

61852-1

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NO. 61852-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHAWN SWENSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Months in advance of his trial, Shawn Swenson told the court of a complete breakdown in the attorney-client relationship over a host of issues. The court largely ignored Swenson's complaints, refused his pleas for a private discussion, and declared only "extreme circumstances" would prompt it to appoint another attorney. Because of unremitting discord with his attorney, Swenson waived his right to counsel, but the court insisted that the same attorney remain as standby counsel without considering the seriously fractured relationship between Swenson and the attorney.

Once a *pro se* litigant, the court prohibited Swenson from participating in any interviews with prosecution witnesses to prepare for trial even though the State did not object to his participation. At his trial, one witness told the jury that Swenson had been previously convicted at a first trial. The court found this remark so prejudicial that no curative instruction could cure the taint but refused to declare a mistrial or give a limiting instruction. Additionally, the court endorsed the prosecutor's argument that the jury should consider Swenson's failure to testify as evidence against him. These various errors denied Swenson the right to the

assistance of counsel, the right to meaningfully prepare a defense under the state and federal constitutions, and the right to a fair trial.

B. ASSIGNMENTS OF ERROR.

1. The court violated Swenson's right to counsel under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. The court improperly ordered Swenson to represent himself without making the express findings necessary under RCW 10.77.020.

3. The court denied Swenson his right to prepare a defense under the Sixth Amendment and the more protective requirements of Article I, section 22.

4. The court violated Swenson's right to fundamentally fair proceedings under the Fourteenth Amendment and Article I, section 3, as well as the appearance of fairness doctrine, by failing to protect his right to conflict-free counsel.

5. The prosecutor committed flagrant misconduct and improperly sought a conviction based on Swenson's exercise of his right to remain silent, thus denying Swenson his right to a fair trial.

6. The introduction of evidence of Swenson's prior conviction for the same offense without any limiting instruction denied Swenson a fair trial.

7. The cumulative effect of the various trial court errors denied Swenson a fair trial as required under the Fourteenth Amendment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Due to an accused person's right to a conflict-free attorney, a court must inquire into an apparent conflict in private and in depth. Here, although the court received written motions complaining of a serious and complete breakdown in attorney-client relations, including the failure to convey a plea bargain and allegations of physical danger from counsel's actions, and where defense counsel displayed overt hostility toward his client in court, the judge made only a single, short inquiry into the attorney-client problems before refusing to appoint a new lawyer. Did the court's failure to engage in a mandatory private and detailed inquiry into an obvious conflict between attorney and client deny Swenson his right to the assistance of counsel?

2. A waiver of counsel must be voluntary, knowing and intelligent. Was Swenson's waiver of counsel involuntary when it

was the direct result of the court's failure to pay heed to Swenson's serious complaints about the inadequacy, hostility, and distrust engendered by appointed counsel?

3. Was Swenson's waiver of counsel not knowing or intelligent when he did not enter the waiver of counsel with an understanding of the difficulties of proceeding *pro se* while incarcerated, and the court did not explain these difficulties before Swenson waived counsel?

4. Was Swenson's waiver of counsel inadequate under RCW 10.77.010, which mandates that the court first find a defendant is competent before it permits the defendant to waive counsel and represent himself, and the court made no such finding in the case at bar?

5. The right to meaningful assistance of counsel and the appearance of fairness doctrine require the court to ensure the process of appointing an attorney occurs in a fair manner. Here, Swenson told the court that the office charged with appointing counsel had a serious, personal bias against him because of its relationship with the victim's family and asked for an alternative means of appointing counsel, but the court refused without inquiry.

Did the appointment of counsel in a potentially biased fashion deny Swenson his right to counsel and to proceedings that appear fair?

6. The right to self-representation is guaranteed by the Sixth Amendment and is more directly established and thus more rigorously protected by Article I, section 22. Swenson encountered serious difficulty in preparing his defense not only due to jail restrictions and procedural hurdles but also because the court refused to let him participate in witness interviews without any reasonable basis for this restriction. Was Swenson denied his right to prepare his defense as a *pro se* litigant by the restrictions placed on his ability to investigate and prepare his defense?

7. A prosecutor owes a duty of fair dealing, and will deny an accused person a fair trial by substantially burdening the defendant's exercise of his right to remain silent or by encouraging a verdict based on the prosecution's denunciations of the defendant's character. Here, the court overruled Swenson's objection to the prosecutor's argument that Swenson's failure to testify should be used against him, and the prosecutor repeatedly assailed his character by calling him a lying, thieving coward. Did the prosecution's blatantly improper argument tactics, and the

court's endorsement of those tactics, violate Swenson's right to remain silent and deny Swenson a fair trial?

8. When unduly prejudicial information comes before the jury and its taint cannot be removed, the proceedings are rendered unfair and the court should declare a mistrial. Here, the court agreed that a witness's testimony that Swenson had been previously convicted of the same crime should not have been introduced and was not Swenson's fault, and found the comment was so prejudicial that no limiting instruction could cure it. Did the court's refusal to declare a mistrial in the face of plainly prejudicial information, and its refusal to issue a limiting instruction so that the jury would not use the information as substantive evidence against Swenson, deny Swenson a fair trial?

D. STATEMENT OF THE CASE.

In 2005, Shawn Swenson faced a retrial after the Supreme Court overturned his conviction for a 1995 murder.¹ CP 44 (mandate). The attorney appointed to represent him for the retrial, Brian Todd, withdrew from the case in August 2006, upon

¹ His conviction was reversed due to the prejudicial effect of an incorrect accomplice liability instruction combined with the improper prosecutorial argument of "in for a dime, in for a dollar." In re Pers. Restraint of Swenson, 154 Wn.2d 438, 452-53, 114 P.3d 627 (2005).

discovering that he represented a prosecution witness and had a conflict of interest. 8/9/06RP 4.² When Todd withdrew from the case, the court did not address Swenson's complaints that Todd had not prepared the case, barely communicated with him, and did not understand the legal issues. Id. at 6-7. The appellate attorney who had successfully represented Swenson concurred with Swenson's concern that Todd did not appear to either understand or be familiar with the issues in the case. CP 633-37 (Declaration of David Zuckerman).

After Todd withdrew, Michael Danko became Swenson's attorney. Swenson and Danko's relationship degenerated into one characterized by overt hostility, public bickering, and little substantive legal progress. CP 569-72. Swenson further complained that Danko's actions had placed him in physical danger. When the court refused to inquire into Swenson's complaints about Danko or appoint a new attorney, Swenson waived counsel. The court insisted Danko remain standby counsel, over objections from both Swenson and the prosecution. 5/25/07RP 2, 9.

² The verbatim reports of proceedings (RP) are referred to herein by the date of proceeding followed by the page number.

