

FILED

JUN 01 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28671-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KEIR WALLIN,

Appellant.

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

The Honorable John Antosz, Judge

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BRIEF OF APPELLANT

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JENNIFER M. WINKLER  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

Cross-examination of the appellant concerning his opportunity to tailor his testimony to evidence introduced during his trial violated the appellant's state constitutional rights to be present at trial, to meet witnesses face to face, and to testify in his behalf.<sup>1</sup>

Issues Pertaining to Assignment of Error

1. Article I, section 22 of the Washington Constitution guarantees an accused person "the right to appear and defend in person, or by counsel, to testify in his own behalf, [and] to meet the witnesses against him face to face." When a prosecutor elicits testimony that an accused has had the opportunity to read discovery and to hear all the State's witnesses and evidence before he testifies, does that questioning violate a criminal defendant's rights to be appear and defend in person, to testify, and to confront adversary witnesses?

2. The Court of Appeals may exercise inherent supervisory powers to maintain sound judicial practice. Where a prosecutor uses the fact of the presence of the accused at trial to suggest he has tailored his

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<sup>1</sup> Division One of this court denied a nearly identical claim in State v. Martin, 151 Wn. App. 98, 210 P.3d 345 (2009, review granted, 168 Wn.2d 1006 (2010)). But the Supreme Court granted review and is set to consider the case on its fall/winter 2010-2011 calendar.

testimony to fit the State's evidence, does that practice undermine the administration of fair trials, requiring the court's oversight?

B. STATEMENT OF THE CASE<sup>2</sup>

1. Charge, verdict, and sentence

The Grant County prosecutor charged appellant Keir Wallin with possession of cocaine, morphine, and ecstasy (counts 1-3), as well as possession of marijuana and use of drug paraphernalia, a marijuana pipe (counts 4-5). CP 1-2. A jury convicted Wallin as charged. CP 89-93. The court sentenced him within the standard range on counts 1-3 and ordered the sentences on counts 4 and 5 to run concurrently to the felony sentences. CP 94-113.

2. Testimony of State's witness

Sergeant Brian Jones stopped a van after noticing the passenger was not wearing a seat belt. 2RP 26. The van's driver pulled into a residential driveway and suddenly opened his door. Jones ordered the driver, Jeremy Antone, to stay the car. 2RP 27-28; 3RP 142. When Jones confronted the occupants, he noticed Wallin appeared fidgety and was looking back and forth as if "weighing his options." 3RP 87-88. Jones

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<sup>2</sup> This brief refers to the verbatim report as follows: 1RP – 8/20/09; 2RP – 11/4/09; 3RP – 11/5/09; 4RP – 11/6/09; and 5RP – 12/1/09.

called dispatch and learned Wallin, but not Antone, had been flagged for “officer safety.”<sup>3</sup> 2RP 32.

Jones asked Wallin if he had a weapon. Wallin said he might have a BB gun, which Jones removed from Wallin’s waistband. 2RP 36-37. Jones cuffed and frisked both Wallin and Antone and ordered them to sit on railroad ties bordering the driveway. 2RP 37-38.

During a “sweep” of the front portion of the van, Jones noticed a pack of black, odd-looking cigarettes that matched the cigarette Antone was smoking. 2RP 31, 39. Jones also observed a glass-topped wooden box partially covered by a blue shirt near on the floorboard in front of a passenger seat. 2RP 40; 3RP 102. The box contained a glass marijuana pipe containing partially burnt marijuana. 2RP 40. Fearing a gun might also be concealed in the box, Jones opened it and saw items he recognized as illegal drugs. 2RP 41.

Jones asked Wallin if the box was his, but Wallin – who was cuffed and sitting near Antone – said he did not want to talk about it. 3RP 99. After Antone gave Jones permission to search the van, Jones retrieved and packaged the items in the box. 2RP 43. Inside the box were an

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<sup>3</sup> The court instructed the jury it was not to consider the dispatch information for the truth of the matter asserted but instead to establish its effect on Jones. 2RP 29, 32-35, 58-61; 3RP 90-94.

"Ecstasy" pill, a pill Jones recognized as morphine, cocaine, marijuana, and a marijuana pipe. 2RP 44-45, 53, 56, 70.

