72497-5

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No. 72497-5-I

King County #13-1-03205-0

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HO,

Appellant.

FILED
Dec 15, 2015
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
KING COUNTY

The Honorable Teresa Doyle, Judge

APPELLANT'S AMENDED OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Douglas Ho was deprived of his Sixth Amendment and Article I, section 22, rights to counsel of choice under United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), and State v. Hampton, __ Wn.2d __ (2015 WL 7294538) (11/19/15).

2. Resentencing is required in order to apply the principles of State v. O'Dell, ___ Wn.2d __, __ P.3d ___ (2015 WL 4760476).

3. Mr. Ho's Fifth Amendment and due process rights were violated, as well as his rights to a fair trial before an impartial jury, when a detective commented on his failure to deny guilt initially, giving an improper opinion on guilt, veracity or credibility. Further, counsel's unprofessional failures amounted to ineffective assistance, in violation of Mr. Ho's Sixth Amendment and Article 1, section 22, rights.

4. Ho's constitutional rights to jury unanimity under Article 1, section 21, were violated.

5. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct which compels reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Sixth Amendment as interpreted by the Supreme Court in Gonzalez-Lopez, supra, a defendant who does not require court-appointed counsel is entitled to be represented by counsel of his choice and under Hampton the trial court is required to consider all of the relevant facts in deciding whether to allow new counsel to substitute for appointed counsel.

   Were Mr. Ho's Sixth Amendment rights violated when, well before trial, his dissatisfaction with new court-appointed counsel led him to retain counsel but the trial court would not grant the request for counsel to substitute in, even though Mr. Ho had been forced to accept new appointed counsel after the prosecution created a conflict by endorsing a witness who was never called to testify at trial?

2. Mr. Ho was only 18 on the day of the crimes. He was sentenced to serve 606 months in custody. At the time of sentencing, it was generally believed that a sentencing court

could not consider the defendant's youth as a mitigating factor and that State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997), had so held. In O'Dell, supra, the state Supreme Court recently clarified that Ha'mim did not so hold.

Is reversal and remand for resentencing required because O'Dell applies to this case and Mr. Ho's case involves serious questions regarding maturity and age and culpability under O'Dell?

3. Does an officer improperly comment on the defendant's guilt when he testified that people he arrests would normally protest their guilt but that Mr. Ho did not do so and instead just sat there? Further, is such testimony an impermissible comment on Mr. Ho's exercise of his rights to remain silent in the face of accusation? And is counsel prejudicially ineffective in failing to even attempt to mitigate the harm?

4. Was the right to jury unanimity violated when the prosecution charged three counts of first-degree assault based on three victims but failed to elect which of two different assaults upon which the jury should rely and no unanimity instruction was given?

5. Does the prosecutor commit flagrant, prejudicial misconduct in declaring "we know for certain" that Mr. Ho and his codefendant, Mr. Contreras, were two of the three shooters, and in using derogatory claims regarding the defense?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Douglas Ho was charged along with codefendant Victor Contreras by first amended information in King County Superior Court with a count of first-degree unlawful possession of firearm and three counts of first-degree assault charged with firearm enhancements and a "gang intent" aggravating factor. CP 189-91; RCW 9A.36.011(1)(A); RCW 9.41.040(1); RCW 9.94A.030; RCW 9.94A.533(3); RCW 9.94A.535(3)(aa).

Pretrial proceedings were held before the Honorable Judges Theresa Doyle, Ronald Kessler and Jim Rogers, on August 9, October 4 and 25, November 8 and 15 and December 13, 2012, January 10, April 25, My 2, June 5, August 22 and September 9, 2013 and with trial before Judge Doyle on April 8, 10, 15, 21, 22, 23, 24, May 5, 6, 7, 8, 12, and 14, 2014, after which Mr. Ho was found guilty as charged.[1] CP 322-342.[2] At sentencing on September 5, 2014, Judge Doyle ordered Mr. Ho to serve standard-range sentences and enhancements totaling 606 months in custody. CP 419-20.

Mr. Ho appealed and this pleading follows. See CP 425-34.

2. Testimony at trial

On the evening of July 22, 2012, gunshots were fired on the streets of Seattle's Beacon Hill neighborhood, leaving casings, bullet fragments

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[1]Codefendant Contreras was also convicted as charged; his appeal was not consolidated with this one and is instead being pursued under No 72419-3-I.

[2]The verbatim report of proceedings contains 14 separately paginated volumes reflecting multiple days of proceedings over several years, which will be referred to as follows:

> "1RP"-the chronologically paginated volume containing the proceedings of August 9 and October 4, 2012 (Judge Doyle), October 25, 2012 (Judge Kessler), November 8, 2102 (Judge Doyle), November 15 and December 13, 2012 and January 10, 2013 (Judge Kessler), April 25, 2013 (Judge Rogers), May 2 and 30, June 6 and August 22, 2013 (Judge Kessler), September 9, 2013 and April 8, 2014 (Judge Rogers), the reading of the verdict on May 14, 2014 (Judge Doyle), and the sentencing proceedings of September 5, 2014;
> "2RP" - the proceedings of April 10, 2014;
> "3RP - the proceedings of April 15, 2014;
> '4RP - April 21, 2014;
> "5RP" - April 22, 2014;
> "6RP' - April 23, 2014;
> "7RP' - April 24, 2014;
> "8RP"- May 5, 2014;
> "9RP" - May 6, 2014;
> "10RP" -May 7, 2014;
> "11RP" - May 8, 2014;
> "12RP" - May 12, 2014;
> "13RP" - May 13, 2014; and
> "14RP" - May 14, 2014.

and bullet strikes, damage to the windows of a home and leaving bullet holes in a fence, a railing, the side of a house and two parked cars. 6RP 46-47, 52, 55-56, 76-69, 102-104. The incident appeared to involve at least two people firing, with one shooting a .45 caliber gun and another shooting a .40 caliber. 9RP 136-44.

Laurence West was injured in that incident. 8RP 27-31. West was in a car with Trung Ngo and William Ngeth, members of his street gang, the "Tiny Raskal Gangsters" (TRG). Ngeth was driving and the car was stopped at a red light when a car drove up next to them. 8RP 23-27.

The TRG gang members did not agree on what happened next. West said that a man came out of the sunroof of the car next to them and fired one shot at the car with the TRG members. 8RP 27-29, 31. Ngo, however, was sure that the shot from that other car came from the driver's side window, from either the driver or the front seat passenger not up through a sunroof but instead by leaning across the driver. 10RP 43-44.