Swenson's retrial occurred in May 2008, with Danko as standby counsel. The prosecution charged Swenson with first degree felony murder, predicated on a robbery, with the aggravating factor of deliberate cruelty, thus exposing Swenson to an exceptional sentence. CP 6-7. Swenson's former co-defendant Joe Gardner testified for the prosecution, claiming Swenson arranged for the two of them to steal equipment from a recording studio owned by David Loucks, and during the heist, Gardner strangled and unintentionally killed Loucks. 5/15/08RP 71, 78, 95-96, 100-06. Gardner contended Swenson was minimally involved in using force against Loucks and Gardner admitted that he himself thought of and used most of the force. 5/15/08RP 99-106.

The prosecution introduced some additional witnesses or witness statements not used at the first trial, including a number of Swenson's acquaintances from 1995, Swenson's statements to the police in which he admitted arranging a theft from Loucks' studio but denied knowing participation in a robbery, and testimony from Maurice Jamerson, a person whom Swenson claimed coerced him into stealing money. See e.g., 2/1/08RP 6-7; 3/18/08RP 46, 56, 60, 63, 68-69. Other testimony new to the second trial included forensic analysis of a stun gun that may have been used against

Loucks, telephone records showing Swenson's relationship to other prosecution witnesses, and a claim that Swenson admitted to killing someone. 5/13/08RP 11; 5/21/08RP 134-37. Swenson was not permitted to participate in interviews of any of the prosecution witnesses.

Swenson was convicted of one count of first degree felony murder, based on robbery, but was not convicted of acting with deliberate cruelty. CP 823-24. He received a standard range sentence of 333 months. CP 866-76. The relevant facts are discussed in more detail in the pertinent argument sections below.

E. ARGUMENT.

1. WHERE THE COURT REFUSED TO APPOINT CONFLICT-FREE COUNSEL FOR SWENSON, AND SWENSON DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL, SWENSON WAS DENIED HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT AND ART. I, § 22

Shawn Swenson's originally assigned attorney withdrew from the case when he learned of a conflict of interest. Shortly thereafter, Swenson's relationship with replacement attorney Michael Danko deteriorated over a host of issues. Swenson filed motions explaining the complete breakdown in the attorney-client relationship but the court conducted only the barest of inquiries

before steadfastly insisting Swenson would not receive a different attorney. Swenson then said he had no choice but to waive his right to counsel. The court granted Swenson's motion to proceed *pro se* and appointed Danko to be Swenson's standby attorney despite witnessing in-court evidence of their distrustful and hostile relationship. The court's failure to inquire into the extent of the conflict between Danko and Swenson, either as Swenson's attorney or as standby counsel, denied Swenson his right to counsel and to due process of law.

a. The right to counsel is a bedrock guarantee that includes the right to assistance of a conflict-free attorney. The constitution guarantees criminal defendants the right to representation by a competent attorney at all stages of a criminal proceeding, as well as the corollary right to waive counsel and represent oneself. U.S. Const. amend. 6;³ U.S. Const. amend. 14;⁴

³ The Sixth Amendment provides in part, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

⁴ The Fourteenth Amendment says in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Wash. Const. Art. I, § 22;⁵ Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986); State v. Silva, 108 Wn.App. 536, 539, 31 P.3d 729 (2001).

A trial court must “indulge in every real presumption against waiver” of counsel. Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Hahn, 106 Wn.2d at 896. The right to effective assistance of counsel “is fundamental and helps assure the fairness of our adversary process.” State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

While accused persons are not guaranteed a good rapport with their attorneys, they are guaranteed representation by “an effective advocate” with whom they have no irreconcilable conflicts. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A criminal defendant must be able to communicate with his lawyer during key phases of trial preparation, to “provide needed information to his lawyer and to participate in

⁵ Article I, section 22 provides in pertinent part:
In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . . [and] to have a speedy public trial by an impartial jury.”

the making of decisions on his own behalf.” Riggins v. Nevada, 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992).

A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. In Re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001); United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) (“For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’”).

The right to a conflict-free attorney extends to standby counsel. McDonald, 143 Wn.2d at 512. When the court knows or should know about a conflict between a *pro se* defendant and standby counsel, the court must inquire into the nature and extent of the conflict, just as the court must do when the attorney is actively representing the client. Id. at 513. Because standby counsel remains obligated to impart accurate technical legal advice in a confidential fashion, and will represent the client if *pro se* status changes, standby counsel must be free from the same

fundamental conflicts of interest that apply to an attorney representing a client. Id. at 512.

To determine whether there is an irreconcilable conflict between attorney and client requiring substitution of counsel, the Washington Supreme Court applies a three-part test. Stenson, 142 Wn.2d at 724 (adopting the test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors include “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” Id.

An inquiry into a conflict of interest is entirely separate from assessing an attorney’s competence. Nguyen, 262 F.3d at 1003. The court should not consider, and errs by focusing on, whether the attorney was prepared and capable of trying the case. Id. Instead, the court must examine the nature and extent of the problem between attorney and client.

b. Swenson had an irreparable conflict with Danko throughout the proceedings and the court took no steps to inquire into or rectify the conflict. Todd withdrew from the case on August 9, 2006, and the Office of Public Defense (OPD) appointed Danko to represent Swenson. Supp. CP __, sub. no. 104 (order substituting Danko for Todd as attorney of record). By December

2006, Swenson lost trust in Danko over his failure to explain a plea bargain offer. The relationship worsened and Swenson informed the court of a complete communication breakdown, Danko's betrayal of his confidences, Danko's failure to prepare the case for trial or seek a viable plea bargain, and the personal danger in which he found himself because of Danko's actions. CP 67-70; Supp. CP __, sub. no. 126C (letter to court). The court did not conduct any inquiry into Swenson's complaints for several months. The bare inquiry the court conducted in April 2007 did not seek explanation of Swenson's serious complaints and ended when the court ruled that Swenson's recent refusal to speak with Danko precluded him from getting a new attorney.

i. Breakdown in communication between Swenson and Danko during attorney-client relationship and court's lack of inquiry. Swenson filed a motion on January 26, 2007, asking for a new attorney because of an irreconcilable conflict of interest and a complete breakdown in communication with Danko. CP 67. He sent a cover letter with the motion asking the court to hear his request as soon as possible in an *ex parte* proceeding so he could reveal confidential information. CP 69. Swenson did not appear in court until March 2, 2007. At this hearing, Danko and

Swenson displayed a hostile and distrustful attorney-client relationship but the court conducted no inquiry into their relationship and both the court and Danko interrupted Swenson when he tried to speak.

When Swenson tried to say something, Danko said, “you’re not talking. I am. I’m your attorney.” 3/2/07RP 4. When Danko did not object to the prosecution’s amended information adding an allegation of “deliberate cruelty” that would subject Swenson to an exceptional sentence greater than the standard range, Swenson interjected. Id. Swenson said, “No I object, your Honor. Pursuant to RCW 10.40.060 - -.” The court cut off Swenson, saying “you’re not your lawyer.” Swenson explained, “This guy, he’s trying to kill me. He’s trying to sell me out.” Id.

