No. 92605-1

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION

COA. 45374-6-II

NO. 12-1-04101-1

PERSONAL RESTRAINT PETITION

Zylion Houston-Sconiers
Petitioner's Full Name

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of the form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, Zylion Houston-Sconiers #368944,
(Full name and current address)
1830 Eagle Crest Way WA 98326

Apply for relief from confinement. I am Y am not ___ now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order: ___
(Identify type of court order)

1. The court in which I was sentenced is: Pierce County.
2. I was convicted of the crime of: Robbery, Assault, Unlawful Pos.
3. I was sentenced after (check one) Trial Y Plea of Guilty ___ on 9-13-13
Date of Sentence
4. The Judge who imposed sentence was John R. Hickman.
5. My lawyer at trial court was Barbara Corey
Name and Address if known

6. I did ✓ did not ____ appeal from the decision of the trial court. (If the answer is that I did), I appealed to: Division II.
Name of court or courts to which appeal took place

7. My lawyer for my appeal was: _____.
Name and address if known or write "none"

The decision of the appellate court was _____ was not _____ published. (If the answer is that it was published, and I have this information) the decision is published in _____

Still Pending COA # 45374-6-II.

8. Since my conviction I have ____ have not ✓ asked a court for some relief from my sentence other than I have already written above. (If the answer is that I have asked, the court I asked was _____. Relief was denied on
Name of court

_____.
Date of Decision or, if more than one, all dates)

(If you have answered in question 7 that you did ask for relief), the name of your lawyer in the proceedings mentioned in my answer was _____
Name and address if known

_____.

9. If the answers to the above questions do not really tell about the proceedings and the courts, judges and attorneys involved in your case, tell about it here: _____

_____

_____

_____.

B. GROUNDS FOR RELIEF:

(If I claim more than one reason for relief from confinement, I will attach sheets for each reason separately, in the same way as the first one. The attached sheets should be numbered "First Ground", "Second Ground", "Third Ground", etc). I claim that I have 4 reason(s) for this court to grant me relief from the conviction and sentence described in Part A.

1 Ground See Attached brief
(First, Second, etc)

1. I should be given a new trial or released from confinement because (State legal reasons why you think there was some error made in your case which gives you the right to a new trial or release from confinement): _____

See Attached brief

2. The following facts are important when considering my case. (After each fact statement put the name of the person or persona who know the fact and will support your statement of the fact. If the fact is already in the record of your case, indicate that also) _____

See Attached brief

3. The following reported court decisions (indicate citations if possible) in cases similar to mine show the error I believed happened in my case. (If none are known, state "None Known". _____

4. The following statutes and constitutional provisions should be considered by the court. (If none are now, state, "None Known") _____

See Attached brief

5. This petition is the best way I know to get the relief I want, and not other way will work as well because: See Attached brief.

C. STATEMENT OF FINANCES:

If you cannot afford to pay the $250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

1. I do ✓ do not_____ ask the court to file this without making me pay the $250 filing fee because I am so poor and cannot pay the fee.

2. I have $ ✓ in my prison or institution account.

3. I do ✓ do not _____ ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a layer.

4. I am ____ am not ✓ employed. My salary or wages amount to $_____ a month. My employer is _____.
Name and address of employer

5. During the past 12 months I did _____ did not ✓ get any money from a business, profession or other form of self-employment. (If I did, it was _____
Type of self-employment
And the total income I received was $ ✓.

6. During the past 12 months I:

Did ___ Did Not ✓ Receive any rent payments. If so, the total I received was $_____

Did ___ Did Not ✓ Receive any interest. If so, the total I received was $_____

Did ___ Did Not ✓ Receive any dividends. If so, the total I received was $_____

Did ___ Did Not ✓ Receive any other money. If so the total I received was $_____

Do___ Do Not ✓ Have any cash except as said in question 2 of Statement of Finances. If so the total amount of cash I have is $ ✓.

Do ___ Do Not ✓ Have any savings or checking accounts. If so, the total amount in all accounts is $ 0

Do ____ Do Not ✓ Own stocks, bonds or notes. If so, their total value is: $ ✓.

7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what eat item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
N/A	

8. I am ____ am not ✓ married. If I am married, my wife or husband's name and address is:

N/A.