Ngo could not identify any of the people in the car chasing them. 10RP 30, 40. But West claimed that the two men firing the shots were Victor Contreras and Douglas Ho, and that they were members of a gang, the "Insane Boyz" (IB). 8RP 12-17. West claimed that there was some kind of "beef" between his gang and the IB gang, that it had gone on for years and that people had warned him about Contreras, who drove a Honda with a black "primer" painted hood, and Ho. 8RP 12-14, 21-27. Ngo was clear that his gang had "beefs" with lots of other gangs and he probably had a dispute with someone from the IB gang. 10RP 47-48. He also said he had not been given any warning about Ho or Contreras specifically or that

particular car. 10RP 45-49. Instead, there was just a "lot" of "groups" they fought with. 10RP 48.

After that first shot, Ngeth drove away, with the other car following behind. 8RP 27-31. A witness testified that she saw the driver of the pursuing car firing out of the driver's side window. 7RP 84. The two cars drove at high speeds for about 20 blocks when Ngeth banked the car on a turn. 8RP 33-35. West, Ngeth and Ngo jumped out of the car and started running. 8RP 8RP 33-35; 10RP 43-44. West said he heard a number of shots hit around him and he was shot while climbing over a fence, sustaining wounds from a bullet which went through his side and lodged near his elbow. 8RP 42-48.

West admitted it was dark when he said he saw Ho come out of the sunroof. 8RP 28. He maintained, however, that he could see Ho under the streetlight. 8RP 28. West spoke to officers while in the hospital later and told them there were four people, not three, in the car. 8RP 67-68. West admitted that, when he spoke to police, he lied, "trying to throw . . .off" the investigators. 8RP 72. He explained at trial that he had said a lot of things in his statement just because he did not want to "go quarter" and get someone in trouble, so what he said then "might not be true." 8RP 73.

West was unwilling, however, to characterize that lack of truth as an actual "lie," instead repeating it was intended to throw off police and also saying that a gang member coming to court is "putting your life in danger." 8RP 73-74. And West conceded that, at the time, he really was not trying to tell the truth. 8RP 78. He maintained, however, that it was the truth when he identified Contreras and Ho as being in the car. 8RP 78. He said,

he "sort of told the truth sometimes and not told the truth other times." 8RP 78.

A gang unit detective was allowed to testify about seven different incidents months earlier. 10RP 65. None of those incidents had resulted in any criminal charges being filed or proven. 10RP 91-92. Nor was anyone ever arrested. 10RP 98. According to the officer, on April 7, 2012, Ho's house was shot at by someone in a car driving by. 10RP 91-93. There was no evidence, however, that the shooting involved anyone from "TRG" gang. 10RP 114-16. About April 14, 2012, the home next to Ho's was shot at, with the elderly couple who lived there inside. 10RP 91-93. But again, there was no evidence that shooting involved a "TRG" gang member. 10RP 114-16. Nor was there any evidence that an "IB" gang member - let alone Ho or Contreras - was involved in a shooting on about April 17, where two "TRG" gang members were shot by someone in a car. 10RP 93, 114-16.

More than five weeks later, early on the morning of May 27, there was a shooting at the home of the founder of the IB gang, followed quickly by shootings at Ho's house, one at the home of a TRG gang member and then another at the home of another IB member. 10RP 95-96. There was no evidence that the shootings at Ho's house or the houses of the other IB members that morning were committed by TRG members, nor was there evidence that the TRG member's home was shot by anyone associated with IB. 10RP 115-16. The detective, however, stated his opinion that the "motive" for the shooting on Beacon Hill in July was that West, Ngo and Ngeth were in a gang, and further said he was not "aware of any other

evidence of motive for this crime[.]" 10RP 96.

Ho and Contreras were arrested several days later at a barbecue and a detective who interviewed the two said they both "denied any knowledge" of the crimes but "couldn't account for where they were" when the incident occurred. 9RP 97-98.[3] It was established that Contreras' mom had a car similar to the one with the black hood described as being involved in the incident. 7RP 50-52, 56-57. In that car was found a .45 caliber semi-automatic pistol (under the driver's seat), and a .40 Taurus pistol (in the glove box). 9RP 108-110. Officers also found a .45 pistol in the trunk of the car of a girl who was at the barbecue when Ho and Contreras were arrested and she denied knowledge of it. 11RP 6-15. Forensic testing linked a shell casing at the first intersection and all 20 casings found near the stopped car as being fired from these guns. 7RP 34-35, 39-40, 174-77. Ho's fingerprints were found on the magazine of one of the weapons. 9RP 51-54.

The prosecution presented evidence of cell phone "pings" from Ho's phone and Contreras' phone which indicated that the phones used towers in South Seattle earlier in the evening, then hit off a tower on Beacon Hill around the time of the shooting, followed by towers near I-5. 11RP 53-59. Cell towers have a large range, about two miles, and a phone may not use the tower nearest to the caller's physical location, if the closest tower is overloaded with traffic or somehow not available. 11RP 64-68. And there is no way to know exactly where the caller was in relation to the

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[3]The impropriety of the testimony elicited at this time is discussed in more detail in the argument section, *infra*.

tower at the time of the call, at least from the officer who testified. 11RP 65.

D. ARGUMENT

1. MR. HO WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE AND THE ERROR COMPELS REVERSAL

The Sixth Amendment right to counsel includes the right of a defendant who does not need appointed counsel to choose who will represent him. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). This right to "counsel of choice" guarantees that a defendant who can afford to hire a qualified attorney (or convince one to represent him for free) is entitled to have that attorney handle his case. See Caplin & Drysdale, Chartered, v. United States, 491 U.S. 617, 624-25, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).

Reversal is required here, because Mr. Ho was deprived of his Sixth Amendment right to counsel of choice, under Gonzalez-Lopez, and Hampton, supra.

a. Relevant facts

Mr. Ho was arraigned on April 9, 2012. 1RP 5-6. There were agreed continuances into October, based on the large volume of discovery and the prosecution's delay in providing it to counsel. 1RP 7-8. On November 8, 2012, there was a hearing brought by counsel to compel discovery. 1RP 14. Another agreed continuance was granted on November 15, 2012, when the defense had just received "nearly a thousand new pages of additional discovery." 1RP 34.

On December 13, 2012, a continuance was granted because the

prosecution's ballistic testing was "still outstanding." 1RP 36. On January 10, 2013, the parties appeared again, again for a continuance because of the forensic testing, with further discussion of items still missing from discovery. 1RP 41.

A little more than a year after arraignment, on April 25, 2013, it came to light that the prosecution had now endorsed a confidential informant witness which created a direct conflict of interest with counsel. 1RP 44-48. The witness was a former client of defense counsel and there were confidential matters counsel was privy to which would be grounds for impeachment. 1RP 48-49.

The prosecution admitted it had made a strategic decision not to disclose the witness before that date, and Mr. Ho's counsel was very concerned about Mr. Ho having to start with a brand new attorney given the scope and magnitude of the case. 1RP 51.