The court ignored Swenson’s comments and granted the prosecution’s motion to amend the information. CP 6-7. Swenson asked to challenge the information. Id. The court responded, “You are not representing yourself, sir.” 3/2/07RP 5. Swenson said, “I can’t proceed with this guy,” and tried to explain “things that have

happened.”⁶ The court said, “We’re not having [INAUDIBLE],” and concluded the hearing. Id. Even though Swenson filed a motion complaining of a complete breakdown in communication, and the court witnessed Danko’s dismissiveness of Swenson’s efforts to raise substantive issues to the court, the court ignored the obvious discord between attorney and client. CP 67-69.

One cause of discord at this March 2, 2007 hearing was that Swenson discovered he had not been informed of a plea offer that he would have accepted. CP 655-57 (explaining not advised of plea offer before offer withdrawn and would have accepted it);⁷ CP 698 (Feb. 26, 2007, letter to court stating not advised of terms of plea offer); CP 691 (Dec. 4, 2006, letter to prosecutor asking for terms of plea offer). The prosecution made a plea offer to Swenson’s former attorney Todd, but Todd had not told Swenson of it before it expired on November 1, 2006. CP 655. Danko told

⁶ Swenson’s motions complaining of Danko repeatedly refer to a sensitive matter arranged by Danko that put Swenson in considerable personal danger once publicly known that was intended to aid a plea bargain. CP 570. Swenson refused to discuss the sensitive matter in public documents and requested to be heard *ex parte* and under seal about this matter. CP 648. The court never inquired about this matter despite its considerable affect on Swenson and Danko’s relationship and Swenson’s numerous complaints that Danko put him in personal danger.

⁷ Swenson filed a motion “regarding counsel and reasons for proceeding *pro se*” dated March 3, 2007. CP 641-659. In this motion, he explained what occurred during the March 2, 2007 hearing.

Swenson that a plea offer had expired, but said it was not a good one and they would get a better offer. CP 649. Danko did not tell Swenson the terms of the offer. Id.

Although Danko did not explain the terms of the plea offer to Swenson, Swenson had told Danko he wanted him to pursue a plea bargain. Swenson suggested that Danko prepare a package of mitigating information, including information about childhood abuse and exemplary conduct while in prison, as an effort to persuade the prosecution to make a plea offer. CP 646-47. Danko never pursued this tactic and instead assured Swenson that a good plea offer would result from their work on this other sensitive matter. CP 648-49.

On March 2, 2007, the prosecution filed an amended information seeking an exceptional sentence and rendering plea negotiation moot. Swenson said he was never been informed of any offer and asked for the opportunity to consider it. 3/2/07RP 3; CP 658-59. The prosecution claimed Swenson should have known because it had made the offer to Todd and asserted Swenson was just seeking delay. 3/2/07RP 3. The court asked Danko if he had told Swenson of a plea offer and Danko said, "Yes," without any explanation of what he conveyed. Id.

Immediately after this hearing, Swenson filed a motion explaining that he had never received this plea offer and would have accepted it, but the prosecution refused to offer the plea bargain again. CP 658-59. The court never inquired into whether Danko accurately conveyed the offer to Swenson but rather it accepted Danko's terse statement that he had explained the offer to Swenson and it refused to let Swenson speak even though Swenson's recent letter to the court complained of not knowing the terms of any plea offer. CP 698 (Feb. 26, 2007 letter to court complaining not told terms of plea offer). The court did not hold the *ex parte* hearing that Swenson had requested. CP 67-69.

The next hearing occurred on March 29, 2007, when the court considered Swenson's motion to proceed *pro se*, filed on March 20, 2007. 3/29/07RP 2. Danko immediately objected to the hearing. *Id.* at 2-3. He complained, "I'm the only attorney," and someone from attorney David Zuckerman's office filed pleadings

that Swenson had prepared by himself, “[w]ithout my knowledge.”

Id.⁸

Swenson said, “May I briefly be heard,” but the court instructed him that he did not “need to explain anything,” and the court would ask him questions about the rights he was giving up to proceed *pro se*. Id. at 3-4. The court rigidly restricted its discussion with Swenson to the issue of whether Swenson was unequivocally waiving his right to counsel. During the *pro se* colloquy it became evident that Swenson was deeply frustrated with his attorney, and actually wanted a different attorney rather than to proceed *pro se*. Swenson said,

all I’ve ever wanted was an attorney, which apparently I can’t get, who’ll at least have an investigation performed, who will contact new and old witnesses, who will listen to me regarding my defense and the testimony . . . , or one that I should trust.

3/29/07RP 9. When the court understood Swenson’s request centered upon his dissatisfaction with his lawyer, the court ended the hearing. The court summarily denied the motion to proceed *pro se*, because the request was not unequivocal, and refused to

⁸ Zuckerman explained that he was assisting Swenson file his motions as a one-time favor because Swenson had made a number of efforts to file the motion from jail and had been unsuccessful. CP 639-40. Zuckerman knew Swenson because he had represented him in his successful personal restraint

consider Swenson's complaint that "I cannot proceed to trial with him [Danko]." 3/29/07RP 11. The court said "either you will represent yourself or you will not," and again, made no inquiry into the obviously troubled relationship between Danko and Swenson or the validity of Swenson's complaints against his attorney.

Next, on April 23, 2007, the court considered Swenson's request to replace Danko and asked the prosecutors to leave the courtroom for the discussion. 4/23/07RP 2-3. The court asked Swenson about defense witnesses Danko had not contacted. 4/23/07RP 3. Swenson said, "I have quite a few." 4/23/07RP 3. He described one witness who would connect Swenson's former co-defendant Joe Gardner with Maurice Jamerson. Gardner was a witness for the prosecution against Swenson and he denied knowing Jamerson, but Swenson had told the police that Jamerson orchestrated and participated in the killing along with Gardner. Danko vaguely told the court that he was unsure of whether the witness would be germane to the case. The court agreed that the witness may not be germane and directed Danko to discuss the matter with Swenson.

petition.

Danko admitted he had not tried to contact Jamerson, a witness Swenson claimed was directly involved in the case. 4/23/07RP 5. When the court asked why not, Danko said he was “working on a lot of other things, and I was - - it was surely not at the top of my list.” Id. Danko added that the “breakdown of communication has been some time. I haven’t had any communication with him ever since he raised these pleadings on his own.” He claimed he had tried to speak with Swenson but Swenson had not come out to talk to him. Id. at 5-6.

Swenson explained that since March, their conflict had been “irreconcilable” stemming from something Danko “had me doing.” He said Danko “had me engage - - he had me do some things that I believe were assisting the State,” but that fell apart. 4/23/07RP 6. Swenson tried to explain more but the court cut him off and asked Danko if he could be ready to try the case in one week. Id. at 6-7. Danko said no. Id. at 7.