9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age
N/A		

10. All the bills I owe are listed here:

Name & Address of Creditor	Amount
N/A	

D. REQUEST FOR RELIEF:

I want this court to:

Y Vacate my conviction and give me a new trial

____ Vacate my conviction and dismiss the criminal charges against me without a new trial

Y Other: See Attached brief.
(Please Specify)

E. OATH OF PETITIONER

STATE OF WASHINGTON

COUNTY OF Clallam

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

Zeton D Houston-Sconiers
Signature

Zejon Dontice Houston-Sconiers
Print Name & Number

SUBSCRIBED AND SWORN to before me this 4th day of DECEMBER 2014

BARBARA J GRONSETH
COMMISSION EXPIRES
NOTARY
PUBLIC
DECEMBER 1, 2017
STATE OF WASHINGTON

Barbara J. Gronseth
Notary Public in and for the State of Washington
Residing at Clallam Bay
My commission expires Dec. 1, 2017

If a notary is not available explain why none is available and indicate who can be contacted to help you find a Notary: _____

_____

_____.

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

DATED This _____ day of _____, 2_____.

_____
Print Name & Number

COA. 45374-6-II
No. 12-1-04161-1

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

ZYION HOUSTON-SCONIERS

PETITIONER.

PERSONAL RESTRAINT PETITION

OPENING BRIEF:

CONSOLIDATE WITH DIRECT APPEAL

Zyion Houston-Sconiers
#368944
Clallam Bay Corr. Cntr.
1830 Eagle Crest Way
Clallam Bay, WA 98326

A. STATUS OF PETITIONER.

Zyion Houston-Sconiers, challenges his 2013 Pierce County convictions for (7) counts of Robbery in the First Degree, (1) count of Second Degree Assault, and (1) count of Unlawful Possession of a Firearm in the First Degree. (12-1-04161-1). Houston-Sconiers is currently in custody and is serving a total of 372 months. In addition Houston-Sconiers has lost his right to vote and to possess a firearm as a result of the convictions. RAP 16.4(b).

B. RELEVANT FACTS.

On October 31, 2012, Andrew and Steven Donnelly were out trick-or-treating in Tacoma's North End. RP 988, 1124, 1125. Then 19 year-old Andrew was dressed in a graduation gown and red devil mask, and 13 year-old Steven was dressed as a ninja. Around 9;30 PM, three young men approached them on the street. RP 468, 991. The young men wore dark hoodies and one had a bandana around his mouth. RP 922, 1130, 1131. Andrew thought one of the men also wore a white hockey mask, but Steven did not remember any of the men wearing a mask. RP 1004, 1130.

One young man held a silver gun, which he pointed at Steven then demanded their bags of candy. RP 993, 1131, 1132, 11333. The men grabbed the bag and Steven's backpack, then ran away. RP 354. Andrew and Steven then walked to their gradparents' house and called the police. RP 345, 998.

Officer Wnedy Haddow-Brunk responded, and obtained statements from Anfrew and Steven, where they gave discriptions of the suspects and an account of what happened. RP 344, 346, 348, 351, 352-53.

A short time later, Destinae Peterson-Mims, Axsaulis Guice, Edward Bradley, and Isaiah Greene were also trick-or-treating in the North End, when they were approached by three young men. RP 770, 773, 774, 775, 814, 815, 818, 866, 867-68, 870, 949, 950, 954-55. The men wore dark clothing and hoods over their heads, and their faces were covered by a white mask, a red mask, and a bandana. RP 780, 804, 819, 955-56, 957. One young man pointed a silver gun at the freinds, and siad "this is a robbery." RP 785-86, 820, 822023, 829, 870, 872, 954, 957. The men demanded their bags of candy and cellular phones, and ran away. RP 786, 837, 876.

The friends did not call the police, but later Peterson-Mims' parents called 911 to report the incident. RP 857, 922. Officer Jared Tiffany responded and obtained statements from Peterson-Mims and Guice. RP 896, 900-01.

At 10:24 PM, Officer Rodney Halfhill responded to a 911 call from James Wright reporting another robbery in the area. RP 1067, 1071, Wright told Officer Halfhill that the suspects ran in a southerly direction, so the Officer immediately called dispatch and requested that

officers set up a containment operation in the area. RP 1067, 1069, 1071. Then he took a statement from Wright, who said he had been walking through the adjacent apartment complex and talking on his cellular phone, when he was approached by four or five young black men. RP 1073. The men demanded Wright's cellular phone, so he handed it to them. RP 1073. He noticed the young men wearing dark clothing, and one wore a white hockey mask and held a silver gun. RP 1073.

Several officers responded to the area to set up a containment operation. RP 363, 669, 903. Because the suspects fled on foot, police also deployed a K9 tracking team. RP 364, 728, 734. The tracking dog led officers down an alley, and to a Cadillac parked on the back lawn of a residence. RP 738. The officers shone flashlights inside the Cadillac, and saw several people inside. RP 738-39. The officers ordered the occupants to come out of the car, and they complied. RP 740.

