good, You Identified the Suspect’: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 374 (1998).

Fourth, law enforcement repeatedly included Sanchez's image in the montages, creating "source confusion" or "unconscious transference." 10/4/07 RP 224; Fradella, 2006 Fed. Cts. L. Rev. at 10.

Fifth, law enforcement affirmatively informed Kublic that Sanchez had been arrested. See Wells & Bradfield, supra, 83 J. Applied Psychol at 360-74 (witnesses who were given confirming information displayed a significantly higher degree of certainty in their identification than those were not).

Sixth, Kellett failed to instruct Kublic not to view media, resulting in her seeing images of Sanchez in jail garb and shackles at his arraignment. Cf., Emanuele, 51 F.3d at 1129-30 (witness's viewing handcuffed defendant being led to court by U.S. Marshalls impermissibly suggestive). Kublic also attended a court hearing at which she again observed Sanchez in the same restraints. 10/5/07 RP 471.

All of these factors combined, considered in light of Kublic's confident description of the shooter as someone who looked very different from Sanchez, her initial failure to identify him, and Shomer's testimony that the procedures used and resulting change in identification bore all the hallmarks of misidentification, establish undue suggestiveness. The identification should have been suppressed.

iii. The Biggers factors required suppression of the identification. In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court reaffirmed that a conviction based on an eyewitness identification will be set aside if the “identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Id. at 197 (citation omitted). But, the court found that an identification can nonetheless be admissible if it is otherwise reliable. Id. The court identified a test to ascertain whether, under the “totality of the circumstances,” an identification is reliable despite the use of suggestive procedures. Id. at 199-200.

The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. Washington currently utilizes the Biggers test to determine the admissibility of an identification. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

This Court should conclude that under the Biggers factors, the identification should have been excluded.

a) Kubic’s opportunity to view the suspect supports exclusion. Kubic claimed that she got a good opportunity to

look at the person in front of her car, who later put on a mask, and whom she identified quickly and unequivocally as Mario Mendez. 10/5/07 RP 448; 10/3/07 RP 182, 186. She said she got an even better look at the person without the mask. As the record establishes, however, Kublic's initial descriptions of this individual resembled Manuel "Puppet" Sanchez, not Jose Sanchez. See Trial RP 2100. This factor therefore weighs in favor of exclusion of the identification. See Emanuele, 51 F.3d at 1130 (finding that witnesses' protracted opportunity to view robber highlighted one witness's initial inability to select the defendant from a photo array and another witness' selection of a different individual).

b) Kubic's degree of attention was compromised by the presence of two guns and the traumatic events that transpired. Biggers factor two also militates against admission of the identification. Where a dangerous weapon is present, scientific research shows that eyewitnesses focus on the weapon, rather than the suspect, and their ability to make an accurate identification suffers commensurately. Ralph Norman Haber and Lyn Haber, Experiencing, Remembering, and Reporting Events, 6 Psych. Pub. Pol. & L. 1057, 1062 (2000). This phenomenon is known as "weapons focus." Id. Both Mendez and the shooter were armed. The guns acted as "visual magnets," diminishing the accuracy of Kublic's identification. Trial RP 2114.

Additionally, the high stress inherent in this traumatic situation undermined Kublic's degree of attention. A high level of stress is correlated to substantially diminished accuracy in an identification. Trial RP 2111-13. In studies, forensic researchers have established that a high-stress situation will produce accurate identification rates that are less than half of those produced in low- or moderate-stress situations. Gary L. Wells, Eyewitness Identification Evidence: Science and Reform, 29 Champion 12, 13 (2005). "The more violent the act, the lower will be the accuracy and completeness of perception and memory." Fradella, supra, 2006 Fed. Cts. L. Rev. at 12 (citation omitted). This factor weighs in favor of exclusion.

c) Kublic's initial descriptions of the shooter bore no resemblance to Sanchez. Biggers factor three, the accuracy of the witness's prior description, also weighs against admission of the identification. Kublic initially described someone starkly different from Sanchez as the shooter.⁴⁰ She provided this disparate description more than once, and adhered to it even when specifically asked to construct a composite image of the shooter from memory, prior to seeing any montages.

⁴⁰ Kublic described the shooter as 5'1" tall, with a gaunt, "sucked in" face, long matted hair, and a thin mustache. 10/3/07 RP 87, 154-57, 168. Sanchez, by comparison, was 5'6" tall, stocky in build, and at the time of the crime had close-cropped hair. 10/11/07 RP 572, 1810; Trial RP 2070-72.

d) Suggestive procedures influenced

Kubic's degree of confidence in the identification, undermining any correlation between certainty and accuracy. The State claimed below that Kubic's degree of certainty in making the identification supported its admission, but this claim should be viewed with suspicion. First, Kubic's positive identification succeeded a number of highly suggestive events likely to confirm and solidify a false belief that Sanchez was the perpetrator. These included: Kubic being told Sanchez had been arrested in connection with committing the crime; Kubic seeing media images of Sanchez, and Kubic attending a court hearing in which Sanchez appeared in jail garb and shackles.

Second,

The uncontradicted scientific literature ... suggests that the fourth Biggers factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification.

Ledbetter, supra, 88 A.2d at 311 (citing forensic studies); see also Brodes v. State, 614 S.E.2d 766 (Ga. 2005) ('the idea that a witness's certainty in his or her identification of a person as a perpetrator reflected the accuracy of the identification has been "flatly contradicted by well-respected and essentially unchallenged empirical studies."') (citing studies); State v. Long, 721 P.2d 483, 490 (Ut. 1986) (noting research has discredited "the

common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection”).

Third, as noted by the Ledbetter Court, where double blind identification procedures are not utilized, the witness’s level of confidence is “malleable,” or susceptible to cues from the administrator of the identification procedure.” Id. at 312.

This Court should conclude that Biggers factor four weighs against admission of the identification, or, at best, that it is neutral.

e) A substantial amount of time elapsed between the crime and the confrontation. The fifth Biggers factor also weighs against admission of the identification. As noted, Kublic initially did not pick Sanchez out of the photographic arrays she was shown at the hospital. She only altered her identification after learning of his arrest and seeing his image in the media. Further, a substantial period of time elapsed between the crime in February 2005 and November 5, 2007, when Kublic testified at the identification hearing.

This Court should conclude that the five Biggers factors weigh against the conclusion that Kublic’s identification of Sanchez was otherwise reliable. Further, contrary to the inference below, this challenge to the evidence’s reliability does not go to “weight.” As the Utah Supreme Court observed in a like context,

Because the jury is not bound by the judge's preliminary factual determination made in ruling on admissibility, the trial court may be tempted to abdicate its charge as gatekeeper to carefully scrutinize proffered evidence for constitutional defects and may simply admit the evidence, leaving all questions pertinent to its reliability to the jury. But courts cannot properly sidestep their responsibility to perform the required constitutional admissibility analysis. To do so would leave protection of constitutional rights to the whim of a jury and would abandon the courts' responsibility to apply the law. . . The danger of such an abdication of responsibility is particularly serious where the admissibility of an eyewitness identification is concerned because of the probability that such evidence even though thoroughly discredited has a powerful effect on a jury.

State v. Ramirez, 817 P.2d 774, 778-79 (Ut. 1991).

The identification should have been excluded.

iii. This Court should follow the lead of the many state courts that have relied on their own state constitutions or their supervisory authority to adopt a different approach from *Biggers* in order to diminish the likelihood that an unreliable identification will lead to conviction. Recognizing that the use of suggestive procedures may fatally undermine the reliability of an identification, many states have implemented measures to reduce the risk that a conviction will be based on a flawed identification. While adhering to the *Biggers* two-stage approach, some states have invoked their state constitutions to adopt new criteria for assessing reliability under the 'totality of the circumstances' prong. See e.g. *Ramirez*, 817 P.2d at 781 (rejecting this factor under Ut.

Const. art. I, § 7⁴¹, and adopting a new ‘totality of the circumstances’ standard); and State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting Ramirez approach).

Still other states have required that the jury be instructed regarding the risks inherent in certain eyewitness identifications. Ledbetter, 881 A.2d at 314-20 (requiring instruction where witness was not warned that suspect might or might not be in the procedure); State v. Romero, 922 A.2d 693, 702-03 (N.J. 2007) (adopting requirement that existing jury instruction telling jury to take particular care in gauging believability of eyewitness testimony be augmented by further admonishment that “a witness’s level of confidence, standing alone, may not be an indication of the reliability of the identification”); Brodes, 614 S.E.2d at 771 (striking “level of certainty” language from standard cautionary identification instruction issued to juries).

Other states have required that eyewitness identifications be excluded altogether where they are derived from suggestive procedures. State v. Dubose, 699 N.W.2d 582, 596-97 (Wis. 2005) (adopting rule under Wisconsin Constitution’s due process clause⁴² that identifications

⁴¹ Like Washington’s article I, § 3, the language of Ut. Const. art. I, § 7, is identical to the due process clauses of the Fifth and Fourteenth Amendments.

⁴² Article I, section 8 of the Wisconsin Constitution provides: “No person may be held to answer for a criminal offense without due process of law[.]” Wis. Const. art. I, § 8.

resulting from show-ups be excluded unless the government can show the show-up was necessary); Commonwealth v. Johnson, 650 N.E.2d 1257, 1260-65 (Mass. 1995) (holding that article 12⁴³ of Massachusetts constitution requires per se approach barring admission of identifications where they result from suggestive procedures); People v. Adams, 423 N.E.2d 379, 383-84 (N.Y. 1981) (reaching same conclusion under New York Constitution). This Court should similarly conclude that under the Washington Constitution, the Biggers test does not provide citizens with the due process of law they are guaranteed.

a) Article I, section 3 imposes more stringent requirements for the reliability of evidence than the federal due process clause, thus this Court should conclude that the *Biggers* standard violates our state constitution. To find that a state constitutional provision supplies broader protections than its federal counterpart, the court must analyze six nonexclusive criteria. These are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6)

⁴³ This provision provides in pertinent part, “[N]o subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” Mass. Const. art. 12.

matters of particular state interest and local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808, 76 A.L.R. 4th 517 (1986).

The textual language of the federal due process clause of the Fourteenth Amendment and article I, section 3 of the Washington constitution are identical. This does not end the inquiry, however.

The dissent erroneously asserts that it is improper to construe our state constitution as more protective of individual rights than the federal constitution when the pertinent provisions are similarly or identically phrased. Only if constitutional decisions by federal courts are “logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.”

State v. Davis, 38 Wn. App. 600, 605 n. 4, 686 P.2d 1143 (1984) (quoting Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 502 (1977)).

In addition, “[e]ven where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.” Gunwall, 106 Wn.2d at 61.

While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.

Dubose, 699 N.W.2d at 597.

With respect to the third Gunwall factor, there does not appear to be any legislative history from the constitutional convention that sheds light on whether the state due process clause should be interpreted differently from the federal one. See State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (citing Journal of the Washington State Constitutional Convention, 1889, at 495-96 (B. Rosenow ed. 1962)).

Regarding the fourth factor, preexisting state law, our appellate courts have not considered the admissibility of identification testimony under anything other than the federal due process clause. Importantly, however, the Washington Supreme Court has 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 State v. Bartholomew, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (“Bartholomew II”).

In State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982), the Court found that certain provisions of Washington’s death penalty statute violated the federal due process clause because they permitted consideration of any relevant evidence at the penalty phase regardless of

its admissibility. The United States Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in Zant v. Stephens, 462 U.S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983).

On remand, the Court declined to rely solely on the United States Constitution.

[I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause. Olympic Forest Prods., Inc., v. Chaussee Corp., 82 Wn.2d 418, 511 P.2d 1002 (1973); Pestel, Inc. v. County of King, 77 Wn.2d 144, 459 P.2d 937 (1969).

Bartholomew II, 101 Wn.2d at 639.

In finding that the statute violated article I, section 3, the Court declared, "We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." Id. at 640. The Court stressed that "the independent state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached." Id. at 644.

This independent interpretation of article I, section 3 was not an anomalous result. In Davis, the trial judge inferred guilt from the defendant's post-arrest silence. This did not violate the federal due process clause because the defendant had not been read Miranda warnings. Id. at 604, citing Fletcher v. Weir, 455 U.S. 603, 71 L. Ed. 2d 490, 102 S.

Ct. 1309 (1982). The Davis court found that Wash. Const. art I, § 3 required a different result.

Thus, preexisting state law addressing both the fairness of procedures in state courts and the specific question of whether article I, section 3 provides greater protection against the admissibility of unreliable evidence in a criminal trial unequivocally favors an independent constitutional analysis with respect to identification testimony.

The fifth Gunwall factor, differences in structure between the state and federal constitutions, will always support an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Finally, state law enforcement measures are a matter of state or local concern, id., as is the fundamental fairness of trials held in this state. Bartholomew II, 101 Wn.2d at 643-44. An application of the six Gunwall factors requires the conclusion that article I, section 3's more stringent standard for the reliability of evidence requires reevaluation and renunciation of the Biggers test.

b) This Court should hold that article I, section 3 of the Washington constitution requires suppression where suggestive police procedures have called the reliability of an identification

into question. In light of the vast body of uncontradicted research treating the devastating effects of suggestive procedures on eyewitness identifications, a reassessment of the Biggers factors under our state constitution is long overdue. “Appellate courts have a responsibility to look forward, and a legal concept’s longevity should not be extended when it is established that it is no longer appropriate.” Brodes, 614 S.E.2d at 771.

In holding that its own constitution compelled rejection of the Biggers test in favor of a bright-line rule, the Wisconsin Supreme Court noted the many cases in which the United States Supreme Court had relied on scientific or social science research to chart a new path in its decisions premised on constitutional interpretation and application. Dubose, 699 N.W.2d at 597 (citing as examples Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954) and Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 2583, 161 L.Ed.2d 1 (2005)).