The court then ordered the prosecution back into the courtroom and said that Swenson must try to work out his conflict because he had not been speaking with Danko and the court would not appoint a new lawyer under this circumstance. Id. at 7.

When the prosecutor returned to the courtroom, he said he would like to address Swenson's claim that Danko engaged him in dangerous activity in the jail. Id. at 8. The court did not want to hear any explanation and declared, "I'm not going to remove Mr. Danko from this case." Id.

Finally, the court told Swenson he could represent himself but, "I'm not going to appoint new counsel." Id. at 8-9. On May 25, 2007, Swenson moved to represent himself and the court granted the motion without further inquiry into Swenson's relationship with Danko. The court appointed Danko as standby counsel, "given the gravity of the charges you're facing, so that you'll have someone who maybe can help you, run some interference." 5/25/07RP 9.

ii. The court's failure to conduct any in-depth inquiry when confronted by an obvious and intransigent breakdown in attorney-client relationship was an abuse of discretion. The nature of the mandatory inquiry the court must conduct when confronted by an obvious attorney-client breakdown is that which constitutes "such necessary inquiry as might ease the defendant's dissatisfaction, distrust and concern." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001). The court must ask

sufficiently detailed and pointed questions that allow it to “ascertain the extent of the breakdown.” Id. at 777-78.

In Adelzo-Gonzalez, there were “clear indications of serious discord and friction between defendant and attorney.” Id. at 778. The defendant said his attorney did not pay attention to him and used bad language. The attorney tried to stop the defendant from making a motion for a new attorney and displayed antagonism to him in court. The Adelzo-Gonzalez Court termed these circumstances, “striking signs of a serious conflict” and found the trial court abused its discretion in making no meaningful attempt to probe the conflict. Id. at 778. The attorney’s disrespect toward the motions the client wanted to make, including the motion for new counsel, demonstrated the attorney was not acting in the defendant’s interest and instead was taking an adversary stance by openly opposing it. The trial court’s unreasonable and inadequate finding that there was no conflict warranting substitution of counsel was clearly erroneous under these circumstances. Id.

Likewise, the trial court’s cursory and dismissive attention to Swenson’s allegations of a serious breakdown in attorney-client communications did not provide the court with the necessary basis

to determine the extent of the apparently substantial breakdown in the attorney-client relationship.

The court made a single effort at inquiring about Swenson's complaints, during which it learned only that Danko had not conducted interviews and Danko did not explain any work he had done in the case. 4/23/07RP 3-7. The court abruptly stopped Swenson from explaining the attorney-client problems. *Id.* at 6. Moreover, Swenson repeatedly alluded to a "dangerous situation" in which Danko had put him but the court did not ask for any additional explanation. The onus is on the court, not the defendant, to obtain the necessary information to evaluate the nature and extent of the attorney-client rift. Adelzo-Gonzalez, 268 F.3d at 777. The court ignored Danko's disrespectful behavior toward Swenson, his refusal to allow Swenson to speak or explain an objection he wanted Danko to lodge, and his childlike insistence that "I'm the only lawyer." 3/29/07RP 2. Instead of appreciating the serious conflict and friction, the court paid no heed to Swenson's written filings and in-court efforts to explain the nature and extent of the problems. The court's refusal to inquire into the attorney-client conflict and appoint a substitute attorney denied

Swenson his right to the meaningful assistance of counsel and due process of law.

iii. Irreparable conflict with standby counsel undermines the fairness of the proceedings. When the court appoints standby counsel, the attorney owes a duty of loyalty and confidentiality to the client, an obligation to provide technical advice accurately and candidly, and must have the ability to render effective representation if needed. McDonald, 143 Wn.2d at 512. Even though there is no right to standby counsel, once appointed, the attorney rendering standby assistance must be able to do so in a fair, just, and conflict-free fashion. Id.; State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987) (attorney-client privilege attaches to standby counsel and *pro se* litigant's relationship).

In McDonald, the defendant opted for self-representation following conflict with his attorney from the county public defender's office, and the court ordered the same attorney serve as standby counsel. 143 Wn.2d at 513. When the defendant filed a civil suit against this attorney in federal court, the prosecutor's office was appointed to represent the county, and the public defender, in this suit. Id. The trial court found that standby counsel did not have an irreconcilable conflict of interest because the federal case would

proceed slowly and the trial would be over by the time the defense attorney could potentially reveal confidences to the civil attorneys in the prosecutor's office. The Supreme Court reversed this ruling, finding that standby counsel must be able to render confidential, accurate, and trustworthy information to a *pro se* litigant. Id. The trial court fundamentally erred when it retained standby counsel without even inquiring in detail into the possibility of a conflict of interest. Id. As demonstrated by McDonald, standby counsel's inability to render conflict-free assistance undermines the fairness of the proceeding and requires reversal.

iv. Danko and Swenson's contentious and fractious relationship rendered Danko unfit to serve as standby counsel. Despite Swenson's claims that Danko had put him in personal, physical danger as well as completely neglected to prepare his case, even though Swenson told the court, "he's trying to kill me. He's trying to sell me out," and despite continued hostility and evidence of a complete lack of communication or trust, the court kept Danko as standby counsel. 3/2/07RP 4. As Swenson wrote in a motion filed before trial, "after Swenson proceeded *pro se*, Danko made everything difficult for him and he continued to be ineffective even as standby counsel." CP 572. The evidence

As standby counsel, Danko admitted he still had “strained relations” with Swenson while Swenson fruitlessly sought a telephone book so he could locate someone to contact as a forensic expert. 12/4/07RP 36. Danko reluctantly agreed to provide contact information for a forensic expert but never gave Swenson this promised information. 12/4/07RP 38; 12/20/07RP 23; 1/8/08RP 9.

Danko gave confidential information to the prosecution without Swenson’s permission. CP 650. He also offered no assistance when Swenson received hostile and physically threatening treatment, and there was a “hit” put on Swenson, to which Danko was entirely indifferent and unhelpful even though his actions had led to the hostile treatment Swenson received. CP 576.

During the CrR 3.5 hearing, Swenson told the court he asked Danko for assistance but Danko refused to help him, saying “it’s your job,” 3/19/08RP 72-73; 222. During this same hearing, Swenson complained the Danko was falsely accusing him of stealing his pen. Id. at 72-73.

Danko’s refusal to aid Swenson included a refusal to explain what he would or would not do. Swenson complained during the

CrR 3.5 hearing that Danko would not explain what he would help him with. 3/19/08RP 222. Similarly, Swenson reported that during his initial preparation upon becoming a *pro se* litigant, Swenson asked for the type of advice or information Danko would provide, Danko retorted, "I'm not gonna tell you." CP 788 (letter to Danko dated August 7, 2007, included in Motion to Dismiss).

Danko also expressed concern that Swenson intended to file a bar complaint and lawsuit and thus he was "walking in a grey area" and "apprehensive" about what he should do. Id.