Five men were taken into custody. RP 741. Those men were Zyion Houston-Sconiers, Treson Roberts, Zion Johnson, LeShawn Alexander, and Amancio Tolbert. RP 370, 670, 907, 1562.

The owner of the property, Dorothy Worthey, came outside to see what was going on. RP 1155, 1228-29. Worthey told the officers they could search the Cadillac, which belonged to her son and had been parked in the yard for some time because it needed to be repaired. RP 1156, 1171, 1186, 1224, 1229, 1231. Inside the Cadillac, police found several cellular phones, two backpacks, a red devil mask, a white hockey mask

in the glove box, and a silver handgun under the front passenger seat. RP 530, 537-38, 539, 542, 545, 547, 553, 559-60, 592-93, 1154, 1158. Andrew and Steven Donnelly identified one of the backpacks found in the car as the one taken from Steven. RP 996, 1137.

The State charged all defendant's with several counts of Robbery, Assault and Unlawful Possession of a Firearm. However, during pre-trial and trial proceedings, the following did occur:

Defense Counsel for Houston-Sconiers (**Barbara Corey**), moved to suppress the evidence found inside the Cadillac. RP June 27, 2013, Pg. 224-256. The defense argued that the police lacked any reason to order Houston-Sconiers out of the car. RP 232, the police left the doors open to use the plain view doctrine to conduct the search of the vehicle. RP 234, and that the defendant's had permission to be in the car by the owner. RP 235,.

The trial court erroneously denied the evidentiary hearing and based its decision on the fact that it was the court's belief a hearing wasn't necessary. And that its reasoning was based on the fact that it was not sure that Robert Johnson could prove he was the owner, what his color of title was, whether he gave permission...RP 230.

On July 8, 2013, during a better part of the day, the court conducted a hearing on motions that were renewed by counsel, and conducted voir dire, and jury selection without Houston-Sconiers being

present. RP July 8, 2013, Pg. 257-271,.. On July 9, 2013 the Court went on the record and tried to explain the reason why the defendant's were no present, before and after defense counsel injured her leg. Counsel did object to the Court room being open and opposing counsel and trial court engaging in dialogue in the absence of her client. RP July 9, 2013, Pg. 272-280. See App. B. Report of Proceedings).[1]

After the case was called for trial, and the proceedings were under way, Houston-Sconiers and counsel met with the Prosecutor Greg Greer, to discuss a possible plea deal. The prosecutor told the defendant and counsel that "he was going hard after my client because my client comes from "a bad family", and that my client no doubt would continue to commit worse crimes as he got older". See App. C. Declaration of Barbara Corey. Defense counsel also declared that "Mr. Greer minced no words and said that he wanted to lock up my client for as long as he could." Id. Clearly the State's reasoning or belief was based on **future dangerousness.**

When the plea negotiations broke down, the State then turned to Houston-Sconiers co-defendants, where the State dropped all charges and gave immunity to Johnson, Tolbert, and Alexander in exchange for their testimony against Houston-Sconiers. Johnson testified that he did not commit the crimes and did not know anything else. RP 210, 1088, 1091-94. Tolbert testified that he was too drunk to remember the details

1. State v. Irby violation

of the evening, but he did not rob or see anyone with a gun. RP 1817, 1818, 1821, 1859. When asked about a proffer that he made to the prosecutor before he was granted immunity, wherein he implicated Houston-Sconiers and Roberts, he testified that he read Alexander's statement and memorized it so that he would also have a "get out of jail free" card. RP 1823. Alexander testified to the facts of the State's case and implicated Houston-Sconiers, and Roberts in the robberies. RP 80, 38-39, 1442-43, 1447-48, 1451-52, 1454, 1456-59, 1464, 1532-33.

Midway through trial, Defense counsel objected to the States use of a statement made by Wright. Arguing that it was a violation of the defendant's right to confrontation. The court allowed the hearsay evidence, without giving an instruction to the jury on missing witness. RP July 25, 2013, Pg. 1785-76

Defense Counsel further objected to the prosecutors tactics when it appeared that his witness Tolbert was allowed to read a statement made by Alexander. RP 1831-36. The prosecutors tactics were far more prejudicial than the court realized, especially when the State alluded to the fact that defense counsel was dishonest. RP 302.