Jones also found a Marlboro cigarette pack containing what appeared to be a methamphetamine pipe and another pack of distinctive-looking red-banded Camel cigarettes. 2RP 53, 67-70. Jones previously noticed Wallin holding an identical Camel cigarette, which Wallin eventually seized. 2RP 42.

Jones wrote Antone a traffic ticket and drove Wallin to jail. 3RP 115. Wallin complained en route that the drugs were not his but admitted he planned to buy a morphine tablet from Antone. 2RP 46. Jones asked Wallin if he smoked and what kind of cigarettes. 2RP 42. Wallin told Jones he smoked Marlboros. 2R9 53. After Jones asked Wallin why he saw him with a Camel, Wallin explained he got the cigarette from Antone. 2RP 54.

On cross-examination, Jones said the box had been covered by a shirt, which Jones failed to place in evidence, and that Antone was not wearing a shirt during the traffic stop. 3RP 103. Jones also acknowledged the box was not analyzed for fingerprints. 3RP 127-29. He also conceded the two men were not separated when he asked Wallin about the box's ownership, and he recognized Wallin might have been reluctant to accuse Antone in the other man's presence. 3RP 100-01.

3. Wallin's testimony and State's cross-examination

Wallin testified he was relaxing in his back yard when Antone, his friend and fishing partner, dropped by with his wooden box. The two smoked marijuana from Antone's pipe<sup>4</sup> and made plans to go fishing. 3RP 152-54. Although he saw Antone pull the marijuana pipe from the box, Wallin did not know what else was in the box and considered it none of his business. 3RP 182, 200. Wallin acknowledged he planned to ask Antone to sell him some Vicodin, not morphine, but Wallin was uncertain where Antone kept his Vicodin supply. 3RP 175, 190.

While smoking marijuana, Wallin also asked Antone for a cigarette, which he kept in his mouth but never smoked because he was trying to quit.<sup>5</sup> 3RP 174, 192. Antone occasionally smoked the black clove cigarettes Sergeant Jones found in the van. 3RP 174.

Antone returned to his van while Wallin retrieved his fishing gear. 3RP 157. Once in the van, Wallin noticed Antone's box on the floorboard under Antone's shirt.<sup>6</sup> 3RP 189-90. Wallin, who was by then very stoned,

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<sup>4</sup> Wallin acknowledged in closing that he was therefore guilty of the marijuana-related charges, counts 4 and 5. 3RP 234.

<sup>5</sup> Jones's testimony confirmed the cigarette end appeared chewed and discolored. 3RP 109-11.

<sup>6</sup> Wallin was uncertain why Antone had not placed the box between the seats where he usually kept it. 3RP 169-70, 194.

was not surprised when Antone pulled into his driveway to pick up his dog. 3RP 173, 175. He was startled, however, when Sergeant Jones shouted at Antone to stay in the van; he was in “la-la land” and had not noticed Jones following them. 3RP 173, 191.

While the men were detained outside the van, Antone assured Wallin he would take responsibility for the marijuana and the pipe, the only contraband Wallin knew was in the car. 3RP 203-04. En route to jail, Wallin realized Antone lied. Wallin tried to explain the box was not his, but by then it was too late. 3RP 204.

At the start of the State’s cross-examination, the following exchange occurred:

Q. Mr. Wallin, you’ve had the advantage of being in the courtroom and hearing all the testimony so far, correct?

A. Yes I have, sir.

Q. You’ve had the chance to know ahead of time what people were going to say before you took the stand?

A. No, not really. Could you elaborate please?

Q. Before you took the stand, you had the opportunity to hear Sergeant Jones testify?

A. Yes.

Q. And to watch the [patrol car] video [of the traffic stop]?

A. Yes.

Q. And to see the evidence that was admitted?

A. Yes. Today or yesterday.

Q. You have had the opportunity to see the police reports?

A. Yes, I have.

3RP 177-78. The prosecutor then asked Wallin about the events surrounding Antone's visit to his Wallin's home and the traffic stop.