Swenson struggled with his pretrial preparation because Danko was decidedly uncooperative in providing his case file to his investigator. Because Swenson heavily relied on his investigators, as he was barred from personally contacting or interviewing witnesses, Danko's dilatory participation in the defense harmed Swenson's ability to prepare. CP 572 (defense investigator did not receive discovery materials from Danko for five months); 10/1/07RP 13-16, 51.

During the trial, Danko revealed to the court a discussion he had with Swenson's investigator. 5/19/08RP 192-93. Danko revealed this information *sue sponte*, without having been asked,

and despite the obligation of confidentiality that adheres both to attorney and investigator. McDonald, 143 Wn.2d at 512.

These enduring frictions unnecessarily and unreasonably interfered with Swenson's ability to represent himself and left him in the precarious position of relying upon a completely untrustworthy source for confidential information and advice. 10/12/07RP 4-5, 9. The court unreasonably refused to budge from its insistence that Danko remain Swenson's standby attorney, even when the prosecution voiced concern about the apparently poisoned relationship between the two men, and thus forced Swenson to proceed with a standby counsel despite the lack of trustworthy or confidential relationship between them.

c. The complete and irreparable conflict between Danko and Swenson undermined the fairness of the proceedings and requires reversal. In McDonald, the Supreme Court recognized that a conflict of interest between a standby attorney and a *pro se* defendant constitutes structural error and is presumed prejudicial. 143 Wn.2d at 513. The *pro se* defendant has the identical right to a loyal and confidential relationship with standby counsel as any other client has with his attorney.

Even the prosecution recognized the depth of the fractured relationship between Swenson and Danko and asked the court to remove Danko as standby counsel. 10/1/07RP 10; 10/12/07RP 4-5, 9. Swenson agreed that Danko has “not helped me at all,” and was continuing to obstruct his receipt of necessary discovery materials. 10/1/07RP 11-13, 16; 10/12/07RP 12. The court refused to dismiss Danko. 10/12/07RP 19. While Swenson and Danko at times managed to achieve some harmony in their relationship, these fleeting moments of co-existence did not alter the fundamental mistrust based on a lack of confidentiality, failure of providing basic legal assistance such as informing Swenson of a plea offer, or the physically dangerous situation in which Swenson felt himself in and attributed to Danko’s mismanagement of the case, and thus it was impossible for Danko to serve Swenson’s interests or act in a loyal, confidential fashion.

In sum, Swenson was deprived of counsel as the court repeatedly refused his requests to conduct an adequate inquiry into the attorney-client breakdown in trust and communication, and ensure that he was represented by a conflict-free lawyer. Then, the court forced Swenson to continue his distrustful and

contentious relationship with Danko by insisting he remain as standby counsel. These errors require reversal.

2. SWENSON DID NOT KNOWINGLY,
INTELLIGENTLY, AND VOLUNTARILY
WAIVE HIS RIGHT TO COUNSEL

a. The right to counsel is a bedrock requirement that may be waived only when the defendant clearly understands and knowingly waives the assistance of counsel in an unequivocal fashion. A valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused is competent, and knowingly, intelligently, and voluntarily waives the assistance of counsel. Faretta, 422 U.S. at 835. The validity of a waiver is measured by the defendant's understanding at the time he waives his right to counsel, and an incomplete waiver is not rescued by the defendant's subsequent garnering of sufficient knowledge to represent himself. United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994).

The knowledge and intelligent understanding that the pro se defendant must possess when validly waiving counsel includes "(1) the nature of the charges; (2) the possible penalties; and (3) the disadvantages of self-representation." State v. Woods, 143 Wn.2d 561, 588, 23 P.3d 1046 (2001); see Balough, 820 F.2d at 1487.

The request must be unequivocal, or the presumption that the accused person desires counsel will remain paramount.

The court's mandatory warning of the disadvantages of self-representation for a person seeking to waive counsel must delve into the details of *pro se* representation. An "abstract" reference to the difficulties attendant to self-representation does not impart the critical information necessary to a valid waiver of counsel. United States v. Erskine, 355 F.3d 1161, 1168 (9th Cir. 2004). Instead, the court must at least describe "the pitfalls" of not having counsel with some specificity, because regardless of his or her understanding of the intricacies of courtroom rules, the defendant must understand the importance of counsel. United States v. Hayes, 231 F.3d 1132, 1138 (9th Cir. 2000).

Here, Swenson waived counsel on May 25, 2007, after preliminary but equivocal discussions of self-representation on March 27, 2007. He indicated he understood the nature of the charges and the penalty he faced, yet the record does not demonstrate he understood "the core functions of a trial attorney" and the disadvantages of not having a lawyer to perform those functions. Erskine, 355 F.3d at 1168.

b. Swenson's waiver of counsel was not voluntary because it was based on an irreconcilable and unresolved conflict with counsel. "A waiver of counsel must be knowing, voluntary, and intelligent, as with any waiver of constitutional rights." Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

Swenson waived counsel involuntarily, because the court refused to appoint a conflict-free attorney or even conduct an in-depth inquiry into the basis of the serious rift in the attorney-client relationship, as discussed above. The defendant in Adelzo-Gonzalez was denied counsel by the court's refusal to appropriately inquire into the serious rift between attorney and client before Adelzo-Gonzalez simply pled guilty rather than have a trial with an attorney whom he not only mistrusted but also feared. 268 F.3d at 779. Similarly, Swenson was denied counsel because the court refused to ameliorate or address the obvious discord between Swenson and his attorney, discord predicated on counsel's complete failure to interview witnesses and prepare for trial, his dismissal of a plea bargain offer without conveying it to Swenson, putting Swenson in a dangerous situation and making no effort to aid him, and numerous other specific failings. In these

circumstances, Swenson did not voluntarily waive his right to counsel.

c. Swenson's waiver of counsel was not knowing and intelligent because he did not understand the extreme difficulties he would encounter and the obstacles mandated by the State in preparing a defense. Before Swenson proceeded *pro se*, the court cursorily told him that he would need to know the rules of evidence. But the court's skimpy discussion of the disadvantages and difficulties in self-representation render Swenson's decision to forgo counsel neither intelligent nor voluntary.

The choice to proceed without counsel is not made knowingly and intelligently, "with eyes open," if not entered with an understanding of the "core" functions of acting as one's own lawyer. Faretta, 422 U.S. at 835; Milton v. Morris, 767 F.2d 1443, 1445 n.1 (9th Cir. 1995). When a defendant waives counsel under a mistaken belief that he will have access to certain tools such as a telephone to prepare a defense but does not receive such assistance, the waiver of counsel may not be knowing and voluntary as required by Faretta. Milton, 767 F.2d at 1445 n.1. Understanding the disadvantages incurred by not having a lawyer perform his other "core functions" are a critical component of a

defendant's understanding of self-representation. Hayes, 231 F.3d at 1137.