Prosecutor Greg Greer was malicious in the fact that he repeatedly tried to shift the burden of proof, by pointing out why certain witness' did not come before the court. RP August 1, 2013, Pg. 2240. Counsel objected several times to the State discrediting the

witnesses, instructing the jury on the law, RP 2250, 2338, misstating the evidence and testifying to things that witnesses did not say. RP 2239, 2340-41, 2343, 2350. Not only did the prosecutor insinuate that his witnesses Johnson and Tolbert did not remember, due to a snitch code which was clearly a violation of State v. Monday, 171 Wn.2d 667, RP. 2347, 2348, 2350. He argued to the jury in closing that as an advocate it was his job to challenge the evidence, and not take "what Ms. Bush says and just, okay, Ms. Bush, open ended question, what's your answer to this?... Its to challenge it. And that's the only way you discover, for instnace, that she's been talked to during her testimony by somebody who was in here." RP 2348.

When defense counsel Corey objected to the **improper allegation of misconduct"**. Not only was the objection overlooked RP 2351. The prosecutor continued on with his blatant disregard for settled case law by informing the jury that his witness Tolbert, had committed perjury when he testified that he did not remember. RP 2354.

Through the above chain of facts, it is clear that prosecutor misconduct and judicial trial error deprived Houston-Sconiers a right to a fair trial where reversal is required as he will show below.

C. **RELEVANT ARGUMENT**

Our Washington State Constitution art. 1 § 22 (amend 10) and the Federal Constitution amend. 5, 6, and 14, guarantees a

defendant the right to confront his accusers, the right to be present at every stage of the trial, and the right to be free from prosecutor misconduct. State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. ; Bruno v. Rushen, 721 F.2d 1193 9th Cir. 1983).

For the sake of brevity the following will be in the order of the facts presented.

2. The trial Court erred when it refused an evidentiary hearing during counsels motion to suppress the evidence found during the illegal search of the Cadillac.

A warrantless arrest islawful under the Fourth Amendment whenever the arrest is based upon probable cause. Virginia v. Moore, 53, U.S. 164, 128 S.Ct. 1598, 170 L.Ed. 559 (2008). A state, however, may place additional restrictions upon warrantless arrests. In Washington, RCW 10.31.100 provides that an officer may make a warrantless arrest when, there is probable cause, to believe that a felony has been committed.

The "probable cause" standard requires the same amount of evidence for both arrests and searches. Probable Cause requires:

1. Sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. State v. Gentry, 125 Wn.2d 570, 607, 888 P.2d 1105, cert.

denied, 516 U.S. 843 (1995).

2. There must be "reasonable grounds for suspicion supported by facts and circumstances sufficiently strong to warrant a man of ordinary caution to believe" the suspect is involved in criminal activity. Probable Cause is a quantum of evidence less than would justify a conviction, but more than bare suspicion. Brinegar v. United States, 338 U.S. 160, 175, 93 L.Ed.2d 1879, 69 S.Ct. 1302 (1949); State v. Cord, 103 Wn.2d 361, 365, 693 P.2d 81 (1985); State v. Connor, 58 Wn.App. 90, 97, 791 P.2d 261 (1990).

Probable cause is an objective standard. It is determined with reference to a reasonable person with the expertise and experience of the officer in question. The expertise of an officer is critical. What constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer. State v. Rembolt, 64 Wn.App. 510, 827 P.2d 505, review denied, 119 Wn.2d 1005 (1992).

Thus, as applied to arrest, the officer need not have facts sufficient to establish guilt beyond a reasonable doubt but only reasonable grounds for suspicion coupled with evidence of circumstances sufficiently strong in themselves to warrant a cautious and disinterested person in believing that the suspect is guilty. State v. Bellows, 72 Wn.2d 264, 266, 432 P.2d 654 (1967).

Moreover, each individual possess the right to privacy,

meaning that each person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime. Where police do not have anything to independently connect an individual to illegal activity, no probable cause exists and an arrest or search of that person is illegal under article 1, § 7. **State v. Grande**, 164 Wn.2d 135, 187 P.3d 248 (2008).

A person may challenge a search only if he has a personal Fourth Amendment or Art. 1 Section 7 interest in the area searched or the property seized. The defendant must personally claim a "justifiable "reasonable," or "legitimate expectation of privacy" that has been invaded by governmental action. **Rakas v. Illinois**, 439 U.S. 128, 133, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978).