C. ARGUMENT

Introduction to argument

Before 2000, Washington courts precluded prosecutors from drawing negative inferences from a defendant's exercise of his constitutional right to attend his own trial. In State v. Johnson, a prosecutor argued Johnson had tailored his testimony to fit the facts presented by the other witnesses. 80 Wn. App. 337, 340, 908 P.2d 900 (1996). The Court held the prosecutor's argument was misconduct:

The prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses. He did not merely argue inferences from the defendant's testimony, but improperly focused on the exercise of the constitutional right itself.

Johnson, 80 Wn. App. at 341.<sup>7</sup>

However, in 2000 the United States Supreme Court narrowed the scope of the protections provided by the Sixth Amendment regarding comments on the right to be present at trial. In Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), the prosecutor argued

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<sup>7</sup> The Johnson court relied solely upon the Sixth Amendment, as Johnson did not raise state constitutional arguments. 80 Wn. App. at 339, n.1.

that a defendant, "unlike all other witnesses . . . gets to sit here and listen to the testimony of all the other witnesses before he testifies." Id. at 64. In holding these comments did not violate the defendant's Fifth, Sixth and Fourteenth Amendment rights to be present at trial and confront his accusers, the Court reasoned:

[W]e see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate -- and indeed, given the inability to sequester the defendant, sometimes essential -- to the central function of the trial, which is to discover the truth.

Id. at 73. Portuondo has been held to overrule Johnson. State v. Miller, 110 Wn. App. 283, 284-85, 40 P.3d 692, review denied, 147 Wn.2d 1011 (2002).

Although Portuondo has narrowed Sixth Amendment protections, Washington courts may consider whether the state constitution provides greater safeguards. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Under a Gunwall analysis, this Court should grant Wallin a new trial on counts 1-3 because the prosecutor's cross-examination focused on Wallin's right to be present at trial in violation of article I, section 22 of the Washington Constitution.

Portuondo also left open the possibility that state courts may create rules barring prosecutors from commenting on a defendant's exercise of his constitutional right to be present at trial. 529 U.S. at 73 n.4. If this Court finds that the Washington Constitution does not extend greater protections than its federal counterpart, it should follow other state courts in accepting the Supreme Court's invitation to craft such a rule. Applied to the present case, a rule barring prosecutorial comment on a defendant's right to be present at trial should result in a new trial on counts 1-3.

1. THE STATE'S IMPROPER CROSS-EXAMINATION VIOLATED WALLIN'S ARTICLE I, SECTION 22 RIGHTS.

This Court should find the state constitution provides greater protection for the rights to be present, mount a defense, testify, and to confront witnesses than does the Sixth Amendment. The six Gunwall factors<sup>8</sup> demonstrate the state constitution's broad protections require an

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<sup>8</sup> The six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn. 2d at 61-62.

analysis of the prosecutor's cross-examination independent of the Portuondo analysis.<sup>9</sup>

- a. The Gunwall factors demonstrate that Washington's constitution provides the accused broader protections than the Sixth Amendment.

A review of the six Gunwall factors likewise demonstrates the Washington Constitution provides different and broader protections of the right to be present, testify, and confront witnesses than does the Sixth Amendment.

- i. Factor One: Textual language of the Washington Constitution*

As for the right to be present and testify, the textual differences between the two constitutions are quite clear: The Washington Constitution expressly provides for a defendant's right to appear and defend in person and to testify in his own behalf. Wash. Const. art. 1, § 22. This contrasts sharply with the federal constitution. The Sixth Amendment provides that a person accused of a crime has the right "to be confronted with the witnesses against him." The federal rights to appear

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<sup>9</sup> Because the Washington Supreme Court has already recognized the confrontation right guaranteed by the state constitution is broader than that guaranteed by the federal constitution, a full analysis as set forth in Gunwall is not required as to the confrontation clause. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). Such an analysis nonetheless demonstrates the greater state constitutional protections of the right to confrontation.

in person and to present a defense instead derive from the defendant's right to confront witnesses and to due process. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Davis v. Alaska, 415 U.S. 308, 320, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Similarly, the right to testify is not spelled out in any amendment but is derived from the Sixth and Fourteenth Amendments and as a corollary to the Fifth Amendment's guarantee of freedom from self-incrimination. Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (citing Faretta, 422 U.S. at 819, n. 15; Ferguson v. Georgia, 365 U.S. 570, 602, 81 S. Ct. 756, 5 L. Ed. 783 (1961)).