Swenson had never represented himself before. 3/29/07RP 4. He had limited experience in the criminal justice system, as the only other time he had been prosecuted was for a single theft charge that arose out of the same investigation and for which he pled guilty. 5/25/07RP 7. Although he was present when his case was originally tried, ten years had elapsed since that trial. Despite his understanding of appellate legal issues that occurred in his case, his memory of the specific trial proceedings would be at best remote and only predicated on his involvement in a single trial a number of years before the current trial.

Rather than discussing the specifics of self-representation, the court insisted that the only relevant information was whether Swenson would be "familiar with the rules of evidence," to which Swenson replied, he would try his best. 3/29/07RP 7-8. When Swenson said he had experienced problems filing his documents, the court did not follow up that remark or use it a reason to discourage Swenson from representing himself. 3/29/07RP 9.

Similarly and without any detail, the court asked Swenson whether he understood jury selection or the rules of evidence.

5/25/07RP 4-5. Swenson said only that he “somewhat” understood them. Id. The court told him he was bound by those rules but did not explain whether he would be able to access them.

The court did not discuss the extreme restrictions a *pro se* inmate housed in the county jail would encounter in his ability to access legal resources, potential witnesses, telephones, or computers.⁹ The court did not discuss the efforts he would need to undertake to find an investigator, even though his desire for a thorough investigation was a principal reason he sought self-representation. 3/29/07RP 9. In light of the very serious charges at issue, Swenson’s numerous complaints about necessary investigation and the difficulty of arranging such investigation from a jail cell, and Swenson’s limited courtroom experience, the court’s cursory mention of the existence of procedural rules did not provide Swenson with the necessary understanding of the difficulties of self-representation. Accordingly, he did not knowingly and intelligently waive his right to counsel.

d. The waiver is inadequate without a finding of competency under RCW 10.77.020. RCW 10.77.020(1) explicitly commands, “A person may waive his or her right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was competent to so waive.”

The language of RCW 10.77.020 is express and mandatory. The word “shall” in a statute means must, without equivocation. State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994) (“shall” in a statute creates mandatory requirement absent contrary legislative intent); State v. Dodd, 120 Wn.2d 1, 14, 838 P.2d 86 (1992) (“shall,” synonymous with “must,” is a mandatory obligation). Thus, RCW 10.77.020 mandates that the court find a defendant competent before allowing him to proceed *pro se*.

A defendant’s competence requires assessing whether he or she understands the nature of the proceedings against him, is able to assist in his own defense, and knowingly and intelligently decided to waive counsel. Hahn, 106 Wn.2d at 895. In Indiana v.

⁹ For example, the jail strenuously opposed Swenson’s requests for computer access, telephone access, or face-to-face contact with an investigator, and Swenson struggled to get OPD to grant money for an investigator as well as supplies such as paper. 8/10/07RP 49-53. The jail has a *pro se* inmate handbook and schedule regarding access to resources but Swenson did not receive this information until after he became *pro se*. 5/25/07RP 9; 8/10/07RP

Edwards, __ U.S. __, 128 S.Ct. 2379, 2386, 171 L.Ed.2d 375 (2008), the court concluded that even if an individual is competent to stand trial, he or she is not necessarily competent to make decisions needed to conduct a trial without the assistance of counsel. Id. at 2386. The court warned that individualized determinations are necessary to evaluate an accused person's ability to make trial decisions even if competent. Id.

In the case at bar, the court did not make "a specific finding" that Swenson was competent. Although the court's findings embrace Swenson's understanding of the charge and the penalties, and the risks of self-representation, they do not include an express finding of competency, nor any inquiry into Swenson's mental health.

Accordingly, the court's finding that Swenson waived his right to counsel was not "effective." RCW 10.77.020. The plain and unambiguous statutory language indicates a structural requirement imposed upon the court which nullifies the court's authority to find a valid waiver of counsel absent this finding of competence.

77.

e. The inadequate waiver of counsel is structural error requiring reversal. Harmless error analysis is inapplicable where the deprivation of the right to counsel is at issue. Balough, 820 F.2d at 1489-90; Silva, 108 Wn.App. at 542. Due to the lack of record establishing a knowing, voluntary, and intelligent waiver of counsel, reversal and remand for a new trial are required. Silva, 108 Wn.App at 542.

3. SWENSON WAS DENIED HIS RIGHT TO PREPARE A DEFENSE BECAUSE OF UNREASONABLE RESTRICTIONS IMPOSED ON HIS ABILITY TO ACCESS WITNESSES

Swenson had the right to prepare a defense, including the right to conduct a full investigation of the facts and law applicable to the case. Milton v. Morris, 767 F.2d 1443 (9th Cir. 1985); State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). “An incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense.” Milton, 767 F.2d at 1446. Yet the court obstructed and hindered his ability to prepare a defense by limiting his ability to interview witnesses without just cause.

a. The Sixth Amendment guarantees the right to meaningful self-representation. An accused person has the constitutional right to prepare and make his defense. Faretta, 422 U.S. at 819; State v. Silva, 107 Wn.App. 605, 618, P.3d 729 (2001) (hereinafter Silva II); U.S. Const. amend. 6; U.S. Const. amend. 14; Wash. Const. Art. I, § 22. Denying a *pro se* defendant access to legal materials or otherwise unreasonably interfering with the preparation of his defense may violate the defendant's rights to due process, self-representation and a fair trial. See United States v. Trapnell, 638 F.2d 1016, 1029 (7th Cir. 1980); United States v. Bynum, 566 F.2d 914, 918 (5th Cir.), cert. denied, 439 U.S. 840 (1978); Silva II, 107 Wn.App. at 620-21. Moreover, as discussed below, the Washington constitution's more stringent protections accorded a *pro se* defendant require the State to ensure a *pro se* defendant has the ability to meaningfully represent himself.

b. The Washington Constitution's broader protection bars the State or Court from interfering with *pro se* representation. The Washington Constitution more broadly protects an accused's right to meaningful self-representation. Silva II, 107 Wn.App. at 620-21. The court in Silva II conducted a thorough analysis of all Gunwall factors and determined that Article I, section 22's express

guarantee of the right to proceed “in person or by counsel” explicitly embraces an individual’s right to choose self-representation and the corollary right that such representation must be meaningful. Silva II, 107 Wn.App. at 620-21. The court concluded that the state constitution’s right of self-representation affords a pre-trial detainee “a right of reasonable access to state provided resources that will enable him to prepare a meaningful pro se defense.” Id. at 622.

In Silva II, the defendant complained that his right of self-representation was impermissibly restrained by his inability to access legal resources from the jail. This Court agreed that Silva had the right to access necessary resources to prepare his defense and it thoroughly reviewed the materials he received to determine whether he was unreasonably restricted. Id. at 623-25.