In determining whether a defendant has a person privacy interest, the court in **State v. Hinton**, 179 Wn.2d 862, 319 P.3d 9 (2014), focused on whether the defendant possessed a legitimate expectation of privacy as to the item or area searched. Moreover, while the right to privacy is a powerful component to the Federal Constitution it is well established that article 1, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. Id. **State v. O'Neil**, 148 Wash.2d 564, 584, 62 P.3d 489 (2003); **State v Jackson**, 150 Wash.2d 251, 259, 76 P.3d 217 (2003); See also **State v. Gunwall**, 106 Wash.2d 54, 720 P.2d 808 (1986). Article 1, section 7

"is grounded in a broad right to privacy" and protects citizens from governmental intrusion into their private affairs without the authority of law. State v. Chacon Arreola, 176 Wash.2d 284, 291, 290 P.3d 983 (2012)(citing State v. Buelna Valdez, 167 Wash.2d 761, 772, 224 P.3d 751 (2009).,

Further, the defendant seeking suppression of seized evidence has the burden of establishing the requisite privacy interest. See Alderman v. United States, 394 U.S. 165, 173, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

Here, Houston-Sconiers established pretrial that while the property was owned by Dorothy Worthey, the Cadillac that sat on her property belonged to her son. RP 1156, 1171, 1186, 1224, 1229, 1231. And during trial it was established that the owner of the Cadillac gave permission to Houston-Sconiers to be in the car. RP. 240.

Therefore, when the trial court denied the motion to suppress the evidence found inside the Cadillac, and the officers illegal search, because it could not be sure if Robert Johnson could prove he was the owner, was a weak excuse to deny the motion. The trial court clearly abused its discretion, and prejudiced the defendant. State v. Gentry, 125 Wn.2d 570, supra. controls.

This Court reviews a trial court's legal conclusions on a motion to suppress de novo. State v. Schultz, 170 Wash.2d 746, 753,

248 P.3d 484 (2011)(citing **State v. Smith**, 165 Wash.2d 511, 516, 199 P.3d 386 (2009)).

3. The trial court erred when it conducted an open court session without the defendant being present.

Under article 1 section 22 of the State Constitution, the accused in a criminal prosecution has the right to appear and defend in person and by counsel;) and by Statute (Rem. & Bal. Code, § 2145) it is provided that no person prosecuted fro an offense or by confinement in the penitentiary or in the County Jail, shall be unless personally present during trial. State v. Shtzler, 82 Wash. 365, 144 P.284 (1914).

Although the right to be present originated in the Confrontation Clause of the Sixth Amendment, the United States Supreme Court has applied the Due Process Clause of the fourteenth Amendment in situations where defendants are not actually confronting witnesses or evidence against them. See **United States v. Gagnon**, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)(Per Curiam); **Rushen v. Spain**, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

In this case, two critical errors occurred. On July 8, 2013, while conducting voir dire, and jury selection. Houston-Sconiers was not present, nor was Houston-Sconiers present when his counsel had a medical emergency, and the court held open session without him being

present.

The record indicates that on July 8, 2013, the Court held morning sessions where the attorney's discussed motions, and other trial matters. Recess was taken, voir dire completed and the venire members were placed in the box. RP 257-271. Houston-Sconiers was not present at that time.

The record further indicates that on July 9, 2013, Houston-Sconiers, complained to his counsel about not being present, then and after the 1:30 PM recess. Counsel went on the record and Objected to the events that had taken place outside the presence of her Client the day before. RP 279-280

The court responded by stating that it did not want to bring a defendant to the courtroom without an attorney, and that no substantive issues were discussed. RP 279-280.

This is not a case where the court excused jurors pre-voir dire. **State v. Wilson**, 174 Wn.App. 328, 298 P.3d 148 (2013).

This is a case where Houston-Sconiers was absent during the private questioning and excusal of sworn juror's, and during discussions between the prosecutor attorney and trial court in open court. **State v. Gasteazoro-Paniagua**, 173 Wn.App 751, 294 P.3d 857 (2013); See **State v. Irby**, 170 Wn.2d 874, 246 P.3d 796 (2011)(E-mail exchange between trial court and prosecutor and defense counsel that took place after

prospective jurors had been sworn and filled out questionaires, in which court suggested that certain jurors be removed from panel and which resulted in dismissal of seven potential jurors, constituted a part of the jury selection process at which murder defendant had a right to be present.).

Here, the court should have opted to not have court period. It is a well established rule that the court cannot entertain any dialogue in open court without the defendant being present. However, it chose to conduct a hearing on whether or not counsel would be able to continue due to her injury. Because it was a critical stage of the trial, Houston-Sconiers had every right to be present to at least, if applicable inform the court of what would have been best for him. See **State v. Jones**, 175 Wn.App. 87, 303 P.3d 1084 (Div. 2. 2013); Thus the trial court violated Houston-Sconiers right to a public trial. **In re Morris**, 176 Wn.2d 157, 288 P.3d 1140 (2012); **State v. Wise**, 176 Wn.2d 1, 288 P.3d 1113 (2012); **State v. Paumier**, 176 Wn.2d 29, 288 P.3d 1126 (2012)(Public trial violation is automatic reversal).