The text of article I, section 22 also demonstrates the drafters intended the right to confrontation to be different than that of the existing Sixth Amendment. While the Sixth Amendment provides a criminal defendant the right to be confronted by the witnesses against him, article I, section more explicitly speaks of "the right . . . to meet the witnesses against him face to face."

In State v. Foster, the lead opinion held that for purposes of determining whether RCW 9A.44.150 comports with the confrontation clause "[the] state right to confrontation and [the] Sixth Amendment right to confrontation [are] identical." 135 Wn.2d 441, 466, 957 P.2d 712

(1998). However, a plurality consisting of a four-justice dissent and a one-justice concurrence/dissent agreed the provisions of article I, section 22 provide a broader confrontation right than the Sixth Amendment. Id. at 473-498.

After conducting a Gunwall analysis, the dissent concluded that article I, section 22 has a different meaning than the Sixth Amendment and the language of the state confrontation clause is absolute and allows no flexibility dependent upon the significance of the competing interest at issue. Id. at 483 (Johnson, J., dissenting). Therefore, the four justices concluded that because nothing short of face-to-face confrontation is adequate, permitting a witness to testify by closed circuit television deprived the defendant of his right to confront the witness. Id. at 494 (Johnson, J. dissenting).

Justice Alexander's concurrence/dissent agreed in substantial part with the four judges but disagreed with the ultimate conclusion that the term "face to face" must be rigidly and literally defined. Id. at 474 (Alexander, J., concurring in part and dissenting in part). Justice Alexander reasoned that "[n]either [the state nor federal confrontation] clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule." Foster, 135 Wn. 2d at 474 (citing State v.

Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984) (citing Ohio v. Roberts, 448 U.S. 46, 100 S. Ct. 2431, 65 L. Ed. 2d 597 (1980))).

Later, however, it was not literal reading of the state confrontation clause that limited the admission of hearsay but rather the Sixth Amendment. In Crawford, the United State Supreme Court overruled Ohio v. Roberts and held that the admission of any out-of-court testimonial statement violates the federal confrontation clause unless the defendant has the opportunity to cross-examine the declarant or the declarant is unavailable. 541 U.S. at 68-69. Crawford undermines Justice Alexander's support for a more flexible reading article I, section 22.

In addition, Washington's article I, section 22 is modeled after the Oregon and Indiana Constitutions. Foster, 135 Wn.2d at 460, 488 (citing Journal of the Washington State Constitutional Convention, 1889, at 511 n.37. (Beverly P. Rosenow ed., 1962)). In reviewing its state confrontation clause, the Indiana Supreme Court looked to the current and historical meaning of the term "face to face."<sup>10</sup> Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991). The Indiana court noted that the term is an adverbial phrase modifying "to meet" and thus describes how an Indiana criminal defendant and the State's witnesses are to meet. Based on dictionary

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<sup>10</sup> Indiana Const. Art. 1, § 13, reads in pertinent part, "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face."

definitions of the phrase from the 18<sup>th</sup> through the 20<sup>th</sup> centuries, the Indiana Supreme Court concluded that the state constitutional provision had an unmistakable meaning that was more concrete and detailed than the Sixth Amendment. *Id.* The Foster four-judge dissent also found a more concrete interpretation of the right to confrontation in the Washington Constitution. 135 Wn.2d at 483 (Johnson, J., dissenting).

The text of article I, section 22 thus supports the conclusion that Washington's constitution must be independently interpreted. *Id.* at 483-84.

*ii. Factor Two: Significant differences in texts of parallel provisions*

The textual differences between article I, section 22 and the Sixth Amendment mandate an independent interpretation of the state constitutional provision. Foster, 135 Wn.2d at 484-86. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. *Id.* at 485 (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913)).

As noted above, the federal constitution has no provisions parallel to article I, section 22 guaranteeing the right to appear in person and to testify on one's own behalf. In addition to these, article I, section 22 grants other rights not included in the Sixth Amendment, such as the right to have a copy of the charge and to appeal. *Id.* at 485-86. And while the Sixth Amendment does not explain how confrontation is to be achieved, article I, section 22 specifies the method of confrontation: "face to face." The state constitution is thus more detailed, again demonstrating a different interpretation than should be given to the Sixth Amendment. Foster, 135 Wn.2d at 486.