The jail similarly restricted Swenson’s access to the courts, by making it difficult for him to file motions, access the legal computers, use telephones, or locate telephone numbers. But more significantly than the jail’s obstructions of Swenson’s practical ability to represent himself, the court unreasonably and without cause barred Swenson from participating in any of the witness interviews that occurred in his case, and thereby seriously infringed upon his ability to present a defense.

c. Here, the court and prosecution restricted Swenson's ability to prepare his defense and access to legal resources. Shortly after Swenson became his own attorney, the prosecution asked Judge Charles Mertel to order that he not have any contact with witnesses, but the State said it had no objection "whatsoever" to Swenson's personal participation in witness interviews. 8/10/07 73, 80-81. In fact, the prosecution requested some access to Swenson's investigator so that it would be able to arrange telephonic witness interviews in which Swenson could participate from the jail. 8/10/07RP 80. At a later hearing, the prosecution again indicated it expected Swenson to be present on the telephone for witness interviews. 11/9/07RP 26 ("because Mr. Swenson is going to appear by phone, and his investigator appear in person," we need to arrange interviews with investigator).

But the prosecution obtained a court order barring Swenson from having any contact with witnesses, signed by Judge Mertel one month after the hearing where the judge considered the issue. Supp. CP __, sub. no. 156. Judge Mertel had briefly presided at two hearings on August 9 and 10, 2007, regarding various *pro se* access issues, and was otherwise uninvolved in the case. Swenson told the trial court he wanted to be involved in

interviewing the witnesses but was unsure whether Judge Mertel's ruling of no contact with witnesses affected his ability to participate in the interviews. 11/9/07RP 26-27.

Judge Nicole MacInnes ruled that Judge Mertel's ruling barred Swenson from participating in witness interviews, although in fact, his oral ruling indicated he intended the opposite. 8/10/07 80-81; 12/4/07RP 26-27. Swenson complained of being excluded from the interview process, but Judge MacInnes ruled that not only was Judge Mertel's ruling barring Swenson from being part of a witness interview the law of the case, it was properly entered. 12/4/07RP 26-27. Judge Mertel's order "was a ruling that was made previously in this case. There's no reason for me to change the ruling." Id. Swenson voiced his confusion over how it came to be that he was barred from interviewing witnesses, and the court responded, "that was before my time [in the case]. I don't know. But that's - - that's the status of it." Id. at 27.

On several occasions, Swenson expressed his frustration with this misapplication of Judge Mertel's ruling and asked the court to reconsider and allow him the ability to participate in interviews. He objected to not having notice of the interviews and not having witness statements to review to prepare his interviews. 2/1/08RP

11. The witness interviews were conducted over the telephone, making it relatively easy for Swenson to participate, but instead of participating, Swenson was required to draft questions in advance that investigators would ask. 2/1/08RP 6.

After some of the witness interviews occurred, Swenson again complained and asked to be included in the interviews. 2/8/08RP 15. He told the court that the prosecution had not asked to bar him from the interviews and Judge Mertel's ruling should not prohibit him from participating. Id. He asserted his "Faretta rights to personally conduct my own defense." Id. He explained that the investigators "can't really do an actual proper follow-up that I would do if I were doing the interview. And because of that, some of the things are getting missed." Id. at 16. He further objected to the prosecutor dictating questions to the investigators and the investigators feeling or acting shut down by the prosecutor. Id.

But the court remained passive. It said, "there's nothing I can say or do about that. I am not going to change Judge Mertel's ruling with respect to witness interviews" and the procedure used is "perfectly appropriate." 2/8/08RP 19. The court reviewed a transcript of one witness interview based on Swenson's objections to unreasonable prosecutorial meddling and the court ruled that the

prosecutor should not have interfered and it must allow Swenson's investigator to ask questions she believes are relevant. 2/15/08RP 14-15.

Although Judge Mertel had presided in the case only for a brief pretrial hearing and had in fact ruled that Swenson could participate in witness interviews, the trial court interpreted the ruling as a complete prohibition on Swenson's direct involvement in witness interviews and refused to revisit the purported ruling. Furthermore, the prosecution did not correct the court's misimpression of Judge Mertel's ruling even though it had not objected to Swenson's involvement in the interviews from jail. Swenson was denied the ability to participate in witness interviews, to hear their answers or to follow-up on their responses in preparing for his trial.

d. The prohibitions placed on Swenson as a *pro se* litigant require reversal. Improper denial of the right of self-representation is not amenable to harmless error analysis and requires automatic reversal without any showing of prejudice. Neder v. United States, 527 U.S. 1, 14, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). While Swenson's right to represent himself was not wholly denied, it was substantially restricted by the

unreasonable prohibition on his participation in witness interviews, as well as his limited access to legal resources or basic tools such as telephone use or writing paper. The court's prohibition on Swenson's participation in witness interviews was entirely unreasonable, and arose out of a misinterpreted pretrial ruling entered by a judge with limited involvement in the case. Not only did the prosecution offer no reasonable basis for excluding Swenson from witness interviews, it voiced no objection "whatsoever" to Swenson's involvement in interviews, until the court misapprehended Judge Mertel's ruling and forbade Swenson from listening to or participating in the interviews. 8/10/07 80-81.

The harmfulness of this constitutional error is particularly difficult to assess when it is necessary to weigh how Swenson's defense suffered from his inability to listen to the witnesses and react to their answers, by either asking additional questions or better crafting his cross-examination at trial. Some constitutional errors have "unquantifiable and indeterminate" consequences that prevent a realistic assessment of actual harm and thus are structural error. United States v. Gonzalez-Lopez, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) ("We have little trouble concluding that erroneous deprivation of the right to counsel

of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'") (citation omitted). Here, Swenson complained that his investigators were not asking necessary follow-up questions and he sought to regain his right to prepare his defense, but the court refused out of a misunderstanding that another judge had prohibited his participation. 2/8/08RP 15-16.

The court's infringement upon Swenson's right to prepare his defense is not amenable to harmless error. Cf. State v. McDonald, 96 Wn.App. 311, 317-318, 979 P.2d 857 (1999), aff'd, 143 Wn.2d 506 (2001) (harmless error can never apply to those "constitutional rights so basic to a fair trial."). Furthermore, it is impossible to assess the importance of missing evidence not gathered, or the improvement in Swenson's in-court performance had he been able to properly interview the witnesses beforehand. Finally, the restriction was entirely unreasonable and had no valid underpinning in security concerns or efficiency demands. The prosecution had not even objected to Swenson interviewing the witnesses. The denial of Swenson's ability to meaningfully prepare his defense violated his rights under the Sixth Amendment and the

more protective requirements of Article I, section 22, and require reversal. Silva II, 107 Wn.App. at 622.