4. The trial court erred when it allowed hearsay testimony from a witness that was not unavailable, without instructing the jury on "missing witness doctrine".

Under the missing witness doctrine the State may point out the absence of a "natural witness" when it appears reasonable that the

witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable; the State may then argue, and the jury may infer, that the absent witness' testimony would have been unfavorable to the defendant. State v, Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), Montgomery further explained that ...the limitations on the missing witness doctrine are particularly important when, as here the doctrine is applied against a criminal defendant. id. at 488, 816 P.2d 718. First , the doctrine applies only if the potential testimony is material and not cumulative, at 489, 816 P.2d 718. second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. Id. at 488, 490, 816 P.2d 718. Third, the doctrine applies only if the witness's absence is not satisfactorily explained... Id. at 489, 816 P.2d 718. For example, if the witness is not competent or if testimony would incriminate the witness, the absence is explained and no instruction or argument is permitted. Id.

Counsel for the defense, moved the court for an order to warn the prosecutor about a particular officer who was scheduled to testify to the statement taken from (V) victim James Wright. RP 1044.

There, the court issued a material witness warrant on James Wright, and in the event he did not show defense counsel was concerned

that **ER** 801(d)(1)(3) would not allow said testimony because it was not hearsay. RP 1044. The prosecutor agreed with counsel to the extent that "a statement of identification is subject to cross-examination". RP 1045.

Defense counsel further asked the court to prohibit the State from offering any other statements from Mr. Wright...because it would violate **Crawford**. RP 1045.

However, during direct examination, the State asked the witness about Wright identifying certain items that was taken from him. RP 1785. Defense counsel objected due to the questioning violating their client's right to confrontation. RP 1785-86.

First, unlike **Reed**, Houston-Sconiers was not responsible for the alleged victim i,e, James Wright not showing up for trial. **State v. Reed**, 168 Wn.App. 553, 278 P.3d 203 (2012); Second, both the Washington and United States Constitution guarantee criminal defendant's the right to confront witnesses against them. **State v Smith** , 148 Wn.2d 122, 59 P.3d 74 (2002)(citing **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354 (2004,

Even though the prosecutor conceded that it would be a **Crawford**, violation, he elected to solicit the unconstitutional testimony of a non-testifying witness, who could not be found and gave an alias name. RP 1785-86.

Our Supreme Court made it clear, "the doctrine may not be applied,, if it would infringe on a criminal defendant's right to silence or shift the burden of proof. Id. at 491, 816 P.2d 718,.

Failure to instruct the jury on missing witness doctrine, allowed the State to shift its burden of proof to the defense. Especially where, you have an alleged victim claiming to have been robbed by Houston-Sconiers. James Wright was the key to the States case-in-chief, and focal point on the suppression of evidence. For it was his statement to police that helped track the alleged robbers to the Cadillac. See **United States v. Aguiar**, 975 F.2d 45, 47 (2d Cir. 1992)(due process violation-victim statement read as hearsay); also **State v. Dobbs**, 167 Wn.App. 905 (2012); **Crivens v. Roth**, 172 F.3d 991, 997-98 (7th Cir. 1999)(witness used alias).

Equally troubling; the trial court when ruling on the Unlawful Possession of a Firearm count, stated; "Even though he wasn't present, it was clear that based on his testimony, there was sufficient evidence to at least allow it to go to the jury that he, in fact, was robbed by the same individuals that...the State has shown evidence robbed multiple victims that night. RP 1958.

The record clearly indicates a violation by the court, that warrants reversal of charges including the charge of robbery in the first degree against James Wright. See **State v. Z.U.E.**, 178 Wn.App.

769, 315 P.3d 1158 (2014)(unknown informants, who called 911 were not reliable enough to justify investigatory stop); See App. D. Courts Instructions To The Jury #21).

Finally!

5. Prosecutor misconduct deprived Houston-Sconiers the right to a fair trial where he;

a) Used a personal bias to prosecute the defendant, because he believed the defendant came from a bad family and would continue to commit worse crimes when the defendant got older. App. C.

b) alluded to the fact that defense counsel was being dishonest. RP 302.

c) tried to shift the burden of proof, by pointing out why certain witness' did not come before the court. RP 2240

d) misstated the evidence and testified to things that witness's did not say. RP 2239, 2340-41, 2343, 2350.

e) incorporated into his closing the nigger language, and suggested to the jury that his witness' could not remember due to a snitch code. RP 2347, 2348, 2350.

f) used the Halloween Mask's and gun with the lights dimmed to illustrate the scene of the crimes. RP 1190-1212. And

G) stated to the jury that he was advocating on behalf of the public.