*iii. Factor Three: State constitutional and common law history.*

Little is known about the history of the drafting of article I, section 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend article I, section 22 to be interpreted identically to the federal bill of rights, since they copied it from another state constitution and the federal bill of rights did not then apply to the states. Silva, 107 Wn. App. at 672-73; Utter, 7 U. Puget Sound L. Rev. at 496-97; see also Ferguson, 365 U.S. at 573-83 (defendant's right to testify unknown at common law and did not emerge until the mid-19th Century,

first through state constitutions and statutory enactments and then by federal statute in 1878).

Oregon has independently interpreted its identical confrontation clause<sup>11</sup> to require witness unavailability before hearsay may be admitted when the defendant has not had a prior opportunity to cross-examine the witness. State v. Moore, 334 Or. 328, 49 P.3d 785 (2002) (retaining two-part test from Ohio v. Roberts despite erosion of unavailability requirement in later United States Supreme Court opinions); State v. Campbell, 299 Or. 633, 706, 705 P.2d 694 (1985) (court must be satisfied witness is not available before hearsay is admitted in criminal trial).

As early as 1902, the Washington Supreme Court explained that article I, section 22 provided a criminal defendant due process, including right to meet the witnesses against him face to face and cross-examine those witnesses in open court. State v. Stentz, 30 Wash. 135, 142, 70 P.241 (1902).

Under the constitutional provisions defining the rights of accused persons, the appellant had the right, not only to be tried by an impartial jury, but to defend in person and by counsel, and to meet the witnesses against him face to face. This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right

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<sup>11</sup> Oregon Const. Art. 1, § 11 states in pertinent part: “In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . . .”

of the accused to cross-examine such witness as to facts testified to by him. . . .

Id. Noting this language, the Foster plurality held that state constitutional and common law history require an independent interpretation of article I, section 22. Foster, 135 Wn.2d at 486-93.

*iv. Factor Four: Preexisting Washington law.*

The earliest territorial laws preserved a defendant's right to be present at his trial: "No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial." Laws 1854, p. 412, § 109. A second law provided: "On the trial of any indictment the party accused shall have the right . . . to meet the witnesses produced against him face to face." Laws 1854, p. 371, § 2. Article I, section 22 was revised by amendment 10, but the relevant portion of the original 1889 text remained unchanged, still explicitly providing the accused with the right to appear and defend in person. Historical Notes to Const. art. 1, § 22.

The provision's history contrasts sharply with the Portuondo Court's historical analysis of various state constitutions: Although Maine was the first state to make defendants competent witnesses in 1864, Portuondo noted that other states attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior

to his own witnesses. 529 U.S. at 66 (citing 3 J. Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896)). Yet in 1889, Washington had no such requirements, and the right to be present and testify at trial was already established in our Constitution.

Thus, preexisting Washington law demonstrates that the framers intended to enshrine and protect the rights of a criminal defendant to be appear, to present a defense, to testify, and to confront witnesses face to face; allowing the State to burden these rights would offend the framer's purpose.

v. *Factor Five: Differences in structure between the state and federal constitutions.*

The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the state's otherwise plenary power. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis. Id.

vi. *Factor Six: Matters of particular state interest or concern.*

The regulation of criminal trials in Washington is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection

provided to criminal defendants by the confrontation clause. Foster, 135 Wn.2d at 494.

- b. The prosecutor violated Wallin's state constitutional right to be present, testify, and confront the witnesses against him when the prosecutor improperly focused on his exercise of those rights.

Each of the Gunwall factors thus supports an independent analysis under the state constitutional provision. The factors demonstrate the Washington Constitution provides greater protection than the federal constitution with regard to infringement upon a defendant's right to be present at his trial. As a matter of fundamental fairness, Washington Territorial citizens determined 150 years ago that a criminal prosecution cannot proceed without the presence of the accused and limited the State's power accordingly. Adhering to this limitation today is consistent with our legal history, and imposes no great burden on the State's ability to obtain justice. Indeed, precluding comment on the defendant's presence throughout trial is no more burdensome than precluding the State from commenting on a defendant's right to remain silent when the defendant decides not to testify.