Counsel was also deeply concerned about the 9 months of time Mr. Ho had invested into the attorney-client relationship. The prosecutor maintained he had complied with the rules but counsel disputed that claim. 1RP 54-56. The judge made the following findings of fact: that the witness came forward on about November 27, 2012, that the state "first had a good-faith belief" for believing the witness would be a witness in late January 2013 but only disclosed March 19, 2013, "roughly two months later," and that defense counsel had "put a tremendous amount of time into the case." 1RP 64. The judge nevertheless declined to exclude the witness' testimony in the case. 1RP 64.

At a hearing on June 6, 2013, new counsel had been appointed for

Mr. Ho, but no one had yet come to meet with Mr. Ho to introduce themselves as such and no one appeared on his behalf that day. 1RP 71-73. A continuance was granted until the end of August so new appointed counsel could appear. 1RP 74-76. Late August, appointed counsel was not in court but he had sent another to step in for Mr. Ho on an agreed continuance into September. 1RP 73-74. On September 9, 2013, there was a defense motion for work release or bail reduction, which was denied. 1RP 75-76. On September 12, codefendant's counsel did not appear and on September 16, there was an agreed continuance to September 30, with the notation that Mr. Ho "wishes to hire private counsel; current counsel needs more time to review recently received dx." CP 107-108.

On January 24, there was a stipulated agreement of the parties for the omnibus hearing to be continued for "continuing trial preparation." CP 110. It was again continued on February 14, 2014, for "ongoing preparation and investigation of this case" and "this defendant may have an additional charge being filed," "time to consider this new referral and possible negotiations." Supp. CP __ (Order to continue Omnibus, sub no. 99, filed 2/14/14).[4] On February 28, counsel was not present at omnibus so it was "rolled" to March 7. Supp. CP __ (Order to continue omnibus, sub no. 101, filed 2/28/14). On March 7, an agreed motion to continue trial from March 18 to April 10 was requested based on "Defense vacation, 3/26-4/7" and "Finish defense interviews." Supp. CP __ (Order for continuance, sub no. 103, filed 3/7/14).

[4]A supplemental designation of clerk's papers has been filed.

On April 8, 2014, the parties appeared before Judge Rogers and Mr. Ho asked to have private counsel substitute in for appointed counsel. 1RP 76-78. Private counsel told the court he had first talked to the family about being involved, after the forced change in attorneys due to the state's new witness a year earlier. 1RP 78. It was only recently that he had been hired and he told the court he would need 90 days in order to get up to speed on the voluminous record in the case. 1RP 77-78.

Private counsel, John Crowley, said there were no allegations of a breakdown in communication or dissatisfaction but just that Mr. Ho was making "choice of counsel." 1RP 76. Counsel for codefendant Contreras said he could still use more time to prepare for trial, which was currently set for 2 days ahead. 1RP 77. At the same time, however, he said Mr. Contreras "would strongly oppose" a continuance of 90 days. 1RP 77-78.

After asking about other cases, the court said it would "deny this without prejudice," that it might allow the substitution, depending on what happened with another unrelated case and how that might affect sentencing. 1RP 78. The court was concerned that the other case was large and would have a "huge ripple effect" on other cases, but did not explain why granting Mr. Ho's choice of counsel would impact anything. 1RP 78. The judge denied the motion, told appointed counsel, "at this point, I'm going to keep you on for trial in two days," and, two days, later, started the trial. 1RP 78; CP 123-24.

b. The trial court deprived Mr. Ho of his Sixth Amendment right to counsel of choice

The Sixth Amendment right to "counsel of choice" was formulated

in Wheat, supra, and of course the right is not absolute. Wheat, 486 U.S. at 159. It does not require a court to accept as counsel someone who is not a qualified member of the bar, or to waive a conflict of interest the defendant wishes to waive so he can be represented by a particular person, if the court determines there is a serious risk of an unfair trial. See, Wheat, 486 U.S. at 159-60.; see also,Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983).

There are vastly different standards for the right to "counsel of choice" for those with resources to hire counsel and those without. When a defendant is asking the public to pay for his choice, there are significant limits on the right of the defendant to request new counsel and, in fact, an indigent has no constitutional right to "counsel of choice" at public expense. Gonzalez-Lopez, 548 U.S. at 151-52.

But where, as here, the defendant has hired the private attorney prior to trial, the analysis is far different. In State v. Roth, 75 Wn. App. 808, 823, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995), the court of appeals adopted a set of factors in determining whether to allow a continuance so that the defendant could be represented by counsel of choice when he was paying for said choice, as follows:

> (1) Whether the court had granted previous continuances at the defendant's request; (2) whether the defendant has some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial, and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

75 Wn. App. at 825. At the time, while agreeing that it is not required to prove "actual prejudice" to choose a violation, the court found that the

defendant's "inability. . .to establish likely prejudice" was nevertheless relevant because of the trial court's balancing of the "competing considerations." Id.

The same factors were again relied on in cases like State v. Price, 126 Wn. App. 617, 632-33, 109 P.3d 27 (2005), with the real focus on the overall fairness of the resulting trial and whether there was some evidence that forced counsel was actually somehow deficient - thus again, asking about prejudice. And, in Price, the court applied "broad discretion," based on the idea that the purpose of the Sixth Amendment right to counsel of choice was "to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice." 126 Wn. App. at 631.

In Gonzalez-Lopez, however, the U.S. Supreme Court rejected that very theory. In that case, the Court examined the Sixth Amendment, finding that it guarantees the right to counsel of choice. 548 U.S. at 146. And further, the Gonzalez-Lopez Court held, a defendant raising the issue need not prove that counsel he was forced to accept was "deficient," or that forced counsel's performance somehow "prejudiced" him. Gonzalez-Lopez, 548 U.S. at 144-45.

Nor must he establish a "reasonable probability that . . .the result of the proceedings would have been different." Gonzalez-Lopez, 548 U.S. at 144, quoting, Strickland v. Washington, 466 U.S. 668, 691-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In fact, the Supreme Court explicitly rejected the very same reasoning underlying Roth and its progeny - that "[a] trial is not unfair and

thus the Sixth Amendment is not violated. . .unless a defendant has been prejudiced." Gonzalez-Lopez, 548 U.S. at 144-45. While it was "true enough" that the purpose of the right to counsel is, at its heart,"to ensure a fair trial," our nation's highest Court declared, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." 548 U.S. at 145. The Court went on:

> [T]he Sixth Amendment right to counsel of choice. . .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 the best**. . .In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial, and that right was violated because the deprivation of counsel was erroneous. **No additional showing of prejudice is required to make the violation "complete."**

548 U.S. at 146 (emphasis added). The right to counsel of choice, the Court pointed out, "has never been derived from the Sixth Amendment's purpose of ensuring a fair trial" but instead has been "regarded as the root meaning of the constitutional guarantee." 548 U.S. at 547-48.