The Massachusetts Supreme Court, applying its own due process clause to require a per se rule of exclusion where the totality of the circumstances establish unduly suggestive procedures, held that “the dangers present whenever eyewitness evidence is introduced against an accused require the utmost protection against mistaken identifications.” Commonwealth v. Johnson, 650 N.E.2d at 1261. The Court noted that

these concerns – including the correlation between mistaken identification and wrongful convictions and the considerable impact of eyewitness identification testimony on juries – were “at the heart of the Wade trilogy of cases.” Id. at 1262. The Court concluded, “The ‘reliability test’ is unacceptable because it provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful convictions.” Id.

In rejecting the reliability standard of Manson v. Brathwaite and Biggers, the Court concurred with Justice Marshall’s dissenting view in Brathwaite, where he wrote,

This conclusion [that the per se rule should be abandoned in favor of the less protective ‘reliability test’] totally ignores the lessons of Wade. The dangers of mistaken identification are, as Stovall [v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)] held, simply too great to permit unnecessarily suggestive identifications. Neither Biggers nor the Court’s opinion today points to any contrary empirical evidence. Studies since Wade have only reinforced the validity of its assessment of the dangers of identification testimony.

Commonwealth v. Johnson, 650 N.E.2d at 1262 (quoting Manson v. Brathwaite, 432 U.S. at 125 (Marshall, J., dissenting)).

The per se rule of exclusion adopted by the Massachusetts Court requires the defendant to prove by a preponderance of the evidence that the witness was subjected to an unnecessarily suggestive confrontation.

Id. at 1260. If this is established, the identification must be excluded unless the prosecution can prove by clear and convincing evidence that later identifications have an independent source. Id.

The Court explained the rationale for this exclusionary rule in much the same way that our Supreme Court in Bartholomew II articulated the reason for its heightened reliability standard:

The rule excluding improper showups and evidence derived therefrom is different in both purpose and effect from the exclusionary rule applicable to confessions and the fruits of searches and seizures. In the latter cases generally reliable evidence of guilt is suppressed because it was obtained illegally. Although this serves to deter future violations, it is collateral and essentially at variance with the truthfinding process . . . But the rule excluding improper pretrial identifications bears directly on guilt or innocence. It is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police.

Commonwealth v. Johnson, 650 N.E.2d at 1264 (quoting People v. Adams, 423 N.E.2d at 250). For the same reason, this Court should adopt a per se rule of exclusion where the defendant can prove that suggestive procedures have called the legitimacy of an identification into doubt.

c) Alternatively, this Court should recalibrate the factors to be considered in assessing reliability to comport with the scientific research. If this Court is hesitant to wholly jettison the Biggers reliability test, at a minimum, this Court should follow the lead of

Utah and Kansas and recalibrate the factors to be considered in assessing reliability. See Ramirez, 817 P.2d at 780-81;⁴⁴ Hunt, 69 P.3d at 576.

Adoption of a new set of guidelines which eliminate the notoriously controversial “degree of certainty” factor and incorporate considerations such as the nature of the event observed, the consistency of the identification, and the race of the actor can only serve to enhance the truth-seeking function of the criminal process. The proposed standard thus furthers the interest under our state constitution in ensuring fundamentally fair proceedings.

Under either proposed standard, Kublic’s identification of Sanchez should have been excluded.

c. The error in admitting the unreliable identification requires reversal of Sanchez’s conviction. A constitutional error is

⁴⁴ The factors are:

(1) The opportunity of the witness to view the actor during the event; (2) the witness’s degree of attention to the actor at the time of the event; (3) the witness’s capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer’s.

Ramirez, 817 P.2d at 781 (citing Long, 721 P.2d at 493). The Court explained its guidelines “hewed to the teachings of the empirical research” and thus presented a “more appropriate approach” under the Utah Constitution. Id. at 780.

presumed prejudicial. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). On appeal, the State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. Id.

The State largely relied on two pieces of evidence to convict Sanchez: the testimony of his unreliable co-defendant, who obtained a substantial benefit in exchange for his assistance to the State, and Kublic's tainted identification testimony. Following the multiple suggestive police procedures, Kublic told the jury she was "one-hundred percent sure" that Sanchez was the shooter. Trial RP 1023. This testimony likely had an extraordinary impact on the jury and may well have been the weight that swayed the jury to convict. The constitutional error therefore prejudiced Sanchez. His conviction must be reversed, and the matter remanded for a new trial at which the State will be barred from presenting evidence of Kublic's identification.

5. THE TRIAL COURT VIOLATED SANCHEZ'S STATE AND FEDERAL RIGHTS TO DUE PROCESS AND TO THE PRESUMPTION OF INNOCENCE WHEN IT FORCED HIM TO STAND TRIAL IN THE JAIL.⁴⁵

a. To safeguard his due process right to a fair trial, Sanchez objected to the court's determination that his trial should be held in a courtroom in the jail and requested the case be tried in the Yakima County Courthouse. The Yakima County Jail is a large, windowless concrete building. CP 1011, 1013. An individual approaching the jail is confronted with numerous reminders that the building is the county correctional facility. Signs in the parking area admonish that jail visitor parking is limited to two hours. CP 1009, 1011. Affixed to the wall by the main entrance to the building is a plaque which reads: "Yakima County Detention-Correction Center." CP 1011, 1013, 1019. On the wall next to the annex entrance of the building is another plaque which reads, "Yakima County Special Detention Facility." CP 1015, 1017.

Prior to trial, Sanchez moved to transfer his trial from Jail Courtroom Two to the Yakima County Courthouse. CP 196-98; 10/23/07 RP 6-8. The court held a hearing on Sanchez's motion in which a number of jail correctional personnel testified. These witnesses identified several

⁴⁵ This issue is currently pending before the Washington Supreme Court in State v. Jaime, No. 82008-2. As of January 15, 2009, the case has not yet been scheduled for oral argument.

rationales for their belief that it would be preferable to try Sanchez in the jail. The primary reason they cited was that the county courthouse did not have a metal detector, and so security screening would have to be accomplished through the use of handheld wands, whereas in the jail, people entering and exiting the building had to pass through a metal detector. 10/23/07 RP 11-12, 17. They also cited Sanchez's "background" and "lifestyle" as security concerns. 10/23/07 RP 15, 39-40.

Yakima Department of Corrections (DOC) Chief Michael Williams acknowledged that 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. He admitted that Sanchez's security classification in the jail⁴⁶ was principally based on the classification given his alleged crime and his criminal history, which consisted of prior convictions for second- and third-degree assault and malicious mischief. 10/23/07 RP 41-42, 47, 59.

Will Paulakis, the division chief with Yakima County DOC agreed it would be feasible to hold the trial in a regular courtroom; the DOC would simply have to detail three officers to the trial, instead of the two

⁴⁶ Sanchez was listed as maximum security. 10/23/07 RP 41.

that would be assigned if the trial were held in the jail. 10/23/07 RP 18-19. He acknowledged that the lack of metal detectors had been an “ongoing issue” in the main courthouse. 10/23/07 RP 30. Paulakis never looked into whether it would be feasible to bring in a portable metal detector, but conceded it would not be “unreasonable” to hold the trial in the actual courthouse. 10/23/07 RP 30, 34.

Sanchez noted that the State had previously held trials in cases involving serious charges and high-profile defendants in the county courthouse building. 10/23/07 RP 8. He noted that although the court had held trials in the jail courtroom, no out-of-custody defendant had ever been tried there. 10/23/07 RP 77. He contended that by holding the trial in the jail, the jurors not only would realize he was in custody, but would speculate that the trial was being held there because he was too dangerous to be moved. 10/23/07 RP 72. They would believe he could not be moved because “that’s how dangerous he is and that’s how guilty he is,” fatally undermining the presumption of innocence. 10/23/07 RP 73.

The court conceded that numerous trials for serious violent offenses had been held in the courthouse. 10/23/07 RP 79. The court, however, felt compelled to defer to the judgment of Yakima DOC both regarding potential risk factors connected to Sanchez and possible threats to his safety. 10/23/07 RP 79-80. The court observed that in the event of

a threat to Sanchez's security, he could be placed in a secure holding cell if tried in the jail, but that the same level of security was not present in the courthouse. 10/23/07 RP 82. Although there was no way to mask the fact that the trial would be occurring in the county correctional facility, the court felt that putting opaque paper on the windows to prevent civilians from seeing defendants being transported to and from the holding tank would minimize prejudice to Sanchez. 10/23/07 RP 84. The court concluded that in light of the seriousness of the charges, Sanchez's good physical condition,

the assaultive behavior that he's exhibited and been convicted of in the past even though that may have been something that doesn't rise to the level of the charges in this case, the threat that he's made to himself, the threat that he's apparently made to others in the jail and just the concern that I have about the fact that this case is going to get publicity ... jail courtroom number two is an appropriate place to conduct this trial.

10/23/07 RP 85.

b. Requiring an accused person to appear before the jury in physical restraints or communicating to the jury that the accused is in custody violates the Fourteenth Amendment guarantee of a fair trial and the presumption of innocence. An accused person's right to a fair trial by an impartial jury is a fundamental liberty secured by the Fourteenth Amendment guarantee of due process. U.S. Const. amends. 5, 6, 14;

Wash. Const. art. I, §§ 3, 22; Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). The presumption of innocence, although not explicitly stated in the constitution, is a basic component of this right to a fair trial, and requires courts be vigilant to factors that may undermine the fairness of the factfinding process. Estelle, 425 U.S. at 503. An indigent criminal defendant has the same right to the “unqualified presumption of innocence as one who can post bail.” State v. Gonzalez, 129 Wn. App. 895, 897, 120 P.3d 645 (2005).

The accused is thus entitled to “the physical indicia of innocence,” which include the right to be “brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Courts universally recognize “the substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or is otherwise shackled.” Id. at 844-45 (citing cases) (see also State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998) (appearance of prison garb, shackles, or other restraints may “reverse the presumption of innocence” and thereby deny due process)).

The Supreme Court has said that the use of shackling or appearance in prison garb is “inherently prejudicial” because they are

“unmistakable indications of the need to separate the defendant from the public at large.” Holbrook v. Flynn, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). The prejudice is “particularly apparent” when the defendant is charged with a violent crime, because shackling “is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.” Finch, 137 Wn.2d at 845 (quoting People v. Duran, 16 Cal. 3d 282, 290, 545 P.2d 1322 (1976)).

When a defendant wears prison garb during trial it creates a “continuing influence” that could very well “affect a juror’s judgment” by allowing “impermissible factors [to come] into play.” Estelle, 425 U.S. at 505. “When the court allows a defendant to be brought before the jury in restraints the ‘jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers.’” Finch, 137 Wn.2d at 845 (quoting State v. Williams, 18 Wash. 47, 51, 50 P. 580 (1897)).

Several states have found that informing a jury that a defendant is in jail raises an inference of guilt, and can have the same prejudicial effect as bringing a shackled defendant into the courtroom. See e.g. State v. Harrison, 37 P.3d 1, 3, (Id. 2001); State v. Tucker, 629 A.2d 1067 (Conn. 1993) (court’s fleeting reference to defendant as “the prisoner” violated due process but curative instruction proposed by court would have

ameliorated prejudice); Haywood v. State, 809 P.2d 1272, 1273 (Nev. 1991); State v. Spellman, 562 So.2d 455 (La. 1990) (defendant's request to be tried in civilian garb in lieu of prison uniform carried sufficient constitutional weight to justify delaying proceedings); People v. Taylor, 31 Cal. 3d 488, 645 P.2d 115 (1982) (forcing defendant to stand trial in jail clothes violated his rights to due process and presumption of innocence). Similarly, this Court ruled that a trial court's "curative instruction" drawing the jury's attention to the trappings of the defendant's in-custody status was "manifest constitutional error." Gonzalez, 129 Wn. App. at 901-02.

Forcing a defendant to stand trial in a courtroom located inside the jail is no less prejudicial than forcing him to stand trial while shackled, handcuffed, or wearing jail clothing.⁴⁷ It is certainly no less prejudicial than explicitly telling the jury that the defendant is in custody. It not only sends a message to the jury that a defendant is incarcerated, it encourages the jury to infer that he is either guilty or too dangerous to be released into the community. "Whenever a courtroom arrangement is challenged as inherently prejudicial, . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether

⁴⁷ To the extent the State may seek to distinguish forcing a defendant to stand trial in jail clothes from forcing a defendant to stand trial in the jail, this is a distinction without a difference. The jail, essentially, is a bigger jail 'uniform.'

‘an unacceptable risk is presented of impermissible factors coming into play.’” Holbrook, 475 U.S. at 570. Holding a trial in the county jail serves as a “a continuing reminder that the State perceive[s] [the defendant] as meriting the trappings—if not the presumption—of guilt.” Gonzalez, 129 Wn. App. at 902-03.

c. Forcing Sanchez to be tried in the county jail undermined his right to be presumed innocent and destroyed any prospect of a fair trial as required by the Fourteenth Amendment and article I, section 3 of the Washington Constitution. Here, the court’s ruling that Sanchez’s five-week trial should be held in the jail courtroom fatally undermined his right to be presumed innocent. Further, the State neither proved the restraint was necessary to serve a compelling state interest, nor that the need for the restraint outweighed the prejudice to Sanchez from the jurors being reminded daily of his in-custody status. Because the State cannot prove beyond a reasonable doubt that the constitutional error did not prejudice him, Sanchez is entitled to reversal of his convictions.

i. The court was only authorized to permit the trial to proceed in the jail based on a finding that it was manifestly necessary to prevent escape, injury to others, or disruption of trial court proceedings. Although the trial court is vested with the discretion to provide courtroom security, State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981),

because the use of restraints are so inherently prejudicial, close judicial scrutiny is required to ensure that they are necessary to further an essential state interest. Finch, 137 Wn.2d at 846.