As this Court held in Johnson, when the State implies the accused has tailored his testimony by drawing the jury's attention to the fact that he has been present throughout his entire trial, listened to the testimony of

the witnesses against him, and then testified, the State impermissibly burdens the exercise of those rights. 80 Wn. App. at 341. Although the Johnson court's Sixth Amendment holding has been overturned, its reasoning is still sound, and rendered even more persuasive under the broader protections of article I, section 22. As set forth in section 3 below, moreover, this court should find the prosecutor's improper cross-examination violated Wallin's rights and that reversal of counts 1-3 is therefore required. Johnson, 80 Wn. App. at 339-40, n.1.

2. IN THE ALTERNATIVE, THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CURB UNFAIR AND REPUGNANT GOVERNMENT ACTION.

Under Portuondo, this Court may bar prosecutors from commenting on a defendant's right to be present at trial. 529 U.S. at 73 n.4 (inviting state trial and appellate courts to determine whether such comment is "always desirable as a matter of sound trial practice."). Justice Stevens, concurring in the judgment, wrote that the majority's decision "does not . . . deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial." Id. at 76 (Stevens, J., concurring).

This Court has inherent supervisory powers to maintain sound judicial practice. See, e.g., State v. Bennett, 161 Wn.2d 303, 306, 165

P.3d 1241 (2007) (using supervisory power to disapprove a WPIC jury instruction); State v. Bonds, 98 Wn.2d 1, 13, 653 P.2d 1024 (1983) (If “potential liability does not constitute sufficient deterrence of police officers making unauthorized excursions into another jurisdiction, let it be understood that we will not hesitate in the future to use our supervisory power to exclude the fruits of such unauthorized excursions.”).

Based the Portuondo Court’s invitation, other states have adopted rules prohibiting comment by prosecutors on the defendant's opportunity to tailor testimony to that of other witnesses, when such comment is unsupported by evidence. See, e.g., State v. Daniels, 182 N.J. 80, 861 A.2d 808, 819 (2004); State v. Swanson, 707 N.W.2d 645, 657-58 (Minn. 2006) (prosecutor may not, without an evidentiary basis in the record, imply a defendant tailored his testimony after hearing other witnesses); Commonwealth v. Martinez, 431 Mass. 168, 726 N.E.2d 913, 923 (2000) (reaffirming, after Portuondo, prior case law holding that prosecutorial comment on defendant's presence in the courtroom is improper); but see Miller, 110 Wn. App. at 285 (relying on Portuondo to reject appellant's constitutional claims on appeal); State v. Norville, 23 S.W.3d 673, 685-86 (Mo. App. 2000) (relying on Portuondo to find “[n]o manifest injustice or miscarriage of justice flowed from the prosecutor's comments in question.”); State v. Alexander, 254 Conn. 290, 755 A.2d 868, 874-75

(2000) (declining to adopt a mandatory rule requiring courts to give an instruction reminding the jury of the defendant's constitutional right to be present at trial).

Rather than engage in lengthy analysis, Miller simply held that Portuondo overruled Johnson on the issue of Sixth Amendment protection. Miller, 110 Wn. App. at 284. But this Court should now consider whether it is appropriate for Washington to adopt a procedural rule precluding prosecutorial comment on the right of the accused to be present at trial.

The New Jersey Supreme Court's analysis in Daniels is instructive. Unlike Miller, Daniels examined Portuondo in detail, noting the majority's statement that its decision

is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

Daniels, 861 A.2d at 815 (quoting Portuondo, 529 U.S. at 73 n.4). It also found persuasive Justice Stevens' concurrence, stating the Sixth Amendment confrontation right

serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned. The prosecutor's argument in this case demeaned that

process, violated that respect, and ignored that presumption. Clearly such comment should be discouraged rather than validated.

Daniels, 861 A.2d at 815 (quoting Portuondo, 529 U.S. at 76 (Stevens, J., concurring)). The Daniels court continued:

a criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are essential to a fair trial. Indeed, a criminal defendant has the right to be present at trial, to be confronted with the witnesses against him and to hear the State's evidence, to present witnesses and evidence in his defense, and to testify on his own behalf. Prosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees.