In Hampton, supra, the majority of our Supreme Court recently addressed this issue. In that case, the Court held that, under Gonzalez-Lopez, the trial court must consider the "factual context for the motion," including whether there is dissatisfaction with existing counsel, in deciding this issue. 2015 WL 7294538 at 1. In that case, the defendant moved on the day of trial to replace his appointed counsel with a new private attorney, who then needed time to prepare for trial. The only reason given was that he had not really had a good relationship with the attorney and had hired private counsel, but the prosecutor and victim opposed the request and the prosecutor expressed concern that the defendant was also interfering with

the witness. Id. The judge was willing to allow the new attorney to appear but not to grant the continuance. In denying the motion, the judge said there really was not much reason for the request, that the public defender was "very capable," and that the court was required to consider the victim's position about the continuance. 2015 WL 7294538 at 4-5.

On review, the Supreme Court noted that it had not previously addressed what factor should be considered in this situation. Id. It also held that Gonzalez-Lopez applied only to those situations where the defendant's choice of right to counsel was "erroneously denied," but that it was still proper for the trial court to consider "all relevant information," including the following 11 factors:

> (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its trial calender;
>
> (2) the length of the continuance requested;
>
> (3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;
>
> (4) whether the court had granted previous continuances at the defendant's request;
>
> (5) whether the continuance would seriously inconvenience the witnesses;
>
> (6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
>
> (7) whether the defendant's own negligence placed him . . .in a situation where he. . .needed a continuance to obtain new counsel;
>
> (8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;

(9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purposes of delay";

(10) whether the current counsel was prepared to go to trial;

(11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

2015 WL 7294538 at 6-7. While not all factors will be relevant in all cases, the Supreme Court held, it was not automatic error for the lower court in that case to have considered the defendant's lack of dissatisfaction with counsel, the lateness of the request, the history of the case and the victim's opposition to further delay. 2015 WL 7294538 at 8.

Here, it appears the *only* reason the trial court denied Mr. Ho's choice of counsel was scheduling, and just wanting to work around another case which was affecting the trial calender in general. 1RP 77-78. Apparently, that case was going to occupy a courtroom for five weeks. 1RP 77-78.

Inconvenience or court administration needs are important. But the failure of the court to have sufficient space, or judges, or jurors, or resources to handle all of the ongoing cases is not a proper justification for depriving the defendant of his Sixth Amendment right to choice of counsel. See, e.g., State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009).

Further, it is axiomatic that "the cost of protecting a constitutional right cannot justify its total denial." Bounds v. Smith, 430 U.S. 817, 825, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

There is no question the trial in the case had been delayed. Mr. Ho was arraigned on April 9, 2012. 1RP 5-6. At first the delay was mostly due

to ongoing discovery issues with the defense not receiving things from the prosecutor and receiving nearly a thousand new pages in November of 2012, but the prosecution's ballistics testing was not even available or discovery completed when, in April of 2013, the issue of first counsel's apparent conflict with the prosecution's newly divulged witness arose. 1RP 14, 34, 36, 41, 44-48. After Mr. Ho's first counsel were forced to withdraw, appointed counsel did not even appear or send another counsel to do so on Mr. Ho's behalf until late August of 2013. Thus, the delays up to that point for trial preparation were all wasted, as new appointed counsel took over.

Ongoing agreed continuances were for "trial preparation," potential new charges and a need for more preparation and investigation. Appointed counsel's vacation was in March and the beginning of April. And the defense interviews had not even been completed as of March 7, only a scant month away from the scheduled trial.

Thus, it is clear that appointed defense counsel had not even fully investigated the case a month prior to trial, despite the seriousness of the charges against Mr. Ho and effective life sentence he faced.

But again, it is important to note what is at issue. This is not a case where an indigent defendant was saying he wanted a new attorney and a continuance two days before trial. Nor is it a case where the defendant has "counsel shopped" or appears to be trying to cause disruption or delay. Mr. Ho was perfectly happy with his first attorneys - it was the state which forced their removal and caused delay by strategically waiting to endorse the witness who caused the conflict to arise. The delay from the new

appointment onward was caused by ongoing investigation, new potential charges, etc., not by anything done by Mr. Ho himself.

The trial court's decision to deprive Mr. Ho of his right to counsel of choice in this case violated Ho's Sixth Amendment rights. Further, the error is structural and cannot be deemed "harmless. Again, Gonzalez-Lopez controls, and in that case, the Court had "little trouble concluding" that no harmless error standard would suffice. 548 U.S. at 150. Deprivation of the right to counsel of choice had consequences which "are necessarily unquantifiable and indeterminate," and thus was "structural error," the Court found. Further, the Court pointed out, it would be impossible to determine the prejudice from the denial without speculating upon how rejected counsel would have handled the case differently in defense, or cross-examination, or indeed throughout the whole trial. Gonzalez-Lopez, 548 U.S. at 150-51.

Mr. Ho had a Sixth Amendment right to counsel of choice under Gonzalez-Lopez. He was not asking the public to pay the cost of his choice. And the trial court's decision to deprive him of that right and force him to go to trial with appointed counsel based on general courthouse management issues or lack of sufficient facilities was improper. Because denying Mr. Ho his right to counsel of choice was structural error, reversal and remand for a new trial is required.

2. REVERSAL AND REMAND FOR RESENTENCING SHOULD BE ORDERED IN LIGHT OF O'DELL

Even if reversal and remand for a new trial was not required, reversal and remand for resentencing should be ordered, in light of O'Dell,

supra, because Mr. Ho was barely 18 when these crimes occurred and his unique situation would have supported requesting an exceptional sentence of less than 50+ years.

To understand why, it is necessary to discuss the cases upon which that case relied and the case it "clarified," Ha'mim, supra. In Ha'mim, the Supreme Court appeared to reject a defendant's youth as a mitigating factor for the purposes of supporting an exceptional sentence below the standard range. 132 Wn.2d at 836-37.

Ha'mim was consistent with then-holdings of the Supreme Court rejecting the idea that youth mattered when it came to sentencing. As recently as 1989, the U.S. Supreme Court had upheld imposing even the ultimate penalty of death on a juvenile, finding no difference for Eighth Amendment purposes when the defendant was adult or a youth. See, Stanford v. Kentucky, 492 U.S. 391, 109 S. Ct. 2969, 106 L. Ed.2d 306 (1989).

But in 2005 the U.S. Supreme Court started to recognize the flaws in this reasoning. In Roper v. Simmons, the Court reversed the imposition of the death penalty on a juvenile, finding that "our society's evolving standards of decency" had led to "evidence of a national consensus against" it. Roper v. Simmons, 543 U.S. 551, 561-63, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In reaching its conclusion, the Roper majority noted three "general differences" between juveniles and adults, which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders" and thus subject to the death penalty. 543 U.S. at 569-70.