Before a court may properly authorize such potentially prejudicial measures, it must make a factual determination of necessity, on the record, taking into consideration various factors that include the seriousness of the charge, the degree of risk that a particular defendant might pose, the defendant's own safety and that of others in the courtroom, and the adequacy of alternative remedies. Finch, 137 Wn.2d at 848. Further, the determination must be case-specific; “that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.” Deck v. Missouri, 544 U.S. 622, 633, 125 S.Ct. 2007, 161 L.Ed.2d 963 (2005). “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.” State v. Gonzalez, 129 Wn. App. 895, 901-02, 120 P.3d 645 (2005) (citing Hartzog, 96 Wn.2d at 397-98). The court must then balance the need for such measures against the risk of undermining the right of the accused to a fair trial. Finch, 137 Wn.2d at 849-50.

ii. The ruling permitting the trial to be held in the jail derived from considerations of convenience to the jail and budgetary concerns, rather than a finding that Sanchez was so dangerous the restraint was manifestly necessary, in violation of his right to a fair trial and the presumption of innocence. The trial court's ruling violated due process for several reasons: First, the court unjustifiably deferred to the judgment of the jail security officers. Second, the court's ruling appeared to be chiefly motivated by financial considerations, rather than preserving Sanchez's due process right to a fair trial. For these reasons, the court excused the State from proving necessity and failed to weigh Sanchez's right to be presumed innocent in a fundamentally fair proceeding.

Courts have only approved an order that a defendant appear in restraints before the jury where the State has made a specific showing that the defendant (1) presented a threat of escape; (2) posed a threat of injury to others; or (3) had disrupted court proceedings. See Finch, 137 Wn.2d at 847 (citing cases). Further, our Supreme Court has held a trial court abuses its discretion when it relies solely on concerns expressed by a correctional officer as a justification for ordering restraints. Finch, 137 Wn.2d at 853 (citing People v. Vigliotti, 203 A.D.2d 898, 611 N.Y.S. 413 (1994) (trial court ordered restraints based on report from correctional officer that was admitted into evidence) and People v. Thomas, 125

A.D.2d 873, 510 N.Y.S.2d 460 (1986) (trial court deferred to judgment of correctional officers, who said they wanted defendant secured)).

In this case, the claimed ‘security concerns’ connected to Sanchez were unfounded. Over the course of many hearings in this case, Sanchez had always been respectful and appropriate, and never disruptive of court proceedings – a key consideration in determining the necessity of restraints. Finch, 137 Wn.2d at 847. Indeed, when the court decided to hold the trial in the county jail, it had already held a four-day identification hearing at which not only civilian witnesses testified but also the State’s key witness – Michelle Kublic, Sanchez’s alleged victim – with no indication whatsoever that Sanchez either posed a threat to her or that there was a risk of courtroom disruption.⁴⁸

With respect to the other Hartzog factors, Sanchez had no record of attempted escape.⁴⁹ 10/23/07 RP 53. Although the State made much of the fact that Sanchez was alleged to have a shank in his cell, jail administrators actually concluded that Sanchez was not guilty of this allegation. Id.⁵⁰ Sanchez was alleged to have contemplated suicide upon

⁴⁸ The court admitted that 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.

⁴⁹ The State conceded this point. 10/23/07 RP 71.

⁵⁰ It is worth noting that this likely occurred in a hearing at which the standard of proof to adjudicate him guilty of this allegation was a preponderance of the evidence.

first learning that he might face the death penalty or a sentence of life without the possibility of parole, but Yakima DOC Chief Michael Williams agreed that this had no bearing on courthouse security issues. 10/23/07 RP 51.

In addition to failing to find holding the trial in the jail was necessary and outweighed the prejudice to Sanchez's right to a fair trial, the trial court failed to adequately weigh the feasibility of alternatives to the restraint. But the Supreme Court has held the court must consider other alternatives to the 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.

Will Paulakis, the division chief for Yakima County DOC, stated that if the trial were held in the courthouse, the jail would transport Sanchez to court in a vehicle to minimize security concerns. 10/23/07 RP 27. He conceded that only one additional officer would be needed to provide security if the trial were held there. 10/23/07 RP 18, 28. He indicated that the normal procedure would be to screen people entering the courthouse with handheld wands, but admitted that he had not researched obtaining a portable metal detector. 10/23/07 RP 30.

The trial court believed that by putting opaque paper over the windows through which jurors might otherwise see shackled defendants in

jail garb being marched to and from the holding cell vitiating the prejudice from holding the trial in the jail. 10/23/07 RP 84. This finding cannot withstand scrutiny – and in fact, the court acknowledged “we’re never going to get through ... the psychological effect on jurors about the concept that a trial is being held in a monolithic concrete building.” *Id.* In fact, daily for the course of the five-week trial in this case, the jurors were forced to enter a building conspicuously marked “detention-correctional facility” and “jail.” 10/23/07 RP 62; CP 1011, 1015, 1017, 1019.

The State may be expected to argue on appeal, as it did below, that the need for additional security officers would “convey the image that the defendant is in custody.” 10/23/07 RP 69. This claim by the prosecutor is fundamentally unpersuasive. The distinction between three or even four, uniformed guards in the courtroom, as opposed to two (which was the number Yakima DOC deemed necessary for a trial in the jail), is a far cry from the difference between holding the trial in the county jail versus holding it in the county courthouse.

People go to the courthouse for all sorts of non-criminal purposes: to pay taxes, file real estate paperwork, even to get married. But the jail has only one purpose: to keep criminals off the street and away from law-abiding citizens. This, coupled with heightened security measures present in the jail, creates an ominous atmosphere that would be nearly impossible

for a reasonable juror to ignore during trial and deliberations, and could therefore affect a juror's ability to remain impartial. The jurors were not likely to appreciate the court's claimed concerns regarding publicity and crowd control, but would instead conclude Sanchez was "too dangerous to even be removed from this building across the street to the county building." 10/23/07 RP 72.

d. The constitutional error prejudiced Sanchez. As noted supra, a constitutional error is presumed prejudicial. The State must prove beyond a reasonable doubt that absent the error the jury would have reached the same verdict. In this case, the prosecution cannot prove that error from the trial court's violation of Sanchez's constitutional right to due process and to be presumed innocent was harmless beyond a reasonable doubt.

The State had no forensic or scientific evidence whatsoever to connect Sanchez to the crime, even though, given the nature of the homicide and the likely position of the shooter, it would have been very, very likely that biological evidence would be on the shooter's clothes. Trial RP 2319-24, 2476. To convict Sanchez, therefore, the jury had to credit the testimony of a disreputable criminal who negotiated a deal for thirty years in lieu of the death penalty, and find beyond a reasonable doubt that Kublic's tainted identification of Sanchez was reliable.

Holding the trial in the jail conveyed the State's belief that Sanchez was guilty and dangerous, fatally infecting the fairness of the trial proceedings and tipping the balance in this close case. The error requires reversal of Sanchez's convictions and remand for a new trial.

6. IN VIOLATION OF ARTICLE I, SECTION 7, THE TRIAL COURT ERRED IN DENYING SANCHEZ'S CRR 3.6 MOTION TO SUPPRESS EVIDENCE OBTAINED AFTER HIS ARREST BASED ON ANONYMOUS INFORMANTS' TIPS.

a. Sanchez moved to suppress evidence obtained from his unlawful arrest. Counts one through six were severed from count seven and count seven, the UPFA charge, tried separately to the bench after the verdicts on counts one through six. Trial RP 2744-59. Prior to the bench trial, Sanchez moved to suppress a nine millimeter handgun that was the subject of the charge as a fruit of his unlawful arrest. CP 35-37; Trial RP 2749-51.

The police based Sanchez's arrest on tips from two anonymous callers. The first caller told Yakima detective Jim Castillo that Sanchez had shot Ricky Causor and that he drove a blue truck. Trial RP 1297-98. The caller said Sanchez was at 303 South Ninth Street and getting ready to leave for Wenatchee in a Lincoln Continental. Trial RP 1297. Another officer, Sam Masters, also took an anonymous call from a woman who

said “Jose Sanchez” was involved in the homicide. Trial RP 1332, 1334, 1336.

Bardwell went to the Ninth Street house and saw a blue pickup truck and a Lincoln Continental. Trial RP 1298. Two individuals were seen transferring items from the Continental to a Toyota Celica, which soon departed. He provided this information to his detective sergeant, Tim Bardwell, who arranged for additional officers to monitor and follow the car. Trial RP 1355-56. These officers stopped the Celica using their lights and sirens, handcuffed both occupants, and took them into custody. Trial RP 1394-97, 1406. Sanchez, the passenger, was transported to the police station and placed in a holding cell. Trial RP 1408-09.

While conceding that the police may have had sufficient information to conduct an investigatory stop, Sanchez argued the informants’ tips did not support probable cause to arrest. Trial RP 2750-51. The court denied the motion to suppress and issued terse written findings and conclusions explaining its ruling. CP 21-23.

b. Under article I, section 7, where an arrest is based on an anonymous informant’s tip, the State must establish that the informant is credible and possesses a basis of knowledge to support the tip.

Warrantless searches and seizures are condemned under both the Fourth

Amendment⁵¹ of the federal constitution and article I, section 7⁵² of the Washington constitution. Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Because article I, section 7 provides broader protection than the Fourth Amendment, courts in this state apply this provision in lieu of its laxer federal counterpart. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008).

Under article I, section 7, the warrant requirement is especially important as it is the warrant which provides the “authority of law” referenced therein. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Accordingly, any exceptions to the warrant requirement must be narrowly drawn and sparingly applied. Hendrickson, 129 Wn.2d at 71. “Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search.” Setterstrom, 163 Wn.2d at 626 (citing State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994)).

In view of the state constitution’s greater protections to citizens, where probable cause is based on an informant’s tip, the Washington

⁵¹ The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . .” U.S. Const. amend. 4.

⁵² Article I, section 7 of the Washington Constitution provides, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Supreme Court diverged from the federal “totality of the circumstances” test in favor of the two-pronged Aguilar-Spinelli test.⁵³ State v. Jackson, 102 Wn.2d 432, 443-44, 688 P.2d 136 (1984). Under this standard, a probable cause determination is invalid unless the State establishes both the informant’s basis of knowledge and the informant’s credibility. Id. at 437. These two prongs are analytically severable and each ensures the validity of the information. Id.

i. Sanchez was arrested. Although the State briefly tried to argue below that Sanchez was only detained, not arrested, the trial court found that Sanchez “was ordered out of the car and placed in custody.” CP 22 (Finding of Fact 4). This finding was appropriate: it cannot reasonably be disputed that having been ordered out of the car at gunpoint, handcuffed, placed in the back of a patrol car, and transported to the police station, Sanchez had been arrested. Cf., State v. Belieu, 112 Wn.2d 587, 598-99, 773 P.2d 46 (1989). The court further found that this arrest was predicated on the informants’ tips, and that only after Sanchez was taken into custody, “officers learned from the residences [sic] that Mr. Sanchez was involved in the murder.” CP 23 (Conclusion of Law 3).

⁵³ See Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

ii. The State presented no evidence to establish the informants' reliability or basis of knowledge; therefore, Sanchez's arrest was unlawful. Because Sanchez had been arrested, the State had to show that the informants' tips satisfied both prongs of the Aguilar-Spinelli test. This the State did not do.

Nor could the State meet this burden. The tips came from anonymous callers, thus there simply was no basis to satisfy the "veracity" prong. See Jackson, 102 Wn.2d at 437 (noting that this prong can be satisfied by evaluating the informant's "track record" or by showing the accusation was against the informant's penal interest). The anonymous caller who contacted Castillo was unwilling to provide a name, and Castillo could not even be sure of the caller's gender. Trial RP 1296. Masters did not bother to ask the woman who called him to identify herself. Trial RP 1334.

And none of the officers troubled themselves to ascertain the callers' basis of knowledge. Contrary to the State's assertions below, this prong is not established if the informant accurately describes collateral details. "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, Jackson, 102 Wn.2d at 438 ("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.”). Rather, there must be circumstances suggesting that the informant obtained the information in a reliable fashion. Jackson, 102 Wn.2d at 437; State v. Vandover, 63 Wn. App. 754, 822 P.2d 784 (1992).

The fact that further investigation confirmed that the informants’ allegations may not have been wholly unfounded is completely beside the point. “A seizure is not justified by what a subsequent search discloses.” Lesnick, 84 Wn.2d at 944 (citing Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)).⁵⁴ To the extent that the trial court’s conclusions surmised that there was a post-hoc justification for the arrest, the trial court was incorrect.

Nor was the State somehow excused from establishing the Aguilar-Spinelli factors based on the nature of the crime being investigated. “[D]anger posed to the public is a factor which may make an investigatory stop reasonable under the circumstances where there are already indications that the informant’s tip was reliable.” Vandover, 63 Wn. App.

⁵⁴ The State contended that the police initially detained Sanchez and arrested him only after obtaining additional information from the people in the Ninth Street residence, but the record does not support this contention, and the trial court properly did not make this finding. Trial RP 1359-77 (testimony of Bardwell); CP 22-23.

at 760 (emphasis added).⁵⁵ Here, Sanchez was not merely detained, he was arrested without any indications that the informant's tips were reliable.

c. The evidence obtained as a result of Sanchez's unlawful arrest should have been suppressed. In light of the State's failure to show that the officers had probable cause to arrest Sanchez under Jackson, the evidence obtained as a result of the arrest should have been suppressed. "The important place of the right to privacy in Const. art. I, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982). This Court should reverse the trial court's decision and remand with the direction that evidence obtained as a consequence of Sanchez's arrest be suppressed.