The State may not assert its personal opinion as to the defendant's guilt or a witnesses credibility. **State v. McKenzie**, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) "[T]here is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case. **McKenzie**, 157 Wn.2d at 53, 134 P.3d 221 (quoting State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490 (1905).

Here, it was unprofessional conduct for Prosecutor Greg Greer, to use his personal bias against Houston-Sconiers family to seek out a conviction, because he felt that Houston-Sconiers came from a bad family and would most likely commit crimes in the future. The language used by the prosecutor as described in Counsel's declaration, can be found in In re Vandervlugt, 120 Wn.2d 427, 434, 842 P.2d 950 (1992) where the court in that case rejected the States argument on future dangerousness if the defendant was not a sex offender).

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1 Section 22 of the Washington State Constitution.

"A" fair trial "certainly implies a trial in which the attorney representing the State does not throw the prestige of his public office...and the expression of his own belief of guilt into the

scales against the accused." State v. Hecht, 179 Wn.App. 497, 319 P.3d 836 (2014); To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutors conduct was both improper and prejudicial. In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012). To show prejudice a defendant must demonstrate a substantial likelihood that the misconduct affected the jury verdict. See State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009);

Visual aids are more memorable for jurors during deliberations. Highly prejudicial images may sway a jury in ways that words cannot. See State v. Gregory, 158 Wash.2d 759, 866-67, 147 P.3d 1201 (2006); Here, when the prosecutor stated that he was only illustrating with the mask and gun, what he really was doing was inflaming the jury, to be biased against Houston-Sconiers. RP 1194. Defense counsel was correct in their objections to this highly prejudicial tactic, because it led the jury to believe Houston-Sconiers was guilty as charged.

Furthermore, a prosecutor also commits misconduct by personally attacking defense counsel, impugning counsel's character, or generally disparaging defense counsel as a means of convincing jurors to convict the defendant. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). Remarks by the prosecutor that malign defense counsel or their role in the criminal justice system are improper. State v. Negrete, 72 Wn.App. 62, 67, 863 P.2d 137 (1993); State v

Gonzalez, 111 Wn.App. 276, 282-84, 45 P.3d 205 (2002); United States v. Friedman, 909 F.2d 705, 709-10 (2nd Cir. 1990); Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983). "[S]uch tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and [courts] readily presume because the principle is so fundamental that all attorney's are cognizant of it." Bruno, 721 F.2d at 1195.

Proesutors may not use idioms or phrases that imply defense counsel's deceitfulness. State v. Thorgerson, 172 Wn.2d 438, 450-52, 258 P.3d 43 (2011). And the prosecutor cannot interject racial words such as "nigger" into its summation, and claim that witnesses are unwilling to tell the truth due to a "snitch code". See State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); More importantly the prosecutor cannot play to the jurors emotions by stating that he is an advocate for justice, State v Lindsay 326 P.3d 125, 2014 RP 2348. the courts have reversed when the prosecutor steps outside of his ethical boundaries when trying to gain a conviction. See In re Glasma 286 P.3d 673. Also; State v. Pierce 169 Wn.2d 533.

Thus prosecutor misconduct deprived Houston-Sconiers his inherent right to a fair trial. Reversal is required.

Remedy

As noted above, due to the trial court's errors and State

misconduct reversal is required. If the State objects, then this Court should require the State to make a prima facie showing of any compelling reason not to allow this remedy. If the State cannot do so, then this Court should vacate the judgment and remand to Pierce County Superior Court for further proceedings. If the State makes a prima facie showing, then this Court should remand for a hearing on the points raised herein. In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983); In re Fleming, 129 Wn.2d 529, 919 P.2d 66 (1996).

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should vacate Houston-Sconiers convictions and remand to Pierce County for a New Trial. In the alternative this Court should remand for an evidentiary hearing on the points, to include the evidence of the illegal search of the Cadillac.