The first difference was the "lack of maturity and an

underdeveloped sense of responsibility" of youth, which "often result in impetuous and ill-considered actions and decisions." 543 U.S. at 569, quoting, Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). A second significant difference was the fact that "juveniles are more vulnerable" and "susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569. This also made juveniles less culpable than adults who engaged in the same conduct, because of the relative lack of control and experience juveniles have over themselves and their own environment. Id. The third difference was that "the character of a juvenile is not as well formed as that of an adult," and a juvenile has personality traits which are "more transitory, less fixed." 543 U.S. at 569.

These differences led the Roper Court to conclude that juveniles do not fall among the "worst offenders." Id. Because of their susceptibility to "immature and irresponsible behavior," the Court noted, the "irresponsible" conduct of a juvenile is not the same as adult. Id. Further, the Court noted, juveniles "still struggle to define their identity" so that it is "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id.

The Roper majority concluded that, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult," and that youth is a "mitigating factor" because its "signature qualities" can be "transient." Roper, 543 U.S. at 570 (quotations omitted). Further, the deterrent and retribution goals of the death penalty were not served by imposing it upon even juvenile offenders who have committed

"brutal crimes," because the diminished capacity of juveniles makes it such that "the case for retribution is not as strong with a minor as with an adult." Roper, 543 U.S. at 569-71.

As the Court declared, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." 543 U.S. at 571.

In fact, the Roper Court noted, in some cases the youth of the offender may be "counted against him" as a factor which is "aggravating rather than mitigating." 543 U.S. at 573. But, the Court noted, even "expert psychologists" are not easily able to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity," and the rare juvenile offender whose crime reflects "irreparable corruption." 543 U.S. at 573. And this was so even if the juvenile in that case had caused another's death. Id.

In 2010, the Court extended this same reasoning to a sentencing scheme mandating life without the possibility of parole for juveniles who commit non-homicide offenses. See Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court agreed with the concern in Roper that trial courts could be overwhelmed by the "brutality or cold-blooded nature of any particular crime" so that it would "overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require" a less serious punishment. Graham, 130 S. Ct. at 2032. The Court also noted that the characteristics of juveniles could put

them "at a significant disadvantage in criminal proceedings." Id.

Put simply, the Graham Court declared, "[a]n offender's age" is "relevant to the Eighth Amendment," so that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031.

Thus, Graham created a "flat ban" on life without parole sentences for juvenile offenders in nonhomicide cases, regardless "how a sentencing court structures the life without parole sentence." People v. Caballero, 55 Cal. 4th 262, 267, 282 P.3d 291, 145 Cal. Rptr.3d 286 (2012); see also, Martin Guggenheim, GRAHAM V. FLORIDA AND A JUVENILE'S RIGHT TO AGE-APPROPRIATE SENTENCING, 47 HARV. C.R.-C.L. L. REV. 457 (2012).

On June 25, 2012, the U.S. Supreme Court issued Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012), finally extending the reasoning of Graham to cover cases in which a juvenile has been convicted of murder. In Miller, one 14-year old defendant had been drinking and doing drugs with the victim, robbed him when he fell asleep, used a baseball bat to beat the man to death after the man woke up, shouted he was "God" while he beat the victim and then later returned to try to set the home on fire to hide the crime. 132 S. Ct. at 2462-63. A juvenile court remanded him to adult court after considering things like his "mental maturity," and he was sentenced to life without the possibility of parole - a sentence upheld in the state appellate court as "not overly harsh when compared to the crime." 132 S. Ct. at 2463.

The other 14-year old defendant had been involved in a robbery in which a man was shot and killed, and the prosecution exercised its

discretion to try him in adult court, a decision which was upheld on appeal, as was the sentence of life without the possibility of parole. 132 S. Ct. at 2461-62. The Alabama Supreme Court denied review and the U.S. Supreme Court granted certiorari.

On such review, the U.S. Supreme Court reversed, holding that it was a violation of the Eighth Amendment prohibition against cruel and unusual punishment to impose a sentence of life without the possibility of parole on someone who commits even a heinous crime such as homicide as a juvenile. 132 S. Ct. at 2464. Just as in Graham, in Miller the majority focused on the basic "precept of justice that punishment for crime should be graduated and proportioned" to both the offender and the offense." Miller, 132 S. Ct. at 2463, quoting, Roper, 543 U.S. at 560 (quoting, Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). Put simply, the Miller Court said, the "concept of proportionality is central to the Eighth Amendment." Miller, 132 S. Ct. at 2463.

The Court then noted, "Roper and Graham emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders." Miller, 132 S. Ct. at 2464. Juveniles "have diminished culpability and greater prospects for reform," the Miller Court said, so that they were "less deserving of the most severe punishments." Id, quoting, Graham, 130 S. Ct. at 2026. Echoing Graham and Roper, the Miller Court pointed out that the immaturity and attributes of juveniles such as recklessness, vulnerability to outside pressures, and impetuousness made their conduct less "blameworthy" than adults, as well as the fact that juveniles are unlikely to consider the

consequences of their acts. Miller, 132 S. Ct. at 2465. Further, the Miller Court noted, "a child's character is not as 'well formed' as an adult's: his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" Id., quoting, Roper, 543 U.S. at 570.

The Miller Court made it plain that it was not relying just on "what 'any parent knows'" but also on the same studies, research and "social science" that had convinced the Court to issue its rulings in Roper and Graham. Miller, 132 S. Ct. at 2462. Specifically, the Miller Court cited the studies in Roper establishing that a "relatively small proportion" of the adolescents who were involved in illegal activity were shown to later "'develop entrenched patterns of problem behavior.'" Id., quoting, Roper, 543 U.S. at 570. The Miller Court noted that the evidence of "science and social science" supporting Roper and Graham had actually "become even stronger" since those cases were decided. Miller, 132 S. Ct. at 2465 n. 5.

The Miller Court made it plain that the issues of juvenile development it had discussed and relied on in Graham extended beyond the specific facts of that case. Miller, 132 S. Ct. at 2466-69. Instead, the Miller Court noted, the "distinctive (and transitory) mental traits and environmental vulnerabilities" of juveniles set forth in Graham were not "crime-specific." 132 S. Ct. at 2465. While leaving open the question of whether the Eighth Amendment will eventually be held to completely bar *all* juveniles found guilty of homicide from *ever* receiving a sentence of life without the possibility of parole, the Miller Court nevertheless made it plain that such a sentence should be rare. Id. Citing its holdings in Roper and Graham, the Court again emphasized "children's diminished

culpability and heightened capacity for change," stating that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Miller, 132 S.Ct. at 2469. In fact, the Court described such occasions as limited to those situations involving the "rare juvenile offender whose crime reflects irreparable corruption." Miller, 132 S. Ct. at 2469, quoting, Roper, 543 U.S. at 573.

Mr. Ho was just 18 at the time of the crimes. But at the time of sentencing, the controlling authority was Ha'mim, supra. And in that case, the Supreme Court had held that "the age of the defendant does not relate to the crime or the previous record of the defendant" and is not a mitigating factor. 132 Wn.2d at 847. Indeed, in Ha'mim, the Court found that it "borders on the absurd" to suggest that a defendant's youth might have had an effect on his ability to appreciate the wrongfulness of his acts. And the Court rejected the idea that it could "seriously be" claimed that a person's age had an effect on the maturity of their judgment. 132 Wn.2d at 847.