7. SUBSTITUTE COUNSEL DENIED SANCHEZ THE EFFECTIVE ASSISTANCE HE WAS ENTITLED BY THE SIXTH AMENDMENT WHEN COUNSEL FAILED TO LITIGATE THE MOTION TO SUPPRESS EVIDENCE PRIOR TO TRIAL ON COUNTS 1-6.

a. An accused person has the Sixth Amendment right to the effective assistance of counsel. The state and federal constitutions

⁵⁵ Below, the State argued that State v. Randall, 73 Wn. App. 225, 868 P.2d 207 (1994), supported the officers acting quickly to detain a suspect based on a tip involving an alleged violent offense. Trial RP 2753-55. Randall is not on point, as this case involves not an investigatory detention, but a full-blown arrest.

guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. 6; Const. art. 1, §§ 3, 22; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984). To obtain relief based on ineffective assistance of counsel, an accused person must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

The Strickland test was adopted in Washington to "ensure a fair and impartial trial." State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing Thomas, 109 Wn.2d at 225). To establish the first prong of the Strickland test, an accused must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 229-30. If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Id. at 229-30. However, "tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. Wiggins v. Smith, 539 U.S. at 524.

b. The failure to litigate the motion to suppress evidence prior to the trial on Counts 1-6 was deficient performance for which no legitimate strategic or tactical justification could have existed. Although substitute counsel moved to suppress evidence obtained as a result of Sanchez's arrest, counsel did not bring this motion prior to the trial on the first six counts, and instead delayed the motion until after he was convicted of these counts. Counsel did not litigate the suppression issue before the trial on the first six counts even though these were the most serious charges against Sanchez, and even though counsel vigorously fought the admission of evidence derived from Sanchez's arrest at this trial. CP 203-04; 10/23/07 RP 128-29, 136.

Specifically, counsel sought to prohibit the State from introducing evidence of the nine millimeter handgun recovered from the car in which Sanchez was arrested, and moved to exclude a videotape and testimony establishing that when Sanchez was placed in the holding cell at the police precinct, he tried to eat money that was in his pocket. Id. Counsel even moved for a new trial based in part on the admission of this evidence. CP 983-86, 991-92, 995-96; Trial RP 2759-61, 2765-66, 2786-89. But, had counsel brought a motion to suppress before trial and prevailed, this highly prejudicial evidence would have been excluded. Counsel therefore

rendered deficient performance, in violation of Sanchez's Sixth Amendment right to counsel.

Further, there is no conceivable tactical justification that could have justified this omission. As noted, counsel did not want the jury that would be deciding whether Sanchez had committed aggravated murder to hear about the nine millimeter handgun or Sanchez's conduct at the jail. But both of these pieces of evidence unquestionably were fruits of Sanchez's unlawful arrest. If an initial seizure is unreasonable and therefore unlawful, the after-acquired evidence must be suppressed as "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Kennedy, 107 Wn.2d, 1, 4, 726 P.2d 445 (1986). Thus, there cannot have been any legitimate strategy that could have excused counsel from bringing the motion prior to the first trial. This Court should conclude that counsel's failure to move to suppress the evidence before the trial on the charges that resulted in Sanchez's life imprisonment was deficient performance.

c. Counsel's deficient performance prejudiced Sanchez.

The second prong of the Strickland test requires the defendant to show prejudice from his lawyer's deficient performance. 466 U.S. at 693-94. Although it is not enough for an accused to establish merely that "the errors had some conceivable effect on the outcome of the proceeding," he

is not required to “show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. at 693. To prove prejudice, an accused must demonstrate only that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” with a reasonable probability defined as “a probability sufficient to undermine confidence in the outcome.” Id. at 694.

Sanchez was prejudiced by his lawyers’ errors. It is of no moment that the court below denied the motion to suppress evidence, as the reviewing court considers not what actually occurred with deficient counsel, but what would have been the result but for counsel’s unprofessional errors. Strickland, 466 U.S. at 694.

At a motion to suppress evidence, the State has the burden of proving that the evidence was lawfully obtained from the accused. State v. Leach, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989); State v. Cruz, 88 Wn. App. 905, 906, 946 P.2d 1229 (1997). Here, the State was evidently content with the sufficiency of the evidence regarding the circumstances of Sanchez’s arrest that was adduced at trial. The State chose not to call law enforcement witnesses at the suppression hearing, although it clearly

could have done so.⁵⁶ Thus this Court must consider the existing record and the trial court's findings and conclusions based on this record in determining whether the motion to suppress should have been granted.

As argued supra, the trial court wrongly determined that there was probable cause to arrest Sanchez based on the informants' tips. This Court should conclude that there is a reasonable probability that but for counsel's unprofessional error, the outcome would have been different.

d. The constitutional error requires reversal of Sanchez's convictions. This Court should further conclude that the denial of the right to the effective assistance of counsel requires reversal of Sanchez's convictions on all seven counts. The State relied heavily on the evidence of the nine millimeter handgun and Sanchez's post-arrest conduct to try to connect him to the charged crimes. See Trial RP 2637, 2642, 2645, 2712. The State claimed the nine millimeter gun corroborated its theory that Sanchez had the .45 used to shoot Causor on the day the crime was committed and that Sanchez tried to eat the money in the jail holding cell because he was worried it might connect him to Causor. Id.

As has been emphasized, the State had no tangible evidence to link Sanchez to the murders, and there were significant reasons to question the

⁵⁶ The State recalled Kristen Drury to testify regarding her efforts to obtain fingerprints from the nine millimeter handgun.

testimony of the State's two key witnesses. Any evidence tending to corroborate the State's allegations, no matter how weak, likely helped to tip the balance in favor of conviction. This Court should conclude that the State cannot overcome the presumption of prejudice from the Sixth Amendment violation, and grant Sanchez a new trial on counts one through six at which the fruits of his arrest will be excluded. This Court should reverse and dismiss Sanchez's conviction on count seven.

8. THE IRRELEVANT AND PREJUDICIAL EVIDENCE OF THE HANDGUN AND OF SANCHEZ'S POST-ARREST CONDUCT SHOULD HAVE BEEN EXCLUDED FROM SANCHEZ'S TRIAL ON COUNTS 1-6 UNDER ER 403 AND ER 404(b) AND SANCHEZ'S DUE PROCESS RIGHT TO A FAIR TRIAL.

a. Sanchez moved to exclude the irrelevant and prejudicial evidence of the nine millimeter handgun and his post-arrest conduct. Prior to trial on counts 1-6, Sanchez asked the court to exclude any reference to the nine millimeter handgun or that he was eating money at the jail. 10/23/07 RP 128-29. Sanchez noted that the nine millimeter handgun was recovered from inside the vehicle where Sanchez was arrested, not his person, and there was no evidence – fingerprint or otherwise – to connect him to that gun. 10/23/07 RP 141-42. It also was not connected in any way to the charged crimes. 10/23/07 RP 136.

The evidence of Sanchez eating money at the jail was even more attenuated. There was no indication that Sanchez knew why he had been arrested. Further, although there supposedly was blood on some of the bills, the blood did not match anyone connected to the charged crimes. 10/23/07 RP 131, 134. The State claimed the evidence was probative of consciousness of guilt, and the court admitted it for that purpose. 10/23/07 RP 133-35.

b. The evidence should have been excluded under ER 404(b). Other acts evidence is admissible under ER 404(b)⁵⁷ only if it is offered for some purpose other than to prove the defendant's propensity to commit the charged crime and is relevant for that purpose. Therefore, before a trial court may admit evidence of other crimes or misconduct, it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to prove an essential ingredient of the crime charged; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice.

⁵⁷ ER 404(b) provides, **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); ER 403. Any doubt regarding admissibility must be resolved in favor of the defendant. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). An error in the admission of other acts evidence is reviewed for an abuse of discretion. Thang, 145 Wn.2d at 642.

i. The evidence of the firearm was highly prejudicial and minimally relevant, and should have been excluded.

“Evidence of weapons is highly prejudicial, and courts have “uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.” State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001).

The State advanced a few theories in support of its claim that the gun should be admitted. The State asserted that the nine millimeter handgun would corroborate anticipated testimony that (1) Sanchez owned two guns; (2) Sanchez always carried a handgun; and (3) Sanchez left the .45 at the Ninth Street house for the protection of the people who lived there. 10/23/07 RP 141-42. The first of these two claims are only relevant to prove propensity, and thus support exclusion of the gun.

The third claim could be proved without the admission of prejudicial evidence. And in fact Roberta “Christina” Carrillo testified

that on the night of the shooting, Orozco left with Marmelejo carrying the .45, and that the next morning Sanchez came home and gave her the .45 because Luz Carrillo and Albert Vasquez were afraid to be in the house alone. Trial RP 1641, 1662. She said she put the gun under her pillow and that later she gave it to her mother and Vasquez for safekeeping. Trial RP 1641-42.

Given this testimony and the testimony of other witnesses who said the .45 was Sanchez's gun, the sole significance of the evidence was to prove propensity. In State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980), a case similar to this one, the State was unable to find the knife alleged to be a murder weapon. 26 Wn. App. at 83. The defendant was arrested in his car, and subsequent to his arrest police found a knife in his car. Id. Not only was there no indication that the knife was connected in any way to the crime, the prosecutor admitted he knew there was no connection. Id. The court concluded admission of the knife evidence was error: "The testimony about this knife was thus of highly questionable relevance as it tended to impugn defendant's character or suggest the propensity for using knives as a 'weapon,' which is how the officer described the item." Id. at 84. The court found the evidence should have been excluded, but ultimately reversed the conviction on other grounds. Id. Likewise, in Freeburg, that the gun in question was not the gun used in

the underlying offense and did not by itself tend to be probative of a material fact were significant factors in the court's determination that the trial court's evidentiary ruling was incorrect. Freeburg, 105 Wn. App. at 500-01.

The federal courts as well agree that the erroneous admission of weapons evidence where it is chiefly relevant to prove propensity may be reversible error. In United States v. Thomas, 321 F.3d 627 (7th Cir. 2003), the Court found that the admission of a photograph of the defendant's tattoo depicting two crossed guns was improper. Id. at 631. The court determined that the lower court's reasons for admitting the photograph, as well as the reasons proffered by the government, "all circle back to one basic proposition – because Thomas tattooed a pair of revolvers on his forearm, he is the kind of person who is likely to possess guns." Id. The court concluded that even though the district court issued a limiting instruction, the admission of this evidence, combined with evidence of two prior convictions for gun possession, prejudiced Thomas's right to a fair trial, and reversed the conviction. Id. at 637.

The extreme prejudicial effect of the gun evidence here cannot be overstated. Many people view guns with "great abhorrence and fear." State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). It was no secret at trial that Sanchez, like most of the civilian witnesses who testified, both

used and sold drugs. Trial RP 1539, 1544, 1567, 1595, 1644, 1652, 1672-73. Thus, the fact that Sanchez possessed guns was likely to alienate jurors who “react solely to the fact that someone who has committed a crime has such weapons.” Rupe, 101 Wn.2d at 708. The evidence should have been excluded.

ii. The court should have barred the State from introducing evidence of Sanchez’s post-arrest conduct where the State could not prove any connection to the charged offense, and the evidence was unduly prejudicial. This Court should similarly conclude that the trial court erred in admitting evidence that Sanchez was observed eating money at the jail. Sanchez was arrested three days after the Causor homicides. 10/23/07 RP 134. Although there was blood on the money, forensic evidence established the blood was not connected to any of the victims of the charged crime. 10/23/07 RP 134. Thus, absent any showing that Sanchez knew why he was being arrested, the theory under which the State contended the evidence should be admitted falls apart. At best, rather than establishing Sanchez’s consciousness of guilt of the charged crime, the evidence tended to prove his consciousness of guilt of another crime. As such, the evidence was highly prejudicial while bearing no relevance to the elements the State had to prove. Thang, 145 Wn.2d at 642.

And indeed, the State urged this improper inference. Sanchez established the money had been recovered and sent to the crime laboratory for testing, but that the State learned nothing of evidentiary value from this testing. Trial RP 1908. On redirect, the State elicited testimony that there was human DNA on the money, but that it was not matched to any victim. Id.

In a similar context in Freeburg, the court endorsed a strict test for the admission of evidence under the theory that it proves consciousness of guilt:

the probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Freeburg, 105 Wn. App. at 498 (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)). All four inferences must be present in order for the evidence to be admissible. Myers, 55 F.2d at 1050.

Applying this test here, all of the necessary inferences required to establish a nexus were absent.⁵⁸ First, the State could not prove Sanchez's

⁵⁸ The State certainly could not point to flight to prove consciousness of guilt because Jose Sanchez was the one suspect who did not flee after the Causor shooting. By contrast, both Mario Mendez and Manuel "Puppet" Sanchez

behavior was intended to conceal evidence, rather gain attention.⁵⁹

Second, because the State did not prove Sanchez knew why he had been arrested, the State could not show that he ate money because he was conscious of guilt with respect to the Causor homicides.⁶⁰ Third, and most importantly, the State could not show a nexus between consciousness of guilt and consciousness of guilt concerning the charged crime.⁶¹ Fourth, because there was no proof that the money had anything to do with the homicides, the act was not probative of guilt of the charged crime. The evidence should have been excluded.

c. The error requires reversal of Sanchez's convictions.

The erroneous admission of highly prejudicial evidence may deny an accused person his due process right to a fundamentally fair trial. Dudley v. Duckworth, 854 F.2d 967, 970 (7th Cir. 1988); see also, Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). As argued in argument 7(d), the admission of evidence concerning the nine

immediately fled not only the jurisdiction but the country. Trial RP 1719, 2168-69.

⁵⁹ Sanchez argued below that he knew the video camera was in the holding cell and he was trying to get the guards' attention because he wanted to eat. 10/23/07 RP 130.

⁶⁰ Even if Sanchez knew he was being arrested for the Causor homicides, absent evidence connecting the money to these crimes, the necessary inference that he intended to conceal evidence related to this crime is absent.

⁶¹ In this respect, Myers is instructive. In Myers, the court noted that the defendant was believed to have committed another crime. For this reason, the flight evidence was at least as probative of consciousness of guilt of the other offense, and should have been excluded. 550 F.2d at 1050.

millimeter handgun and Sanchez's post-arrest conduct cannot be proven harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24.

The same result is required even under the more lenient standard of review of an evidentiary error. Under this standard, an error in the admission of evidence merits reversal if there is a reasonable probability that the error affected the jury's verdict. State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002).

This Court should find it was reasonably likely that the error affected the verdict. Both pieces of evidence pointed toward the same conclusion: that Sanchez was violently inclined, and that he may have committed other, similar crimes. Given the extreme prejudicial effect of such evidence on a close case like this one, it is reasonably probable that the erroneous evidentiary ruling affected the jury's verdict. Sanchez is entitled to a new trial.