Daniels, 861 A.2d at 819 (internal quotes and citations omitted). Using its supervisory authority over the courts rather than basing its ruling on the state constitution, Daniels reached the narrow holding that "prosecutors are prohibited from making generic accusations of tailoring during summation." Id. at 819; accord Swanson, 707 N.W.2d at 657- 58.

Daniels and Swanson are persuasively reasoned and are based on the Portuondo majority and concurrence's invitation to reject such prosecutorial comments as not "desirable as a matter of sound trial practice." Portuondo, 529 U.S. at 73 n.4.

The Massachusetts Supreme Court has taken a slightly different approach. In Commonwealth v. Gaudette, the Court reaffirmed its pre-

Portuondo holding that “it is impermissible for a prosecutor to argue in closing that the jury should draw a negative inference from the defendant's opportunity to shape his testimony to conform to the trial evidence unless there is evidence introduced at trial to support that argument.” 441 Mass. 762, 767, 808 N.E.2d 798 (2004) (citing Commonwealth v. Person, 400 Mass. 136, 140, 508 N.E.2d 88 (1987) and Commonwealth v. Beauchamp, 424 Mass. 682, 690-91, 677 N.E.2d 1135 (1997)). Because the appellant had not made the claim, Court did not consider the state constitution but instead apparently exercised its supervisory authority. Gaudette, 441 Mass. at 767. The Court emphasized the prosecutor's responsibility to argue “within the bounds of evidence and the fair inferences from the evidence, making clear Massachusetts would not tolerate what the New Jersey Court termed “generic accusations” in Daniels. Gaudette, 441 Mass. at 767-68 (internal citations omitted). Because the evidence in that case supported the prosecutor's accusations of tailoring (primarily due to inconsistencies between the defendant's testimony and his statements to police and between his testimony and that of others), the Court affirmed the conviction. Id. at 803.

This Court should join New Jersey and Massachusetts in exercising its power to prohibit a practice that severely undermines the trial courts' ability to administer fair and impartial trials. Specifically, this

Court should adopt New Jersey's simple and commonsense rule that although a prosecutor may point out inconsistencies or raise questions about a defendant's testimony, the prosecutor may not, in cross-examination, closing argument, or rebuttal, call the jury's attention to the defendant's presence at trial. Daniels, 861 A.2d at 819-20.

3. THE CROSS-EXAMINATION AMOUNTED TO MISCONDUCT REQUIRING REVERSAL OF WALLIN'S CONVICTIONS AND REMAND FOR NEW TRIAL.

The State must take no action to unnecessarily chill or penalize the assertion of a constitutional right, and the State may not invite the jury to draw adverse inferences from the exercise of such a right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (comment on possession of legal weapons)); see also State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (comment on the defendant's failure to testify). In particular, the State may not invite the jury to draw a negative inference from the defendant's exercise of his right to cross-examine witnesses. State v. Jones, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993).

Wallin may raise this argument for the first time on appeal because it is a manifest error affecting a constitutional right. Id. at 809-10 (citing RAP 2.5(a)(3)). Moreover, Wallin may now raise this claim because any

objection at trial was likely to be futile under then-existing law. Miller, 110 Wn. App. at 284-85 (quoting Portuondo, 529 U.S. at 73).

In general, prosecutorial misconduct compels reversal where there is a substantial likelihood it affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Because prosecutor's cross-examination implicates a constitutional right, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Moreno, 132 Wn. App. 663, 671, 132 P.3d 1137 (2006). Under this standard, the reviewing court should reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)); see also State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999) ("The state's burden to prove harmless error is heavier the more egregious the conduct is.").

- a. The accusation that Wallin tailored his testimony was misconduct violating Wallin's state constitutional rights.

The Daniels court analyzed the difference between generic and specific comments on a defendant's ability to tailor testimony. Specific comments are those in which a prosecutor relies on facts in the record to support an inference that the defendant tailored his testimony. Daniels,

861 A.2d at 819 (citing Portuondo, 529 U.S. at 70-71). Generic comments are those in which the prosecutor attacks the defendant's credibility by commenting, without any evidentiary basis, on the defendant's opportunity to tailor his testimony because of his presence during trial. Id. The rule crafted by the Daniels court barred prosecutors from commenting in rebuttal argument on the defendant's right to be present at trial because such attacks on credibility without a specific evidentiary basis "debase the 'truth-seeking function of the adversary process,' violate the 'respect for the defendant's individual dignity,' and ignore 'the presumption of innocence that survives until a guilty verdict is returned.'" Daniels, 861 A.2d at 819 (quoting Portuondo, 529 U.S. at 76 (Stevens, J., concurring)). Washington case law also prohibits prosecutors from introducing facts not in the trial record. Belgarde, 110 Wn.2d at 509.