Respectfully submitted by,

Zyion D Houston-Sconiers

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DECLARATION OF BARBARA COREY

I, BARBARA COREY, declare under penalty of perjury that the following declaration is true and correct:

1. I am over the age of 18 and am competent to make this declaration.
2. I am an attorney, admitted to the Washington State Bar in 1981. Since that time I have practiced exclusively criminal law, both as a prosecutor and as a criminal defense attorney.
3. In 2012-2013, I represented Mr. Zyion Houston-Sconiers in a multi-count robbery case with an addition count of felony assault, several counts of unlawful possession of a firearm. The State had filed firearm enhancements on as many of these charges as it possibly could.
4. In my opinion, I believed that the case was grossly over-charged. With the firearm enhancements alone, my client was looking at more than 30 years of flat time. Flat time means no earned early release time [good time]. This is more time than the standard range for first degree murder which is 240-320 months [20 – 26 years] which IS eligible for earned early release time.
5. Despite my best and repeated efforts, I was unable to obtain reduction of charges for my client. One of the prosecutor's stated reasons for refusing to negotiate was my client's family background. The prosecutor had previously handled the case of Aretha Claresse Sconiers, Pierce County #00-1-02607-4, a homicide by abuse case, and also was familiar with other numerous cases committed by other individuals with the last name of Sconiers. The

prosecutor, Mr. Gregory Greer, told me that my client came from a "very bad family" and that he deserved no leniency. He rejected my repeated arguments that my client should be viewed as an individual human being and that his case and his case only was the matter we were discussing. The prosecutor instead focused on the greater Sconiers family.

6. The prosecutor in this case was the lead attorney on the "gang unit" although the State did not charge any gang motivator for the crime. In Pierce County, the "gang unit" generally regarded by defense attorneys to be a "rogue" unit, unanswerable to anyone else in that office.

7. After the case was called for trial and we were in Judge Hickman's courtroom, my client asked me if he could speak directly to the prosecutor. Although I told him that I thought it was a poor idea, Mr. Houston-Sconiers wanted to do it. I told Mr. Greer of my client's wish. The three of us sat down for a talk in the jury room [there was no jury yet]. My client discussed his rationale for a lesser outcome. Mr. Greer very straightforwardly told us that he was going hard after my client because my client comes from "a bad family" and that my client no doubt would continue to commit worse crimes as he got older. Mr. Greer minced no words and said that he wanted to lock up my client for as long as he could. Mr. Greer appeared to me to be concerned more about my client's family other family members and their misdeeds.

8. Mr. Greer made some offers to my client during the trial. Those offers and my client's consideration and rejection of them are set forth in the appendix to this declaration.

9. After my client was convicted, the State came to the realization that the case had been grossly over-charged. The State therefore recommended an exceptional below the standard range, asking the court to impose only the flat time for the firearms enhancements. The court imposed this sentence. As noted above, Mr. Houston-Sconiers was sentenced to more than 30 years of flat time.

10. This sentence resulted in some uproar in the community. After the sentencing hearing was reported in the local paper, I spoke to one of the editors on the Tacoma News Tribune, Peter Callaghan, who was simply appalled at the length of time imposed in this case. He wrote an op-ed pierce about this case.

11. I also had called from the Washington State Legislature about the harshness of the sentence in this case.

12. It is my understanding that the 2014 Legislature passed a bill that permits individuals who committed crimes as juveniles but were sentenced as adults to petition the Board for review of their sentences at mid-point. If the individual has had good behavior during the first half of the sentence, the individual may be granted the relief of release.

13. The legislation mentioned above is a direct consequence of the gross injustice perpetrated in the Houston-Sconiers' case.

14. Mr. Houston-Sconiers' juvenile probation officer appeared at his sentencing hearing and spoke on his behalf. She was impressed with the progress that he had made while on probation and believed this incident to be a complete aberration.

15. Mr. Houston-Sconiers also had been involved in the Mockingbird Program and was doing so very well that he was featured in the program's publication.

DATED at Tacoma, WA this 3rd day of June, 2014.

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APPENDIX A

7/21/13

ZH WE HAVE DISCUSSED THE OFFER AGAIN (BARBARA COREY, RICHARD AUSTRINN AND MYSELF).

I DO NOT ACCEPT THE OFFER AND WANT TO CONTINUE THE TRIAL ON ALL COUNTS ZH

X Zion D. Houston-Sconiers

WITNESSED BY:

ZH

I Zyion Houston-Sconiers have herd and discussed with my atterney and Pat Pitt & Rich Austring the prosecutor's offer of 17 1/2 years. This would be 5 years flat time and 12 1/2 ZH year of standard ZH Rang time. With good time, I would serve 12 1/2 years. I understand this will be the prosecuters final offer in the case. We have ZH discussed the offer extensively. I ZH do not want to take the offer. I have decicided not to take the offer. I want to go to trial. Even though I understand I could be convicted of enough counts to send me to prison for more than 40 years.

July 14 /13

Zyion D Houston Sconiers

WITNESSED by.

RICHARD AUSTRING