9. THE TRIAL COURT VIOLATED JOSE SANCHEZ'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT BARRED HIM FROM PRESENTING OR ARGUING EVIDENCE THAT MANUEL SANCHEZ WAS A "JACKER" AND THAT THE POLICE DID NOT INVESTIGATE A BLUE TRUCK SIMILAR TO THAT USED IN THE CHARGED CRIME OWNED BY RAMON MARMALEJO.

a. The trial court barred Sanchez from introducing evidence that was central to his theory of mistaken identity. During the testimony of Carlos Orozco, Orozco indicated he knew many of the people who hung around the house on Ninth Street quite well. Trial RP 1539, 1596. Orozco indicated that Manuel Sanchez came by all the time and consumed a lot of methamphetamine at the Ninth Street house. Trial RP 1596-97. Manuel Sanchez was present for the discussions about "jacking" Causor. Trial RP 1549. Orozco agreed that Manuel Sanchez's "main thing was jacking people." Trial RP 1596. He agreed that by this he meant Manuel Sanchez robbed people to get money for his methamphetamine. Id.

The State did not object to this testimony. However, at the conclusion of Orozco's testimony, the State complained that it should be able to inquire whether Manuel Sanchez "jacked" people with Jose Sanchez. Trial RP 1614-15. Sanchez disputed that this was true and denied that he opened the door to this line of inquiry. Id. The court

disagreed with the State, but invited, “I was sort of anticipating there might be an objection about the relevance of what Manuel Sanchez’s avocations were.” Trial RP 1616-17.

Following this prompt, the State objected to relevance and asked the court to instruct the jury to disregard the testimony and to bar the defense from arguing it in closing. Trial RP 1617. The court asked Sanchez why the evidence was relevant. Sanchez explained,

It’s relevant because we have a theory of our case. We’re allowed to explore the theory of our case. The theory of our case is that the person that was essentially depicted by a composite by Michelle Kublic is a person by the name of Manuel Sanchez.

Trial RP 1618. Sanchez noted that this, coupled with the fact that Manuel Sanchez was at the Ninth Street house when the robbery was discussed, made evidence that Manuel Sanchez was known to rob people to support his methamphetamine habit relevant. Trial RP 1618-19. The court ruled the evidence was irrelevant and gave the following admonishment to the jury:

Members of the jury, testimony has been elicited through the last witness, Carlos Orozco, that a person named Manuel Sanchez was a jacker. You are to disregard any reference to Manuel Sanchez as being a jacker and do not consider that testimony for purposes of your ultimate deliberations.

Trial RP 1619-20.

The court also barred the defense from eliciting information that in February 2005, Ramon Marmalejo had a blue pickup truck similar to the truck alleged to have been used in the crime, which the police did not investigate, and which would have challenged the State's theory that Junior Sanchez's blue truck was the vehicle involved. Trial RP 2181-89.

b. Exclusion of the evidence violated Sanchez's Sixth and Fourteenth Amendment right to present a defense. An accused is assured the right to fairly defend against the State's accusations. Chambers v. Mississippi, 410 U.S. at 294. The right to present a complete defense is protected by the Sixth and Fourteenth Amendments of the United States Constitution. U.S. Const. amends. 6, 14; Const. art I, §§ 3, 22; Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Maupin, 128 Wn.2d at 924 (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

Mindful of this right, where the defense seeks to introduce evidence that another person may have committed the crime, Washington courts have excluded the evidence only where there is no connection between the other suspect and the crime. Maupin, 128 Wn.2d at 924-25

(discussing State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932)). Thus, the courts have excluded other suspect evidence that speculated only about opportunity, or only about motive, without other tangible facts to connect the person to the crime. See Maupin, 128 Wn.2d at 924-26 (and cases cited therein).

This case is very different, however. Here, multiple facts not only connected Manuel Sanchez to the Causor homicides, but strongly indicated that he, and not Jose Sanchez, was the shooter. The circumstantial evidence against Manuel Sanchez included: (1) Manuel Sanchez participated in discussions about “jacking” Ricky Causor at the Ninth Street house; (2) Manuel Sanchez matched the description of the shooter provided by Kublic and resembled the composite image she generated through the FACES program; (3) Manuel Sanchez fled Yakima to Mexico after the shooting because he knew that police were looking for him; (4) Manuel Sanchez’s whereabouts were unknown from the time he fled until the trial; and, importantly, (5) Manuel Sanchez was a methamphetamine addict who supported his habit by robbing people. Trial RP 1551, 1596, 1607, 1611, 1656, 2168-69.

Similarly, the evidence of Marmalejo’s blue truck countered a key aspect of the State’s case: the claim that Sanchez’s blue truck (which suffered from such major mechanical problems as to render it nearly

impossible to drive, and had been outfitted with “glass packs” that magnified the noise of the engine, Trial RP 2200-2267, 2363-66) was the truck used in the commission of the crime.

Unlike the examples discussed and distinguished in Maupin, therefore, the evidence here was not “speculative,” but was powerful evidence directly relevant to the truth of the State’s allegations. See ER 401;⁶² ER 402 (“All relevant evidence is admissible...”).

Relevancy is a low bar. “Even minimally relevant evidence is admissible.” State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Moreover, where an accused person’s right to present a defense is at stake, the court must be very careful not to exclude even minimally relevant evidence.

Where the right to a defense is implicated, the court must apply a three-part test to determine if the evidence may be excluded.

First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State’s interest to exclude prejudicial evidence must be balanced against the defendant’s need for the information sought, and only if the State’s interest outweighs the defendant’s need can otherwise relevant information be withheld.

⁶² ER 401 states, “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Darden, 145 Wn.2d at 622 (citing State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)).

The court here did not apply or even consider these factors before sustaining the State's untimely objection and barring Sanchez from introducing evidence about the truck. The court excluded evidence that was central to Sanchez's theory of the case even after ruling that the conspicuous problems with the State's nexus for the other acts evidence under ER 404(b) were "issues for the trier of fact to decide." 10/23/07 RP 135. This Court should conclude that the trial court's ruling violated Sanchez's state and federal constitutional right to present a defense.

c. The constitutional error requires reversal of Sanchez's convictions. This Court should also conclude that the exclusion of this evidence was harmful beyond a reasonable doubt. That Manuel Sanchez was a known "jacker" easily could have been the evidence that persuaded the jury to acquit. Likewise, given Ramon Marmalejo's connection to the crimes and to the people at the Ninth Street house, the jury should have been permitted to consider whether his truck was used to commit the crimes. This Court should conclude the constitutional error prejudiced Sanchez.

10. CUMULATIVE ERROR DENIED SANCHEZ THE RIGHT TO A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. 14; Const. art. I, § 3; Williams v. Taylor, 436 U.S. at 396-98 (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); Coe, 101 Wn.2d at 789. The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the errors set forth above standing alone merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

Sanchez was denied the right to proceed with counsel he trusted who had devoted substantial effort to his defense, and was barred from

discussions regarding the appointment of new counsel. The powerful impact of Kublic's unreliable identification of Sanchez as the person who shot Causor was doubtless compounded by the admission of the irrelevant nine millimeter handgun and inflammatory video of Sanchez trying to eat money in the holding cell. The jury never heard evidence that was integral to the defense theory of mistaken identity. All of this must be viewed in light of the fact that every day of this long trial, the jurors were reminded that the State believed Sanchez was too dangerous to be tried in the courthouse and instead had to stand trial in the jail.

Even if this Court does not find that any single error merits reversal, therefore, this Court should conclude that cumulative error rendered Sanchez's trial fundamentally unfair.

F. CONCLUSION

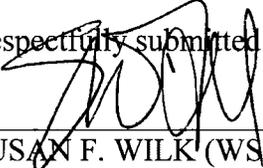
For the foregoing reasons, this Court should reverse and dismiss Sanchez's conviction on count seven. Counts one through six must be reversed and remanded for a new trial.

On remand, this Court should require the reappointment of counsel Witchley and Walsh. This Court should exclude Kublic's unreliable identification. This Court should order that the nine millimeter handgun and Sanchez's post-arrest conduct be excluded for a violation of Sanchez's rights under article I, section 7 of the Washington Constitution. This

Court should permit Sanchez to introduce evidence that Manuel Sanchez was a “jacker” and that Ramon Marmalejo had a blue pickup truck that the police did not investigate. Finally, this Court should order that Sanchez’s retrial occur in the county courthouse, not the county jail.

DATED this 21st day of January, 2009.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant Jose Luis Sanchez

State v. Jose Luis Sanchez, Jr., No. 26816-1-III

Appendix A

Order on Motion for Sanctions

25

FILED

2006 DEC 1 AM 11 11

KIM H. EATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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

State of Washington,

Plaintiff,

NO. 05-1-00459-8 ✓
05-1-00507-1

vs.

ORDER ON MOTION FOR SANCTIONS

Jose Luis Sanchez and
Mario Gil Mendez

Defendants

Facts Relevant to the Motion for Sanctions

Defendants Mario Gil Mendez and Jose Luis Sanchez were charged as co-defendants by information with the crime of aggravated first degree murder (2 counts) and other crimes on February 28, 2005. Sanchez had been arrested a few days earlier. Mendez absconded from Yakima County and was apprehended in California on October 22, 2005, while trying to enter the U.S. from Mexico. He was arrested on a warrant from Yakima County involving the above stated charges.

Sanchez had counsel appointed for him by the Yakima County Department of Assigned Counsel (DAC), first on an interim basis pending appointment of death penalty qualified counsel and subsequently on April 25, 2005 by the appointment of attorneys Jackie Walsh and Steven Witchley pursuant to SPRC 2. Walsh and Witchley are being compensated for their services under an order appointing them at public

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K2

1 expense. Upon being apprehended in California, Mendez was held in the Metropolitan
2 Correction Center in San Diego. He was appointed counsel, Norma Aguilar, in
3 connection with a federal charge of illegal immigration. He also was visited by the
4 Mexican Consulate's representatives. Both Aguilar and the consulate representatives
5 told him not to discuss his pending criminal matters in Yakima County with anyone
6 except his attorney who represented him in the murder case.

7 The Director of the DAC, L. Daniel Fessler, learned on or about October 25,
8 2005, that Mendez had been arrested in California. Fessler began the process of
9 inquiring about the availability of counsel qualified under SPRC 2 to represent him if
10 court appointed counsel were needed. Fessler had learned that Yakima police were in
11 route to San Diego to try and talk with Mendez. As part of the screening process for
12 qualified counsel, Fessler spoke with attorney Todd Maybrown of Seattle. Fessler
13 learned from Maybrown that Walsh and Witchley were thinking of traveling to San
14 Diego to speak with Mendez before he was returned to Yakima County for his court
15 appearance. Mr. Maybrown said he was interested in representing Mendez, but that
16 arrangements for the terms of his appointment would have to be worked out first. Also
17 during this same time frame of October 25 to early November, attorney Cassandra
18 Stamm was in contact with Maybrown about representing Mendez. She also had
19 contact with Sanchez counsel about their desire to interview Mendez in California.
20 Stamm told Walsh and Witchley that she did not want them to interview Mendez.
21

22 Meanwhile, Fessler was urged by Maybrown to file a notice of appearance on
23 Mendez' behalf to preclude both police and Walsh and Witchley from speaking with
24 Mendez about the case. Fessler decided not to do so because he did not know if
25

1 Mendez already had counsel or was going to retain counsel and there was no
2 practical way of ascertaining it without talking to him. Further, DAC was technically
3 disqualified from representation since lawyers within DAC had previously represented
4 some of the victims in this case and since Fessler personally had had some contact
5 with Sanchez during the appointment process for him. Also, an attorney contracted
6 with DAC had appeared for Sanchez until death penalty qualified counsel could be
7 located and appear for Sanchez.

8 Then, during this same time frame, Walsh made an unscheduled and
9 unexpected visit to Fessler at his office. Walsh pointedly told Fessler her strong
10 opinion about how inappropriate it would be for Fessler to enter a notice of
11 appearance for Mendez, since he had spoken to Sanchez during the proceedings to
12 appoint counsel for him. It was Fessler's clear impression during this meeting the
13 Walsh was threatening a bar association complaint against him if he did file such a
14 notice of appearance. Fessler asked Walsh if she would agree not to contact Mendez
15 before he was returned to Yakima and Walsh told him she refused to rule it out. In
16 Fessler's words, it was not a "cordial meeting".

17
18 On November 3, 2005, Witchley and his investigator, Larry Freeman, gained
19 entry to the detention center in San Diego where Mendez was being held in
20 connection with the illegal entry matter. They met with Mendez on November 3 and
21 again on November 4, 2005. Freeman took notes while he and Witchley asked
22 Mendez many questions about the murders and other crimes charged in this case.
23 Mendez did not take notes during these discussions. Detailed and comprehensive
24 interview summaries of the interviews on these dates were prepared by Freeman.
25

1 Neither Witchley nor Walsh ever sought the consent of Norma Aguilar to speak to
2 Mendez. There is significant factual dispute and disagreement between Freeman and
3 Mendez' declarations about the substance of these meetings. It is admitted by
4 Mendez in his declaration that by the end of the first meeting on November 3, he knew
5 that Witchley did not represent him but rather represented Sanchez.

6 On November 7, 2005, a Yakima County judge signed an order authorizing
7 "counsel" for Mendez at public expense. On or about November 9, 2005, the illegal
8 immigration charges against Mendez were dismissed and he was transferred to the
9 San Diego County Jail on the Washington arrest warrant. He was subsequently
10 transferred to Yakima County Jail by police. On November 16 Witchley and Freeman
11 visited him in the Yakima County Jail. Witchley and Walsh had not inquired of Fessler
12 if counsel had been appointed for Mendez since his transport to Yakima County.
13 Witchley and Freeman again asked multiple questions of Mendez about the murders
14 and other crimes. Freeman again took notes and an extensive interview summary was
15 made by Freeman.
16

17 On November 17, 2005, Mendez had a first appearance and arraignment in
18 Yakima County Superior Court. On November 18, 2005, a lawyer qualified under
19 SPRC 2 appeared for him.