In O'Dell, supra, the majority recognized that its decision in Ha'mim contained "reasoning that some . . .have understood as absolutely barring any exceptional downward departure sentence below the range on the basis of youth." The Court expressly disavowed that reasoning, finding that it had been "thoroughly undermined by subsequent scientific developments." O'Dell, _ Wn.2d at __ (slip opinion at 4-5). The Court looked at all of the same information the Supreme Court had in Miller and reached the conclusion that the youth of someone who was over 18 at the time of their crime cannot *by itself* automatically require imposition of an exceptional sentence down at sentencing. __ Wn.2d at __ (slip opinion at 9-

11).

Significantly, the Court also found that Ha'mim was limited only to the question of whether age was a factor which was sufficiently "substantial and compelling" to elevate the particular defendant's crimes above similar crimes of others. O'Dell, _ Wn.2d at __ (slip opinion at 10-11). And the Court then held that the legislature *did not* necessarily consider youth when it set forth the standard-range sentences in our adult sentencing scheme. Id.

In reaching this conclusion, the Court declared, "[t]he legislature has determined that all defendants 18 and over are, *in general*, equally culpable for equivalent crimes," __ Wn.2d at __ (slip opinion at 12) (emphasis in original). But it had not necessarily considered all that we knew about youth and the particular youth in question in each case, the Court found, by definition, and it was those "particular vulnerabilities - for example, impulsivity, poor judgment, and susceptibility to outside influences - of specific individuals." Id.

Thus, under O'Dell, it is not clear that, to the extent that youth affects a person's culpability, it may be relied on in imposing and exceptional sentence below the standard range.

And it is especially important the thoughtful, well-supported arguments are presented in cases where, as here, the crimes are of the type which characterize the recklessness and irresponsibility inherent in child development and which engender the most fear - gangs. The gang context magnifies both the weaknesses and vulnerabilities of youth and the now-discredited fear of a juvenile "superpredator" in significant ways. See Emma Alleyne and Jane L. Wood, *Gang Involvement: Psychological and*

Behavioral Characteristics of Gang Members: Peripheral Youth and Nongang Youth, 36 AGGRESSIVE BEHAV. 423, 424 (2010) (noting how different factors of the gang environment could affect the ability of a member to assess risk). Peer pressure in gangs is even a matter of life-and-death, and the ability of juvenile to assess the riskiness of their behavior is markedly affected, too. Further, gang membership has a strong effect on social development, creating a norm of antisocial and often illegal behavior which then affects the ability of a youth to properly evaluate risk. See id; see also, Finn-Aage Ebsbensen, *Preventing Adolescent Gang Involvement*, JUV. JUST. BULLETIN (September 2006) at 1.5.

Gang members often come from troubled situations where their sense of individual worth has not been nurtured, leaving them more susceptible to the need for belonging a gang satisfies. See id. And many of them have a need for safety and support which gang members may only be getting met from their fellow members. Yet studies show that "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities" develop entrenched patters which create ongoing problem behavior. See Lawrence Stenberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

The crimes in this case were all gang-related - even, according to the prosecution, motivated by the need to further or support the gang. That is exactly the kind of conduct which most defies explanation to adults, especially in light of the gang "attitude" of seeming not to care or not

expressing remorse after the incident.

There is no question that the shooting risked unrelated people's lives in a way almost incomprehensible for those not susceptible to the weaknesses of youth as magnified through the lens of gang culture. The sentencing judge's remarks about the "waste" of their lives the defendants had caused by their irresponsible acts proves this point. They reflect the fears of Miller that trial courts will not be able to see beyond the heinous nature of the charged crimes to the mitigating factors of youth which may underlie. But it is exactly the inability to predict outcomes, to limit impulse, to resist peer pressure, to make good individual judgments which are the hallmarks of youth. And it is those kinds of inabilities which make gang activity seem reasonable to a youth when an adult would have no trouble recognizing the danger or gravity of their choices and resisting the influence of others.

At the time of this sentencing, the law appeared to be, under Ha'mim, that youth was not to be considered and could not support an exceptional sentence below the standard range. Under the Supreme Court's new clarification in O'Dell that Ha'mim did not so limit trial courts as a matter of law, and its holding for the first time that youth was not considered and thus could be an aggravating factor, this Court should reverse and remand for a new sentencing even if a new trial is not ordered.

3. APPELLANT'S DUE PROCESS RIGHTS TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY AND HIS FIFTH AMENDMENT RIGHTS WERE VIOLATED BY THE OFFICER'S IMPROPER COMMENTS ON HO'S FAILURE TO DENY GUILT AND HIS DEMEANOR OF NOT SEEMING "TO CARE" ABOUT THE VIOLENT ACTS FOR WHICH HE HAD BEEN ARRESTED

Both the state and federal constitutions guarantee the defendant in a criminal case the right to trial by impartial jury. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1994); Sixth Amend., Art. I, §21. As part of those rights, the defendant is entitled to have the jury serve as the "sole judge of the weight of the testimony" and credibility of witnesses. Lane, 125 Wn.2d at 838, quoting, State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). For this reason, no witness, lay or otherwise, may testify in a way which conveys an opinion regarding the veracity or credibility of a witness or the guilt of the defendant. State v. Demery, 144 Wn. 2d 753, 758-59, 30 P.3d 1278 (2001). Such "opinion testimony" is improper because it invades the "exclusive province" of the jury to decide guilt or innocence. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Further, it a violation of due process to "chill" the exercise of a constitutional right, such as the right to remain silent. See State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an arrested person is entitled to be warned that they have the rights to remain silent, to counsel before they are questioned and that, if they waive these rights, anything they say can - and will - be used against them later, at trial. And due process further compels that the defendant's silence after these warnings are given is not used against him to suggest his guilt or attempt to impeach him at

trial. See Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

In other words, it is "fundamentally unfair" and not only a violation of the constitutional rights to be free from self-incrimination and to counsel but also "a deprivation of due process" to first tell the defendant he has a right to remain silent by giving him his Miranda warnings, but then use his silence against him later. Id.

In this case, reversal is required, because the detective who arrested Ho and Contreras testified that the two men failed to make "some protestation about guilt or innocence," which a person who was arrested would "normally" do, and instead "really were kind of indifferent, just sat there." 9RP 98. First, the detective, Robert Sevaaetasi, was established as an especially qualified officer in gang cases, with 26 years with SPD, five years with LA County Sheriff's Department at "the largest jail in the free world," had monitored "Crip gang sets" and "Blood gang sets," as well as other gangs. 9RP 57-58.