In the present case, at the outset of cross-examination the prosecutor implied Wallin tailored his testimony to fit with that of the police officer, the State's only witness, as well as other discovery materials. The prosecutor did not point out tortured inconsistencies in Wallin's story that allowed it to mesh improbably with the other testimony and evidence. The prosecutor even acknowledged in closing that Wallin's story was "fairly convincing." 3RP 230.

Instead, it appears sole purpose of this line of questioning was to accuse Wallin of tailoring his testimony, which was possible only because Wallin had exercised his constitutional rights under article I, section 22. Gregory, 158 Wn.2d at 806. Under either article 1, § 22 or the Daniels rule against prosecutorial commentary on the defendant's presence at trial, the prosecutor's direct yet generic comments on Wallin's exercise of his constitutional rights amounted to flagrant, prejudicial misconduct denying Wallin a fair trial on the disputed counts.

b. The misconduct prejudiced Wallin.

As this Court held in Johnson, when the State implies that the accused has tailored his testimony by drawing the jury's attention the defendant's exercise of right to be present at trial and to testify, the State impermissibly burdens the exercise of those rights. 80 Wn. App. at 341. Although Johnson's Sixth Amendment holding has been overturned, its reasoning is still sound when analyzed under article I, section 22.

Because of the important constitutional rights involved and the nature of the prosecutor's comments, this Court should apply a constitutional harmless error analysis. Moreno, 132 Wn. App. at 671. Sergeant Jones testified he chose to arrest Wallin, not Antone, but he admitted he could not be certain to whom the box belonged. 3RP 123-32. Wallin, on the other hand, offered a plausible account of events

disclaiming his knowledge of and possessory interest in the drugs, and thus his credibility was the linchpin of his case. The State therefore cannot demonstrate the prosecutor's improper line of questioning was harmless beyond a reasonable doubt.

But even if this Court should hold for some reason that the general prosecutorial misconduct standard applies or that defense counsel should have objected — despite the apparent futility of such an objection<sup>12</sup> — the State's bald suggestion of tailoring was so flagrant and prejudicial not even a curative instruction could have remedied it. Belgarde, 110 Wn.2d at 508. This is a case in which in which this Court should hold “[t]he bell once rung cannot be unring”<sup>13</sup> because the generic cross-examination questions, once asked, necessarily affected the jury's perception of Wallin's mere exercise of his constitutional rights.

In summary, only the jury could assess Wallin's credibility. But the prosecutor attempted to tip the scales by exacting a price for the exercise of Wallin's rights, tipping the weight of credibility towards the State. Wallin's count convictions on all but the marijuana-related charges should therefore be reversed.

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<sup>12</sup> Miller, 110 Wn. App. at 285 (holding Portuondo overruled Johnson).

<sup>13</sup> State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992) (quoting State v. Trickel, 16 Wn.App. 18, 30, 553 P.2d 139 (1976)).

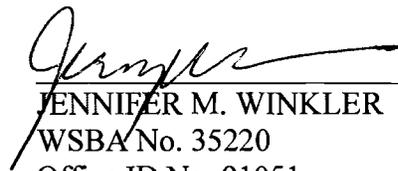
D. CONCLUSION

For the foregoing reasons, this Court should remand for a new trial on counts 1-3.

DATED this 27<sup>th</sup> day of May, 2010.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 28671-1-III
	)	
KEIR WALLIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 27<sup>TH</sup> DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] EDWARD OWENS  
GRANT COUNTY PROSECUTOR'S OFFICE  
P.O. BOX 37  
EPHRATA, WA 98823-0037
  
- [X] KEIR WALLIN  
DOC NO. 870772  
AIRWAY HEIGHTS CORRECTIONS CENTER  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF MAY, 2010.

x Patrick Mayovsky