20 Roberta Cristina Castillo is age 16 and has a child (Dianay) together with
21 defendant Jose Sanchez. She has a younger sister, Adriana Castillo and a younger
22 brother, Ramiro Castillo, Jr.

23 In December, 2005, the 3 Castillo children and the baby, Dianay, were flown
24 out of the State of Washington to Stockton, California, to live with their father, Ramiro
25

1 Castillo, Sr. At least two of the children apparently have relevant and material
2 information about the crimes in this case. According to the San Joaquin County
3 District Attorney's office, Ramiro Castillo, Sr. has sole physical custody of all three
4 children, however at the time they left Washington State they were living with their
5 mother, Luz Carrillo, on 9th Street in Yakima.

6 The evidence in the record is that the airplane tickets for the children to leave
7 Yakima and fly to Stockton, CA were paid for, in whole or in part, by Witchley and
8 Walsh. There is evidence in the record that Witchley and Walsh did not ask to be
9 reimbursed for the tickets they purchased. There is evidence in the record that the
10 Castillo children remain in close contact with Walsh and Witchley and that they have
11 purchased food for them and let them use their cell phones. There is evidence in the
12 record that Witchley and Walsh led Ramiro Castillo, Sr. to believe they worked for the
13 state or a welfare department.
14

15 In early January, 2006, Detectives Kellett and Mendoza of the Yakima Police
16 Department flew to try and locate the Castillo children and their father, Ramiro, Sr. in
17 Stockton. They were successful and obtained statements from Ramiro, Jr., Adriana,
18 and Roberta Cristina about what they knew of the crimes. There is evidence in the
19 record that Ramiro, Jr. and Roberta Cristina are currently living in Yakima.

20 In September, 2006, counsel for Mendez filed a Motion for Sanctions against
21 Walsh and Witchley, asking the Court to impose sanctions for the Sanchez' attorneys
22 alleged violations of the Rules of Professional Conduct in contacting Mendez without
23 counsel present and in assisting and arranging for the Carrillo children to leave the
24 state despite being material witnesses. During the briefing schedule established by
25

1 the Court, the State advised that the State may be investigating criminal charges
2 against Walsh and Witchley for, among other things, witness tampering and
3 intimidating a public servant.

4 On August 11, 2006 and October 27, 2006, the Yakima County Prosecuting
5 Attorney advised counsel for Mendez and Sanchez, respectively, that he had decided
6 not to file a death penalty notice in either case under RCW 10.95.040.

7 The Court convened a hearing on November 17, 2006, for purposes of hearing
8 arguments related to both the State's and Mendez' motion to compel production of the
9 notes and witness summaries compiled by the Sanchez attorneys/ investigator in
10 contacting Mendez before he was appointed counsel. These motions were granted
11 subject to an *in camera* inspection by the Court to ascertain if any work product
12 privilege attaches to the notes or summaries. The Court has now determined that no
13 work product or other privileges apply to the Mendez witness summaries and that, at a
14 minimum, those summaries must be produced to the Mendez attorneys and possibly
15 to the State.
16

17 Additionally, the Court heard arguments in connection with the Motion for
18 Sanctions filed by Mendez. Mendez seeks sanctions against Walsh and Witchley up
19 to and including disqualification as Sanchez' counsel. Walsh and Witchley declined to
20 file any declarations under penalty of perjury or under oath for purposes of the
21 hearing, but did allow the Court extensive latitude in asking questions about their
22 alleged actions in connections with the Motion for Sanctions.

23 Additionally, the State has raised an issue about whether it would be
24 investigating Walsh and Witchley for charges of Tampering with a Witness, RCW
25

1 9A.72.120 and/or Intimidation of a Public Servant, RCW 9A.76.180. In the event the
2 Court does not disqualify Walsh and Witchley, the State urges that the Court inquire of
3 Sanchez about his understanding of a conflict of interest between himself and Walsh
4 and Witchley and whether he will voluntarily waive such conflict of interest.

5 Numerous issues arise in connection with the Motion for Sanctions. The Court
6 will generally address the issues in connection with the interviews with Mendez and
7 then generally address the issues in connection with the contacts by Walsh and
8 Witchley with the Carrillo children.

9
10 Sanchez Attorneys Engaged in *Ex Parte* Contact with Mendez

11 Sanchez does not deny that Witchley and Freeman interviewed Mendez on
12 three (3) separate occasions after Mendez was arrested in California. Sanchez does
13 not deny that at a number of points throughout the first meeting, Mendez stated that
14 he would like to talk about the case, but that he wanted to wait to do so until he had
15 his own lawyer.
16

17
18 RPC 4.2

19 Mendez first contends that Walsh and Witchley violated RPC 4.2 by
20 communicating with a person represented by counsel.

21 "... (a) In representing a client, a lawyer shall not communicate about the
22 subject of the representation with a party the lawyer knows to be represented
23 by another lawyer in the matter, unless the lawyer has the consent of the other
24 lawyer or is authorized by law to do so."

24 Mendez contends that Maybrown and Stamm represented Mendez when
25 Witchley and Freeman contacted him. In fact, it is abundantly clear that neither

1 Maybrown nor Stamm ever represented him, met him, ever considered themselves to
2 be his lawyers or gained any confidences or secrets from him material to his defense.

3 Further, when viewed from Mendez' perspective, it cannot be demonstrated that he
4 believed Maybrown and Stamm were his counsel, since in his declaration he
5 professes to believe that both Witchley and Freeman were lawyers and were his
6 lawyers. Thus, Mendez does not possess a "reasonable belief" that Maybrown and
7 Stamm were his attorneys. In re: Egger, 152 Wn.2d 410 (2004), is entirely different on
8 its facts. There, the attorney set up a client file, wrote a letter on behalf of the client
9 and shepherded a loan of \$66,000 for Kirkham (client #2) from client #1.

10 No attorney client relationship ever existed between Maybrown/Stamm and
11 Mendez.

12 Next, Mendez contends that since he was represented by Norma Aguilar on the
13 federal immigration matter, that Witchley and Freeman were precluded from
14 communicating with him about the criminal charges in Washington state. There is no
15 declaration from Aguilar that she gave advice to Mendez about the Washington
16 criminal charges, but Mendez says she told him to remain silent about them. It is not
17 clear that Mendez believed Aguilar represented him in connection with the criminal
18 charges in Washington. In his declaration, on p. 4, Mendez states: "... I was
19 represented by a CJA panel attorney, Norma Aguilar, on my immigration matter illegal
20 entry." Norma Aguilar met with Mendez "once or twice" and was representing him on
21 the immigration matter. She had an existing attorney client relationship with Mendez
22 when Witchley and Freeman contacted Mendez.

23 Freeman (remembering that Witchley did not choose to submit his own
24
25

1 declaration) does not deny that he and Witchley knew about Norma Aguilar when they
2 met with Mendez. Where there is a reasonable basis for an attorney to believe a party
3 may be represented, the attorney's duty is to determine whether the party is in fact
4 represented. In re: Carmick, 146 Wn.2d 582 (2002). Witchley gave unsworn testimony
5 at the November 17 hearing that he did not feel compelled to make inquiry of Aguilar,
6 although Freeman says Mendez was told they did not want to talk with him about his
7 federal charge of Illegal Reentry.

8 Mendez cites the Disciplinary Rules of the ABA Code of Professional
9 Responsibility as support for his assertion that he was represented when contacted by
10 the Sanchez team.

11 "During the course of his representation of a client a lawyer shall not:

- 12 (1) Communicate or cause another to communicate on the subject of
13 the representation with a party he knows to be represented by a
14 lawyer in that matter unless he has the prior consent of the lawyer
15 representing such other party or is authorized by law to do so." DR
16 7-104(A)(1).

17 Here, both the Sanchez team and Mendez indicate that there was no
18 communication with Mendez about the "matter" in which they knew or reasonably
19 should have known Mendez had counsel, i.e. illegal reentry into the U.S. If that is the
20 case, then technically Witchley and Freeman did not violate DR 7-104(A)(1), nor
21 would any other lawyer who contacts someone who is represented by a lawyer on a
22 wholly different matter.

23 However, Mendez urges that the interviews with Sanchez' attorney were
24 prohibited because those contacts touched and concerned subject matter relevant to
25 Norma Aguilar's representation of Mendez. Specifically, information that Mendez

1 might have given to Witchley and Freeman could have a bearing on his criminal
2 history, whether adjudicated or unadjudicated, and could have had an unwelcome
3 impact on any sentence that might have been imposed on Mendez in connection with
4 his federal illegal reentry charge. It is of little comfort to the Court that the federal
5 charge was subsequently dismissed because it is the effort to gain the information in
6 the face of the pending charge that had the potential to affect Aguilar's representation
7 of Mendez.

8 As will be discussed, *infra*, the sanction, if any, that might attend this contact
9 would have to take into account the extent of the actual or potential harm caused by
10 the misconduct. Carmick, *supra*. Since the federal charge was dismissed and since
11 the information gathered by Witchley and Freeman did not apparently affect Mendez'
12 legal situation vis-à-vis the federal charge, the Court on this issue alone, at least,
13 would have to consider if disqualification would be too harsh a sanction.
14

15
16 Walsh's Contact With Fessler

17 Walsh does not dispute the meeting with Fessler in an effort to dissuade him
18 from filing a notice of appearance on behalf of Mendez while Mendez was still in San
19 Diego. Fessler had personally spoken briefly with Sanchez when he was first arrested
20 and had appointed Troy Lee, a contract attorney with DAC, to represent Sanchez on a
21 limited basis while death penalty qualified counsel were found. Technically, Fessler
22 and DAC attorneys would have had a conflict of interest if Fessler had appeared for
23 Mendez, although it is not unethical (and in fact is expected) for Fessler to make
24 contact with a defendant and explain the process of appointment in a case such as
25

1 this. The state of the record is that Walsh did not demand that Fessler appoint no one,
2 but that he should not appoint himself (or by inference other DAC attorneys) to
3 represent Mendez because of the conflict of interest.

4 Additionally, Mendez argues that Walsh's demand of Fessler constitutes a
5 violation of RPC 4.4 which states:

6 In representing a client, a lawyer shall not use means that have no substantial
7 purpose other than to embarrass, delay, or burden a third person, or use methods of
8 obtaining evidence that violate the legal rights of such a person.

9 The Court is not convinced that RPC 4.4 is applicable here. Although Walsh's
10 obvious goal was to deter Fessler from appointing counsel for Mendez before
11 Witchley and Freeman interviewed him, she did not make an inappropriate or
12 burdensome request without a "substantial purpose". She simply made her demand
13 from the point of view of her client and it was still up to Fessler to decide who and on
14 what basis, he would or could appoint as counsel for Mendez. Nothing, for example,
15 would have prevented him from appointing interim counsel for Mendez from his list of
16 contract attorneys, if he could have gotten one of them to agree to appear on this
17 basis.
18

19 Although it is unfortunate that arrangements with death penalty qualified
20 lawyers could not have been made in a more immediate fashion in this case, the
21 Court finds no actual violation of the RPC by Walsh in contacting Fessler and making
22 the demand she made. However, her actions in making her demand known to him
23 likely deterred him and exposed Mendez to the very real possibility that State agents
24 might interrogate him and obtain inculpatory information.
25

RPC 4.3

1 Mendez argues that even if the Court does not find that Mendez was
2 represented in this matter at the time that Witchley and Freeman contacted him, that
3 Witchley did not fulfill his duty under RPC 4.3 to clarify for Mendez what his role in this
4 case is, that he misled Mendez into believing that he and Freeman were disinterested
5 and lied to Mendez in order to obtain inculpatory statements from him or exculpatory
6 statements about Sanchez' role, if any, in the crimes.
7

8 At this point of the analysis, it is impossible for the Court to weigh the
9 competing declarations of Mendez and Freeman. They are contradictory in many
10 material parts. Further, just because Witchley has decided not to give any sworn
11 declaration of his own in connection with the 3 meetings with Sanchez and Freeman,
12 does not mean he is any less a witness to these conversations than they are.
13

14 Sanchez and Mendez have suggested that the Court now allow for an
15 evidentiary hearing to apparently ascertain the truth about the contacts. Apparently
16 the Court would be asked to choose between the dueling declarations of Mendez and
17 Freeman. Perhaps Sanchez would waive his attorney client privilege with Witchley
18 and Witchley, as well, would testify.

19 The Court does not find that this would be useful now. First of all, the Court
20 finds such a hearing would be potentially violative of Mendez's 5th Amendment
21 privilege. Sanchez argues that such privilege has been waived because he submitted
22 a declaration in connection with his meetings with Witchley and Freeman. Yet there is
23 no certainty that Mendez is going to testify at trial or that Mendez's statements given
24 to Witchley and Freeman are going to be used at trial and there is no certainty that
25

1 Freeman would be called to contradict that trial testimony.

2 Secondly, the Court has already ordered the production of the Mendez witness
3 interview summaries to the Mendez lawyers. At least until they have an opportunity to
4 digest the contents of those summaries and Freeman's contemporaneous notes, this
5 firefight ought to be delayed if not dispensed with altogether.

6 Sanchez counsel's actions in seeking and conducting the interviews with
7 Mendez while he was unrepresented in this case are aggressive, unusual and
8 controversial but the Court is reluctant to say that those actions alone are of such a
9 magnitude as to require disqualification as a sanction. Sanchez' attorneys are
10 obligated to represent their client zealously and, for them to stand by knowing Mendez
11 was unrepresented and not attempt to interview him, might very well have subjected
12 them to ineffective assistance arguments either now or on appeal. Both Mendez and
13 Sanchez will have access to the witness interview summaries and contemporaneous
14 notes made by Freeman. This equal access should go a long way towards assuring
15 that each defendant is going to get a fair trial on any issues raised at trial about the
16 method used by Sanchez in obtaining that information.