In fact, he specifically said, his experience "over the years" had involved "**hundreds of hours interviewing individual gang members from different sets, just learning what they are doing, how they do it, and why they do it.**" 9RP 58 (emphasis added). He told the jury he had been with the Seattle Police Department gang unit for over 21 years, was "a member of the California gang association; Las Vegas, Nevada, gang association; Washington state gang association; Asian gang investigators here in the Pacific Rim." 9RP 58. Then he told the jury that he had "investigated hundreds" of "gang-related crimes, gang-on-gang rivals,

gang-on-non-gang rivals," with victims as other gang members or "regular citizens. 9RP 58. And he touted his "**[h]undreds of hours of interviews with thousands of gang members.**" 9RP 58 (emphasis added).

He even emphasized his expertise in relation to this case, saying, as regards to Asian gangs in Seattle, that he was "a little more knowledgeable than the average gang detective in our unit" on the issue. 9RP 59. Then he gave his opinion that there was a "hot war" between the gang West was in and the one the officer said both Ho and Contreras were in and that there was "an ongoing war" between the "two gang sets" at the time of the incident. 9RP 60, 66.

The detective also talked about how shooting someone over what the normal non-gang juror would think was trivial- perceived disrespect - was actually seen as a positive in gang culture, and how committing "more risky crimes, more personal crimes, more dangerous crimes" was important and necessary to "elevate" within the gang. 9RP 66-70. And then he told the jury his "professional opinion" that Ho was now a "shot caller" in the gang, because he was "more vocal," "bragging about" the crimes to his fellow gang members and making himself noticeable, and how committing the crimes with which he was charged would have elevated Ho because of the extreme nature of the crime. 9RP 69-71.

Then, when talking about interrogating Ho, the detective said he had read them their rights, told them they were there "for investigation of a shooting," and then started to question them. 9RP 97-98. He said they "couldn't account for where they were" and then went on:

Q: Did both of them give the same kind of answers?

A: Yes. They had - - they were - - they were kind of indifferent to the whole incident, being interviewed, being advised of their rights. It was like nonchalant to them, and I found this not at all unusual.

Q: The nonchalance you didn't find unusual?

A: Year, or the indifference to it and that there was similar behavior.

Q: Explain nonchalance and indifference.

A: **Well, you know, normally you would arrest someone, put them in handcuffs, and take them to the police station. They would - - some protestations about guilt or innocence or whatever or why they're there. There was no such attitude from them. They were - - really were kind of indifferent, just sat there.**

9RP 98-99 (emphasis added).

Thus, the officer directly commented on - and drew a negative inference from - Ho's exercise of his rights. The jury was told that a "normal" person would protest their innocence when arrested but that Ho had not done so. The jury was then given the clear message - that Ho's acts of being "indifferent," not protesting his innocence and just sitting there *without saying he was not guilty* was evidence that he was a gang member and had committed the crimes - and further, was so violent and cold he did not care.

Reversal is required. Washington courts have repeatedly condemned the kind of suggestion of guilt based on failure to deny it which occurred here. See, State v. Terry, 181 Wn. App. 880, 891, 328 P.3d 932 (2014) (direct comment on guilt when the officer answered a juror's question over defense objection about whether the defendant had ever asked or wondered why he was arrested and said, "no" and prosecutor

implied that he had not asked the question because he knew he was guilty); see State v. Romero, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002). Thus, in State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264 (2011), it was reversible error when the prosecutor elicited testimony that Thomas was not interested in talking with an officer when the officer answered the alleged victim's phone, then argued in closing that Thomas knew he had been accused of a crime but did not want to talk to officer about his "story" and that Thomas knew the police were at the alleged victim's apartment but "fled" rather than returning to deny her accusations to police. 142 Wn. App. at 594. The court noted that the arguments "plainly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story." Id. And in State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159 (1973), reversal was required after an ambulance driver testified that the defendant's response to finding out his wife was dead was unusual because he was "calm and cool," which implied he was guilty.

Mr. Ho's convictions must be reversed. Where improper opinion testimony is admitted in violation of the defendant's constitutional rights to trial by jury, or where an officer improperly comments on the defendant's exercise of his right to remain silent, reversal is required unless the prosecution can prove the error "harmless" by showing, beyond a reasonable doubt, that every reasonable jury would have reached the same result, absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). That standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to

a finding of guilt. 104 Wn.2d at 425.

Here, the prosecution cannot meet that burden. As a threshold matter, it is important to note that this Court uses a different standard and test for review of this issue than those employed when the issue on review is the sufficiency of the evidence to support a conviction. Where the question is sufficiency of the evidence, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error "harmless," the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. Easter, 130 Wn.2d at 242. Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the "overwhelming evidence" test, requires the Court to reverse unless it is convinced beyond a reasonable doubt that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a "sufficiency of the evidence" challenge, that is not enough to meet

the "overwhelming evidence" test. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 65 P.3d 1255 (2005) (evidence found sufficient to uphold the conviction was insufficient to meet the "overwhelming evidence" test). Even where there is significant evidence of guilt, where there are issues of credibility and evidence is disputed, the jury is presented "with a credibility contest" and constitutional error such as improper opinion testimony cannot be said to be "harmless." Id. Put another way, when the jury is faced with having to make a credibility determination, it is not likely the state can show that every single jury faced with such a decision would still have reached the same conclusion absent the constitutional error, i.e., could not possibly have been swayed by whatever evidence that error allowed.

Here, there is no way the prosecution can meet that burden of proof, given the presumption of prejudice and reversal which applies. The testimony came from an experienced officer. The testimony commented directly on the "failure" to deny guilt - a strong statement likely to stay in jurors' minds like glue and make them wonder why, if he was not guilty, Mr. Ho did not just say so. But even worse, the description of Ho as appearing not to "care" about the crimes exacerbated the prejudice to Mr. Ho given the gang allegations and discussion which occurred at trial.

The prosecution cannot meet its heavy burden of proving that the evidence of guilt was so overwhelming that the officer's comments drawing attention to Ho's "refusal" to speak and the officer's opinion about what a "normal" person would do if accused of crime can be deemed "harmless," beyond a reasonable doubt. This Court should so hold.

4. APPELLANT'S RIGHT TO JURY UNANIMITY WAS VIOLATED

Article I, section 21 of our state constitution guarantees the right to an unanimous jury verdict, which means a defendant may only be convicted if a jury unanimously agrees that he committed the charged act. See State v. Kitchen, 110 Wn.2d 403, 409, 765 P.2d 105 (1988). Where, as here, there are multiple acts which could support the conviction, the trial court must instruct the jury as to unanimity or the prosecution must elect an act to rely on in seeking the conviction. See id. A multiple acts case exists when "the evidence tends to show two separate commissions" of the same crime. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (quotation omitted).