17
18 In the event that Mendez is called to testify at what is now a consolidated trial,
19 Freeman would likely be called to rebut his testimony. Witchley is also a potential
20 witness in rebuttal of whatever Mendez' trial testimony might be. Additionally,
21 Freeman and Witchley might be called as witnesses by Mendez, though that seems
22 less likely. Essentially, any testimony by Witchley on the subject of the Mendez
23 interviews that he orchestrated will subject Witchley to scrutiny by the jury as to his
24 veracity versus Mendez' veracity. One of the concerns that the Court has is whether
25

1 there would be jury confusion about Witchley's dual role as both advocate and
2 witness. Another concern is how Witchley would avoid commenting on Mendez'
3 credibility as an "unsworn witness" in cross examination or in argument to the jury or
4 as an actual witness if called to testify?

5
6 Carrillo Children as Material Witnesses

7 There is little doubt in the Court's mind that at least Roberta "Christina" Carrillo
8 and Romero Carrillo, Jr., are important, material witnesses in this case. Furthermore,
9 it appears from the police reports that they have evidence that would be adverse to
10 Sanchez.

11 Walsh and Witchley do not deny that they rendered the purported financial
12 assistance to these witnesses. They point out that they did so for "moral" reasons,
13 indicating in argument that the Carrillo children were living in what can only be
14 described as "dangerous conditions" in an unheated, drug infested dwelling with a
15 parent who did not have legal custody of them.

16 Walsh and Witchley also point out that at this time, counsel for Mendez have
17 not attempted to interview the Carrillo children and have no evidence that their
18 testimony has been tainted or in any way affected by the substantial contact that the
19 Sanchez lawyers have had with them. They point out that upon learning from Luz
20 Carrillo that her children had been taken to California, Detectives Kellett and Mendoza
21 were able to fly to Stockton, locate the children and interview them without delay.
22 Kellett and Mendoza do not appear to be concerned that the statements they did
23 obtain are tainted, at least as indicated in their own declarations.
24
25

1 Mendez intends to call Walsh and Witchley at trial for purposes of establishing
2 that they moved the Carrillo children out of state with the knowledge, authorization or
3 consent of Sanchez. Mendez further contends that the move of the children out of the
4 jurisdiction constitutes consciousness of guilt because the children have evidence that
5 inculpates Sanchez in the crimes.

6 The difficulty for the Court in deciding this issue is that Walsh and Witchley
7 have thrust themselves into the case as likely witnesses. Even if the Court decided
8 that their actions in moving the children out of state had purely humanitarian motives,
9 the fact that they assisted them leaves the clear appearance of impropriety.

10 Even during argument, Sanchez' counsel found themselves in the
11 uncomfortable position of having to vouch for the propriety of their behavior in helping
12 move the children to California. They stated, in response to questioning by the Court:
13 "Nobody's hiding anything; Nobody's trying to ferry witnesses out of the jurisdiction (in
14 fact that has already occurred); Nobody's trying to prevent anybody from testifying."

15
16 Mr. Witchley says: "Do I have concerns about it [removing witnesses] in the
17 sense that we have somehow improperly influenced a witness to say something or to
18 not say something or to talk with someone or not talk to someone? No, I don't have
19 any concerns whatsoever."

20 "...And yes, we [Walsh and Witchley] assisted them...does that maybe look
21 bad?"

22 Clearly, counsel for Sanchez recognize by their own comments that it does
23 "look bad", particularly when there were other avenues that could have been taken to
24 protect the Carrillo children from the "danger" of their living situation.
25

1 Suppose that one or more of the Carrillo children are called to testify at trial and
2 give evidence that departs from the statements that they have given the YPD. The
3 issue of their bias as witnesses is surely going to take some momentum from the fact
4 that Walsh and Witchley removed them from the "dangerous" conditions at the Luz
5 Carrillo residence and paid for them to fly to California to be with their father. What
6 additional information might the Carrillo children have given to YPD if they had not
7 been removed from the state or if they had not had such close, continuing contact with
8 Walsh and Witchley? Are Walsh and Witchley then going to testify that they did
9 nothing to influence the testimony? If they don't so testify, are they going to be
10 representing their client in a manner consistent with his best interest?

11 Further, Walsh and Witchley's act of paying for all or part of the airfare and
12 other expenses of the Carrillo children is tantamount to a prohibited transaction under
13 RPC 1.8(e).

14 RPC 1.8(e) states a lawyer:

15 ...shall not, while representing a client in connection with contemplated or
16 pending litigation, advance or guarantee financial assistance to his or her client,
17 except that:

18 (1) A lawyer may advance or guarantee the expenses of litigation, including
19 court costs, expenses of investigation, expenses of medical examination,
20 and cost of obtaining and presenting evidence, provided the client remains
ultimately liable for such expenses...

21 The payment for airplane tickets, in whole or in part, by Walsh and Witchley, is
22 advancing financial assistance to their client; at least as it pertains to Roberta
23 Christina Carrillo and the infant child they have together. There is no evidence that
24 anyone intends to reimburse Walsh and Witchley for payments they made. For that
25

1 matter, there is no evidence that public funds paid to Walsh and Witchley during the
2 history of this case might not have been used to pay for the tickets.

3 The removal of material witnesses from this jurisdiction with the assistance of
4 defense counsel creates an appearance that Sanchez wanted them removed,
5 particularly his girlfriend with whom he has a child and over whom one might presume
6 he has some influence.

7 The Court finds that RPC 1.8 (e)(1) has been violated in this case.

8
9 Potential Criminal Sanctions

10 The State does not join in the Mendez Motion for Sanctions. Instead, the State
11 has responded that it would be appropriate for the Court to inquire of Sanchez about
12 the purported conflicts of interest that arise because of the potential for the State to
13 charge Walsh and Witchley with the crimes of Intimidation of a Public Servant (RCW
14 9A.76.180) and Tampering with a Witness (RCW 9A.72.120).

15
16 Courts have long recognized the importance of ensuring that defense counsel
17 is not subject to any conflict of interest that might dilute their loyalty to the accused.

18 Strickland v. Washington, 466 U.S. 668, 694 L.Ed. 2d 674, 104 S. Ct. 2052,2065
19 (1984). A conflict of interest can arise when a defendant's attorney is charged with a
20 crime in the same jurisdiction where the defendant is facing trial. Campbell v. Rice,
21 265 F.3d 878 (9th Cir. 2001).

22 In Campbell, *supra*, the defendant's attorney was charged with possession of
23 methamphetamine two days before the defendant's trial was to begin. The prosecutor
24 made assurances to the court that the lawyer was going to be treated in a fair and
25

1 neutral manner. In reversing the defendant's convictions, the 9th Circuit held that
2 because the potential conflict of interest had been brought to the trial judge's attention,
3 the trial judge is put on notice and must take adequate steps to protect the
4 defendant's rights. Cutting to the chase, the Court held:

5 "...But the question is whether [the lawyer] was able to accept those
6 assurances [of fair and neutral treatment], put aside her fears, and advocate
7 for her client uninfluenced by the district attorney's power over her [own]
8 future."

9 Here, the attorneys have not been charged with any crimes, and it is not for the
10 Court to say if they will be. Nevertheless, if the Court becomes aware of the possibility
11 that they will be charged, the Court has a duty to inquire of Sanchez if he understands
12 the conflict and is willing to waive that conflict in the interest of continuing the
13 representation of his current lawyers. The Court, according to the case law, has
14 considerable latitude to reject any waiver by the defendant because that waiver
15 doesn't necessarily solve the problem as many federal circuit courts are willing to
16 entertain ineffective assistance of counsel claims from defendants who previously
17 waived their right to conflict-free counsel. Wheat v. U.S., 486 U.S. 153, 100 L. Ed. 2d
18 140, 108 S. Ct. 1692 (1988).

19 Thus, the allegations of criminal conduct by Mendez create a specter of a
20 future hearing, after these cases have moved closer to a trial date, where Walsh and
21 Witchley are charged with a crime or crimes and the Court has to determine if, on that
22 basis alone, they can or should continue to represent Sanchez, whether or not
23 Sanchez executes a waiver of a conflict of interest.

24 Disqualification as a Sanction

25 Mendez urges that disqualification of Walsh and Witchley is the appropriate

1 sanction in this case.

2 RPC 3.7 provides guidance to the Court regarding those situations where a
3 lawyer may (or may not) serve as both an advocate at trial and as a witness.

4 When interpreting RPC 3.7, "courts have been reluctant to disqualify an
5 attorney absent compelling circumstances." P.U.D. No. 1 of Klickitat County v Int'l Ins.
6 Co., 124 Wn.2d 789, 812, 881 P.2d 1020 (1994).

7 In order to prevail on a motion to disqualify under RPC 3.7, Mendez must
8 satisfy a three part test. First, he must show that Sanchez' attorneys "will give
9 evidence material to the determination of the issues being litigated." *Id.* Second, he
10 must demonstrate "that the evidence is unobtainable elsewhere." *Id.* And finally, he
11 must show "that the testimony is or may be prejudicial to the testifying attorney's
12 client." *Id.*

13 Sanchez' counsel primarily defend the Motion for Sanctions on the basis that
14 the evidence is obtainable elsewhere.

15 If Walsh and Witchley are correct that Freeman is available to testify about the
16 3 contacts that Witchley and Freeman had with Mendez, then at least one witness,
17 other than Witchley, is available to rebut any testimony that Mendez may give about
18 those contacts. However, Witchley has already alluded in the Sanchez brief that he
19 believes that Mendez has perjured himself in his declaration. Should Mendez testify,
20 would Witchley, even if he does not himself testify, be able to cross examine Mendez
21 without referring to his own recollection of the meetings? Would the State not be
22 prejudiced by the implication to the jury that Witchley's questions represented the truth
23 based on his personal knowledge of what had occurred? If Witchley does testify, in
24
25

1 rebuttal of Mendez, would not his dual role as advocate and witness, potentially
2 prejudice Sanchez if the State is able to impeach him as a witness?

3 With respect to the Carrillo children, once the issue of bias or improper
4 influence or witness tampering is raised, how else (or who else) is available to testify
5 that "Nobody's hiding anything" except Walsh and Witchley? The children are not
6 shown to have knowledge of the financial arrangements or why they were removed
7 from the State of Washington. The children are not shown to know what Walsh and
8 Witchley knew about the consequences of their likely testimony when they were
9 moved.

10 There is a paucity of case law in Washington dealing with disqualification of
11 counsel for a co-defendant when sought by another co-defendant.

12 However, the case of Gonzalez v. State of Texas, 117 S.W. 3d 831, 2003 Tex.
13 Crim. App. LEXIS (2003) is instructive. In that case, the State sought disqualification
14 of one of several co-defendants' attorneys because the State believed that the
15 defendant's lawyer had personal knowledge of a contested matter bearing directly on
16 the defendant's guilt that the State intended to introduce at trial. It was alleged that
17 Gonzalez' lawyer, also named Gonzalez, had several meetings and telephone
18 contacts with the State's witness in which it was at least possible that attorney
19 Gonzalez was trying to bribe the State's witness. The State contended that this was
20 evidence of the defendant's consciousness of guilt.
21

22 Attorney Gonzalez argued that he should not be disqualified. First, he did not
23 believe that he would be a necessary witness in the case. Second, he argued that his
24 client would suffer a substantial hardship from his disqualification. He based his first
25

1 argument on the existence of taped statements he had made at some of the meetings
2 with the State's witness and his ability to impeach the State's witness regarding any
3 untaped meetings with rigorous cross-examination.

4 In rejecting all of the appellant's arguments, the Court held, at page 840, as
5 follows:

6 "If counsel were to have testified, the State would have been prejudiced not
7 only by the undue weight jurors might have attached to counsel's testimony, but
8 also by the confusion that would most likely have resulted during argument
9 regarding whether counsel was summarizing evidence or further testifying as to
10 personal knowledge. However, even if attorney Gonzalez did not testify, but
11 referred to his own recollection of the events through cross-examination, the
12 State would have been prejudiced by the implication to the jury that his
13 questions represented the truth based on his personal knowledge of what had
14 occurred. The State would have been prejudiced by the inability to clarify
15 counsel's testimony and impeach counsel's credibility. Counsel's personal
16 knowledge regarding the conversations with the State's witness would have
17 affected the jury's perspective, not only on the witness tampering issue, but
18 also on the credibility of the State's key witness against appellant regarding the
19 facts of the charged crime. Therefore, the confusion resulting from counsel's
20 dual roles would most likely have substantially affected the jury's verdict. If the
21 confusion were such that it would have prevented an impartial verdict from
22 being reached, it could have resulted in a mistrial, as the State argued."

23 The Court in Gonzalez, *supra*, at p. 841-42 went on to discuss, in consideration
24 of the defendant's 6th Amendment central aim, that:

25 "Counsel's dual role may also have prejudiced the defendant, especially if the
State effectively impeached attorney Gonzalez on the stand. At the hearing for
disqualification, the State discussed some evidence it intended to introduce, if
necessary, to impeach counsel's credibility. "

One of Sanchez' lawyers' arguments is also that they may not need to testify
regarding the Mendez interviews. After all, they argue, we took Freeman, the
investigator into those interviews to serve as a witness if necessary. In Gonzalez,
supra, the Court held that:

1 "The court determined that even if someone other than counsel testified to the
2 conversation, counsel would still be placed before the jury in the dual roles of
3 both advocate and unsworn witness, with personal knowledge of disputed
4 facts." Gonzalez, supra, at 842.

5 Finally, the Court ruled, at page 844, that:

6 "...when a judge makes a ruling on disqualification at a pretrial hearing, some
7 speculation is involved. The Supreme Court of the United States recognized
8 this in *Wheat* in relation to conflicts of interest leading to disqualification. The
9 Supreme Court held that the presumption in favor of petitioner's counsel of
10 choice may be overcome not only by a demonstration of actual conflict but by a
11 showing of serious potential for conflict."

12 The "serious potential for conflict" is present in this case as it relates to the
13 Mendez interviews by Witchley and Freeman. There appears to the Court to be an
14 actual conflict as to the actions relating to the movement of the Carrillo children out of
15 state by Walsh and Witchley since they had knowledge that they were material
16 witnesses in this case and the attorneys will likely be called as witnesses in this case
17 as to the movement of the children.

18 Sanchez' 6th Amendment Right to Counsel

19 No discussion of disqualification of counsel would be complete unless the Court
20 considers the implications for Sanchez should the motion be granted. Sanchez' trial
21 date, if one is ever established, would be delayed if new counsel are appointed for him
22 now. Walsh and Witchley have been representing him for 19 months and have spent
23 many hours developing evidence for his defense as well as for the mitigation package.
24 Although the U.S. Supreme Court has long recognized that the 6th Amendment
25 contemplates "the right to select and be represented by one's preferred attorney", that
right is not absolute. Wheat v. U.S., *supra*. A defendant does not have a right to be

1 represented by a lawyer who has a conflict of interest.

2 Although a party's choice of counsel is important, it "is secondary in importance
3 to preserving the integrity of the judicial process, maintaining the public confidence in
4 the legal system and enforcing the ethical standards of professional conduct." Koch v.
5 Koch Indus., 798 F. Supp. 1525,1530 n.2 (D. Kan. 1992).

6 U.S. v. Gonzales-Lopez, 126 S.Ct. 2557,2561, 165 L.Ed.2d 409 (2006), holds
7 that the 6th Amendment provides that in all criminal prosecutions the accused shall
8 enjoy the right to have the assistance of counsel for his defense.

9 "We have previously held that an element of this right is the right of a defendant
10 who does not require appointed counsel to choose who will represent him."
11 (emphasis added)

12 Significantly, the Court holds, at p. 2565:

13 "As the dissent, too, discusses, the right to counsel of choice does not extend
14 to defendants who require counsel to be appointed for them." [Citing Wheat,
15 supra].

16 It does not need belaboring that Sanchez has had two counsel appointed for
17 him since late April, 2005, and that many of the delays in bringing this case to trial
18 were either requested by the defense team or acquiesced in by them because of the
19 need to prepare a mitigation package in what is now a successful effort to deter the
20 State from seeking the death penalty. Unlike the defendant in Gonzales-Lopez, supra,
21 who retained private counsel, Sanchez has no right to continued representation by
22 Walsh and Witchley, particularly where there is a conflict of interest.

23 The Court finds that there is an actual conflict of interest in this case, requiring
24 the imposition of sanctions.
25

Sanctions

1 The Court does not find that the Motion for Sanctions was precipitated by
2 Mendez in bad faith nor does the Court find that counsel for Mendez unreasonably
3 delayed bringing the Motion for Sanctions. Current counsel for Mendez were
4 appointed in late June, 2006 and filed this motion in September, 2006.
5

6 The Court believes that disqualification of Walsh and Witchley is required in this
7 case. Most probably, disqualification and appointment of a new lawyer for Sanchez
8 will delay not only his own trial but that of Mendez since the cases are presently
9 consolidated (although counsel have already indicated they intend to seek immediate
10 appellate review of the Court's order releasing the Mendez interview summaries and
11 notes to Mendez counsel and thus, some delay is already built into any setting for
12 trial). If the only issue was the Mendez interviews, then perhaps the Court could wait
13 until it became clear that Witchley was a necessary witness or the parties could
14 somehow "finesse" the issue by some pre-trial order or give appropriate jury
15 instructions that would guide the jury to avoid confusion about the dual role he has as
16 both advocate and witness. But compounding that problem with the issue of the
17 Carrillo children and the possibility that criminal charges against counsel may be
18 investigated makes it simply too clear that immediate disqualification is required in this
19 case.
20

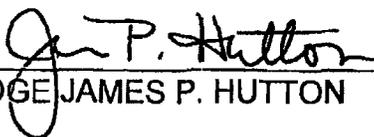
21 The disqualification extends to Ms. Walsh because she and Mr. Witchley are
22 presumed to have shared all of the information and made the joint decisions that have
23 led to disqualification.
24

25 Walsh and Witchley are ordered to account to the financial judge for any public

1 monies spent in the care, support or transportation of the Carrillo children, including
2 the attorney's fees and expenses incurred and paid by Yakima County in arranging for
3 the travel and other support. Walsh and Witchley are further ordered to repay the
4 travel costs of Detectives Kellett and Mendoza in traveling to Stockton, California and
5 obtaining the interviews of the Carrillo children.

6 The Department of Assigned Counsel, through Mr. Fessler, is appointed to
7 represent Sanchez pending a search for new counsel to represent Sanchez.

8
9 DATED this 29 day of November, 2006.

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14 JUDGE JAMES P. HUTTON
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State v. Jose Luis Sanchez, Jr., No. 26816-1-III

Appendix B

Order on Motion to Reconsider Order
Disqualifying Defense Counsel

FILED

2006 DEC 15 AM 4 42

KIM M. BROWN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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

State of Washington,

Plaintiff,

vs.

Jose Luis Sanchez and
Mario Gil Mendez

Defendants.

NO. 05-1-00459-8
05-1-00507-1

ORDER ON MOTION TO RECONSIDER
ORDER DISQUALIFYING DEFENSE
COUNSEL

Without regard to whether Ms. Griffith actually contacted Defendant Sanchez and asked him if he wanted her to make a "Limited Appearance" for him or whether she or former counsel, now disqualified, obtained the supporting declarations in support of the "Motion to Reconsider", the Court makes the following order:

Counsel misses the point because the challenged conduct is not that Witchley and his investigator interviewed a witness; it is that Witchley interviewed a co-defendant who did not have counsel yet appointed in this case, although he had been requested by Department of Assigned Counsel not to make such contact and despite his knowledge that Mendez had a lawyer representing him in his immigration case.

1 Counsel does not cite any case where a court has found it to be proper for a
2 lawyer for a co-defendant to ignore the availability of social welfare services, avoid
3 seeking a court order that might have authorized such expenditures and then paying
4 for airplane tickets and other necessities for material witnesses to be transported out
5 of this Court's jurisdiction. Where is the case that says it's proper for a lawyer to take
6 these extraordinary steps with actual knowledge that what those witnesses have to
7 say is inculpatory for their client and may stain their client with the appearance that he
8 authorized that conduct?

9
10 Counsel challenges the Court's reliance on a version of RPC 1.8(e)(1) that had
11 been modified at the time the Motion for Sanctions was filed. Nevertheless, the
12 version cited by the Court and moving counsel is exactly the version that was in place
13 at the time the prohibited transaction occurred in December, 2005. It is exactly the
14 version, had Walsh and Witchley chosen to consult same, that might have given them
15 pause in their quest to do the "humanitarian" thing.

16
17 The Court did cite to an opinion, Campbell v. Rice, 265 F.3d 878 (9th Cir. 2001),
18 that has been withdrawn. The State cited that decision in its response to the Mendez
19 motion for sanctions for the proposition that a conflict of interest can arise when a
20 defendant's attorney is charged with a crime in the same jurisdiction where the
21 defendant is facing trial.

22
23 It is interesting that counsel do not mention that in the final decision of
24 Campbell v. Rice, 408 F.3d 1166 (9th Cir. 2005), the Court cites to the identical facts
25 as in the withdrawn opinion. Upon consideration of those facts, the Court held that:

1 "Upon notification that an actual or potential conflict of interest exists, a trial
2 court has the obligation either to appoint separate counsel or to take adequate steps
3 to ascertain whether the risk was too remote to warrant separate counsel. If the trial
4 court fails to undertake either of these duties, the defendant's 6th Amendment rights
5 are violated." (emphasis added)
6

7 This Court finds it extremely interesting that counsel are so certain that there is
8 not even a scintilla of evidence that would support a criminal charge and are
9 convinced that not even a "potential" conflict of interest exists. Further, why would
10 counsel ignore such an important holding when jealously guarding Mr. Sanchez's 6th
11 Amendment rights?
12

13 Finally, counsel truly does miss the point if it is believed that this Court has not
14 considered the 6th Amendment right to counsel in making the decision that has been
15 made. The Order on Motion for Sanctions discusses this issue at pp. 22-23. Again,
16 Sanchez does not have the right to be represented by counsel of his choice nor does
17 he have the right to be represented by lawyers who have a conflict of interest.
18

19 Walsh and Witchley's efforts, and those of the rest of the Sanchez defense
20 team will be of substantial use to new counsel since those efforts appear to have been
21 memorialized in notes, summaries and taped interviews. Nothing precludes new
22 counsel from utilizing some or all of the experts consulted during the past months. But
23 with all due respect, new counsel will not have imperiled the judicial process in this
24 case or be burdened by the actual and potential conflicts of interest that clearly exist
25 with former counsel.

State v. Jose Luis Sanchez, Jr., No. 26816-1-III

Appendix C

Findings of Fact and Conclusions of Law
Re: Suppression Hearing

2008 JAN 10 PM 5:01
EX. CLERK
CLERK
YAKIMA COUNTY

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

STATE OF WASHINGTON,
Plaintiff,
vs.
JOSE LUIS SANCHEZ, JR.,
Defendant.

NO. 05-1-00459-8
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: SUPPRESSION HEARING

THIS MATTER HAVING come on for hearing pursuant to CrR 3.6 on defendant's motion to suppress on January 10, 2008, before the Honorable James Hutton; the plaintiff being represented by Howard W. Hansen and Kenneth L. Ramm, Deputy Prosecuting Attorneys for Yakima County; the defendant being present and represented by his counsel, Peter Mazzone and Jesse Cantor.; and the court having heard testimony of the witnesses herein and having heard the arguments of counsel now makes the following findings and conclusions:

UNDISPUTED FACTS

1. On February 20, 2005, Yakima Police Officers responded to a call regarding a female gunshot victim. The responding officers contacted a female identified as Michelle Kublic, who appeared to have been shot. When the officers entered the apartment, they observed an adult male and a young child lying on the floor with blood around them. They both appeared to have been shot. The two gunshot victims located inside the apartment were identified as Ricky Causor and Maya Causor.

2. The suspects in the shooting were identified as Hispanic males, driving a blue pickup. Witness Kendra Bean, a CWI security guard observed two Hispanic males seated in a

ORIGINAL

781

1 blue pickup minutes before the reported shooting. Witness Macaela Cuevas drove into the
2 apartment at the time of the robbery and observed an individual wearing a mask trying to enter
3 a sport utility vehicle that was parked next to the fence, and then observed a blue pickup truck
4 drive up, stop, and the masked individual entered the pickup.

5 3. On February 23, 2005, Sgt. Castillo of the Yakima Police Department, received
6 an anonymous tip regarding the Causor homicide. The information that he obtained was that
7 the person responsible for the murder was a man named Jr. Sanchez and that he was located at
8 303 S. 9th Street, Yakima, Washington. That Sanchez was ready to leave town. The
9 defendant was seated in a gray Toyota Celica that was stopped by Yakima Police when officer
10 observed him. In the front strip of the lawn in front of the house was parked a blue pickup.
11

12 4. Yakima Police Officer Kasey Hampton, driving a marked patrol vehicle was
13 requested to conduct a traffic stop of the vehicle by Sgt. Bardwell. Mr. Sanchez was ordered
14 out of the car and placed into custody. Mr. Sanchez had been seated in the front passengers
15 seat at the time of the stop.

16 5. The 9mm pistol, State's Exhibit 154, was located by Detective Kellet on
17 February 28, 2005, when he searched the vehicle from which Mr. Sanchez was taken into
18 custody pursuant to a search warrant. The pistol had a loaded magazine, and was located
19 under the forward part of front passenger seat, with the butt of the gun sticking out onto the
20 floor area.
21

22 DISPUTED FACTS

- 23 1. There are no disputed facts.
24

25 CONCLUSIONS OF LAW

- 26 1. This court has jurisdiction over this matter and over the parties.
27
28 2. The defendant, Jose Sanchez, was seized at the time he was ordered out of the gray
29 Toyota Celica.

1 3. That Mr. Sanchez has standing to challenge the search of the vehicle.

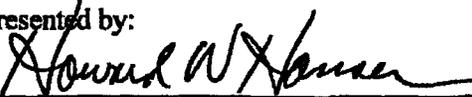
2 4. Based upon the information received by Sgt. Castillo, the nature of the offense,
3 and the additional information regarding the blue pickup truck parked at the 303 S. 9th Street
4 residence, the officers had sufficient information to conduct and investigative detention of Mr.
5 Sanchez. That once he was taken into custody, officers learned from the residences that Mr.
6 Sanchez was involved in the murder. The murder weapon was later recovered from that
7 location upon execution of a search warrant.

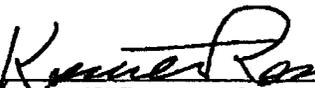
8 5. Detective Kellett properly seized the 9mm pistol pursuant to a search warrant on
9 February 28, 2005.

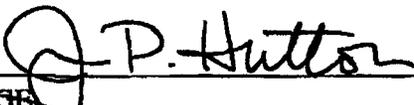
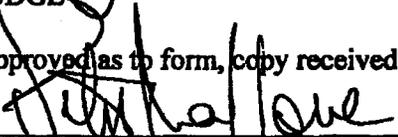
10 6. The evidence is admissible in trial and the defendant's motion to suppress is
11 denied.

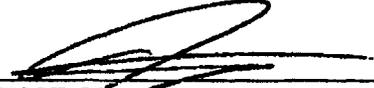
12 DONE IN OPEN COURT this 10 day of January, 2008.

13
14
15
16
17 Presented by:

18 
19 _____
20 HOWARD W. HANSEN
21 Deputy Prosecuting Attorney
22 Washington State Bar No. 7505

23 
24 _____
25 KENNETH L. RAMM
26 Deputy Prosecuting Attorney
27 Washington State No. 16500

18 
19 _____
20 JUDGE
21 Approved as to form, copy received:
22 
23 _____
24 PETER MAZZONE
25 Attorney for Defendant
26 Washington State Bar No. 25262

27 
28 _____
29 JESSE CANTOR
30 Attorney for Defendant
31 Washington State Bar No. 26736