Here, Ho's rights to unanimity were violated, because the prosecution presented multiple acts which could support the first-degree assault charge. There were two separate shooting incidents for each victim but the jury was not required to be unanimous as to which occurred in order to convict. For example, for West, the allegations were that Mr. Ho fired into the car at the stoplight and later that he or an accomplice had fired the shots later which hit West and caused his injuries. But there was very different evidence regarding each of those alleged assaults, which were separated from each other by time and distance.

In response, the prosecution may attempt to invoke an exception for the requirement of unanimity, the concept of a "continuing offense." Any such effort should be rebuffed. The exception exists for those limited cases where the legislature has expressly defined an offense as a continuing

offense or the nature of the offense is such that it appears the legislature intended for the offense to involve such a theory. See State v. Green, 150 Wn.2d 740, 742-43, 82 P.3d 239 (2004). A defendant's conduct is looked at in a commonsense manner with the court looking at whether the acts occurred separately or in the same time frame and place, as well as by looking at the nature of the charge. Petrich, 101 Wn.2d at 571. Here, the acts occurred separately and the first alleged assault was completed well before the shots fired in a different location, causing the injuries to West.

Reversal is required. Where, as here, the jury is not properly instructed on unanimity, the error is constitutional. See State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996). There is therefore a presumption of prejudice and reversal is required unless the prosecution meets the extremely high burden of proving that every rational juror would necessarily have convicted because the evidence of the defendant's guilt was so overwhelming. Kitchen, 110 Wn.2d at 411. Here, that standard is not met. A rational juror could have doubted that West had accurately identified Ho as being the person who fired the single shot at the intersection. A rational juror could have questioned whether West's gang rivalry was affecting his testimony or even his perceptions that night. And no one identified Ho at the site of the second shooting, where West was hurt - it was just assumed that it was Ho and Contreras.

Because Mr. Ho's rights to jury unanimity were violated, this Court should so hold and should reverse and remand on this ground even if no other.

5. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT WHICH COMPELS REVERSAL AND IN THE ALTERNATIVE COUNSEL WAS INEFFECTIVE

Prosecutors are "quasi-judicial" officers, with a duty to act in the interests of justice rather than as "heated partisans" at trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct which is likely "to produce a wrongful conviction." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

Further, because the words of a prosecutor carry great weight with the jury, those words may ultimately deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367.

In this case, reversal is also required based on the prosecutor's flagrant, prejudicial misconduct below. Further, counsel was prejudicially ineffective in failing to object below.

During closing argument, the prosecution committed misconduct both by vouching for the credibility of the state's most crucial witness and by disparaging defense counsel and their roles. First, in discussing the "facts," the prosecutor told the jury, "[w]e. . .know for certain two of the individuals that were shooting that night," then identified them as Contreras

and Ho. 13RP 15-16. During rebuttal closing argument, later, the prosecutor then told the jury that counsel had "tried to explain away or dismiss every single piece of the State's evidence" but that "it gets to a point. . .where it becomes nonsensical." 13RP 87. Ho objected that the argument was improper but the trial court overruled. 13RP 87.

These arguments were serious, prejudicial and flagrant misconduct. The prosecutor must refrain from placing the prestige of his or her public office by expressing a personal belief about the veracity or credibility of a witness. See, State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Further, it is well-recognized that the prosecutor must refrain from "taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the 'fundamental distinctions' between advocates and witnesses." United States v. Edwards, 154 F.3d 915, 921-22 (9th Cir. 1998). Here, the prosecutor improperly vouched for West's credibility - and effectively, commented on Ho's guilt, when he said that "[w]e only know for certain" that Contreras and Ho were shooting that night. That comment made it clear that the prosecutor and indeed the government was personally "certain" that West's identification of Ho and Contreras as the shooters was not only accurate but that West's version of events was credible.

But where, as here, the evidence is disputed, a jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." State v. Weatherspoon, 410 F.3d 1142,

1147 (9th Cir. 2005) (quotation omitted).

The prosecutor also committed serious, prejudicial misconduct in denigrating not only defense counsel but also their role. More than 20 years ago, our highest court made it clear that the prosecutor may not make comments "calculated to align the jury with the prosecutor and against" the accused or defense counsel. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). In Reed, the prosecutor reminded the jury that defense counsel and their experts were "outsiders" in the community who drove expensive cars. Indeed, comments made by the prosecutor maligning counsel have the clear effect of damaging the defendant's fair opportunity to present his case to the jury. See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983).

Here, the prosecutor denigrated counsel as trying to "explain away" all the evidence against the defendants, and then declared those efforts as "nonsensical." 13RP 87. But it was not counsel's job to "explain away" or provide a reasonable explanation of the evidence which is inconsistent with guilt - it was the prosecutor's job to prove guilt beyond a reasonable doubt. See, e.g., State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010). Further, if counsel was explaining away the prosecution's case, that would mean counsel was presenting a defense. And by declaring defense counsel's efforts to question the strength of the state's case as "nonsensical," the prosecutor not only disparaged counsel and their role but in fact reduced the state's burden, by placing in jurors' minds the ideas that they should ignore any reason they might have to doubt the state's claim. Denigrating counsel's efforts impugns his or her integrity, for example in referring to the presentation of the defense case as "bogus" or a "crock."

See State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011).

Reversal is required. Below, Ho objected to the prosecutor's misconduct in denigrating counsel and saying their efforts to "explain away or dismiss every single piece of the State's evidence" had gotten "to a point where you lose - where it becomes nonsensical." 13RP 87. As a result, this Court will reverse if there is substantial likelihood that the misconduct could have affected the jury's decision to convict. See State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). There is more than such a likelihood here. This case was far from overwhelming, and West's motive to identify rivals as guilty when they were not was strong.

In relation to the other misconduct, even if this Court were to find that the prosecutor's declarations vouching for West and placing the prestige of the state behind the convictions was not so flagrant and ill-intentioned that it should be reviewed and relief granted for the first time on appeal, reversal should be granted based on counsel's ineffectiveness in failing to object. Both the state and federal constitutions guarantee the right to effective assistance of counsel. See Strickland, supra; see also, State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel is deficient even with a strong presumption of competence if there is an "absence of legitimate strategic or tactical reason" for counsel's actions - or failures to act. See State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006).

Counsel's failure to object to highly prejudicial misconduct below can be deemed ineffective assistance. Given the severity of the misconduct below, the failure to object to the comments of the prosecutor vouching for

West's credibility and veracity in his version of events, had counsel objected, a mistrial would likely had been granted. Even if this Court does not find the unpreserved misconduct so flagrant and ill-intentioned that it compels reversal absent objection, it should nevertheless reverse based on counsel's unprofessional failure to object to the prosecutor's serious misconduct. In addition, reversal is required because there is more than a substantial likelihood that the misconduct to which counsel objected affected the verdict. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 15th day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at King County Prosecutor's Office Appellate Unit, at paoappellateemail@kingcounty.gov, and to Mr. Douglas Ho, DOC 37746, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 15th day of December, 2015.

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