4. BY REFUSING TO ENSURE FAIRNESS IN AN APPARENTLY BIASED PROCESS OF APPOINTING AN ATTORNEY TO REPRESENT SWENSON, THE COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE AND SWENSON'S RIGHT TO THE ASSISTANCE OF COUNSEL

When Todd withdrew from the case because he had represented a prosecution witness, Swenson asked that the court appoint a replacement attorney or allow him to choose one. CP 644-45. Swenson opposed OPD appointing an attorney. 8/9/06RP 6-7. He harbored a serious fear that OPD would not give him an effective advocate because the OPD attorney who would select Todd's replacement was a friend of Allen Loucks, Sr., the father of the deceased who had single-handedly pursued Swenson's prosecution in a manner that Loucks himself called "obsessive." Id.; CP 336 (Loucks Sr. admitting at hearing during Swenson's first trial, "I was obsessed with finding my son's murderer"). Loucks Sr. had considered bribing staff at OPD when he was obsessively investigating his son's death. 8/9/06RP 7. The prosecution conceded that Loucks Sr. gave information connecting Swenson to

the incident that was not “legally obtained.” But the court refused to alter OPD’s authority to select Todd’s replacement.

The court’s refusal to inquire into the integrity of the appointment process, and take steps to guarantee Swenson was appointed a conflict-free counsel, violated the appearance of fairness doctrine as well as the right to meaningful assistance of counsel. While an indigent person does not have the right to choose appointed counsel, he has the right to a fair process by which an attorney is appointed to represent him. Wheat, 486 U.S. at 160; U.S. Const. 6, 14; Wash. Const. art. I, § 3, 22. The court has an independent interest in ensuring that “legal proceedings appear fair to all who observe them.” Id. Swenson articulated a reasonable basis to surmise that the appointment process was tainted in his case, by the relationship between OPD and the homicide victim’s father, and sought to alleviate this apparent bias by having an attorney appointed by an alternative procedure. The court’s refusal to do so, without taking steps to ensure that Todd’s replacement was assigned in a fair and impartial fashion, undermined the fundamental fairness of the proceedings and denied Swenson his right to the assistance of conflict-free counsel.

5. THE PROSECUTOR'S COURT-ENDORSED COMMENT ON SWENSON'S SILENCE AND ATTACKS ON SWENSON'S CHARACTER DENIED SWENSON A FAIR TRIAL

a. A prosecutor violates the bounds of fair conduct by aggressively deriding a defendant's character and urging a conviction based on the defendant's failure to testify. "As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice." State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008); see Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1934) (because the jury will expect the prosecutor to act fairly, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChrisoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend 6, 14; Wash. Const. art I, § 22.

Prosecutorial misconduct requires reversal when the improper conduct is substantially likely to affect the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where improper statements are not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that no jury instruction would have cured the problem. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

b. Swenson did not testify at trial based in part on the prosecutor's threat against him. Near the end of the trial, Swenson told the court that "after watching [prosecutor] Mr. Konat in action" he did not believe he would testify. 5/21/08RP 192. Earlier that same day, Swenson had reported to the court that Konat said to him in private, "you're a dead man." 5/21/08RP 25. Konat admitted making the comment and apologized. Id. Konat explained he was very angry about Swenson's in-court actions and "if this were another situation, perhaps I would have engaged him physically . . . I wasn't shy about saying you're a dead man, obviously figuratively." Id. at 26.

During his closing argument, Konat urged the jury to disregard any factual component of Swenson's closing argument, because "he had the opportunity to take the stand." 5/27/09RP

210. Swenson had not testified in the case, and the prosecutor's comments thereby highlighted that Swenson had not taken advantage of this "opportunity." Id. Swenson promptly objected to this remark but the court said, "Overruled. Go ahead." Id.

c. The prosecutor's attack on Swenson for failing to testify was plain misconduct to which Swenson objected. It is well-established that a prosecutor may not urge the jury to convict the defendant because he did not take the stand in his own defense. Griffin v. California, 380 U.S. 609, 611, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (reversal based on prosecutor's argument the defendant "had not seen fit to take the stand and deny or explain" the killing). The prosecutor may not comment on the defendant's silence or suggest guilt can be inferred from such silence. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). It "violates a defendant's Fifth Amendment rights if the prosecutor makes a statement 'of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify.'" State v. Fiallo-Lopez, 78 Wn.App. 717, 728, 899 P.2d 1294 (1995) (quoting State v. Ramirez, 49 Wn.App. 332, 336, 742 P.2d 726 (1987)).

“A comment on an accused’s right to silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Here, the prosecutor commented on Swenson’s right to remain silent. Swenson did not invite this improper argument, and he “has no power to ‘open the door’ to prosecutorial misconduct.” State v. Jones, 144 Wn.App. 284, 295, 183 P.3d 307 (2008). Swenson’s *pro se* closing argument was not evidence, as the prosecutor had already highlighted for the jury,¹⁰ and Swenson was in the awkward position of arguing about incidents in which he was personally involved, thus making it difficult to separate himself from his argument. Nonetheless, Swenson focused his argument on the testimony at trial, which included his statements to the police, and the legal definitions. Swenson was allowed to make an argument to the jury about the case with the understanding that it would be considered only an argument. It was the prosecutor who repeatedly referred to Swenson’s conduct during the trial as if it were testimony, such as the prosecutor’s depiction of “deceitful,

¹⁰ 5/27/08RP 91, 100, 210.

deceptive, insincere remarks that the defendant has made about his involvement in this murder over the last couple of weeks.” 5/27/08RP 45; 5/27/08RP 49 (Swenson “told you through testimony” that he was forced to commit theft).

Furthermore, when the court intervenes in the face of a clearly improper argument and gives an effective curative instruction, it may cure the error. Warren, 165 Wn.2d at 28. Here, the court not only neglected to advise the jury of the inappropriateness of the prosecutor’s remark about Swenson’s failure to testify, the court implied that the prosecution’s argument was accurate. See e.g., State v. Coleman, 74 Wn.App. 835, 842, 876 P.2d 458 (1994) (Pekelis, J., dissenting) (“trial court gave its official stamp of approval to the misconduct by *overruling* the defense attorney’s prompt and proper objection to the comments,” thus compounding error) (emphasis in original). The court overruled Swenson’s objection and told the prosecutor to “go ahead,” thus endorsing the notion that Swenson’s failure to testify when he had the opportunity to do so should be considered by the jury in its deliberations.

The court’s implicit endorsement of the prosecutor’s plainly improper efforts to undermine Swenson’s argument by highlighting

his failure to testify in his own defense left the jury with a distorted view of the fundamental right to remain silent. The prosecution's argument that Swenson did not take "the opportunity to testify" is particularly misplaced here, when Swenson decided not to testify after the prosecutor had threatened him, saying, "you're a dead man," and thus, the prosecutor played a role in discouraging Swenson from taking the stand and then tried to use his failure to testify against him.

d. The prosecutor's aggressive denunciations of Swenson's character were flagrant efforts to obtain a verdict based on impermissible grounds. A prosecutor may never assert a personal opinion as to the credibility of a witness or the guilt or innocence of an accused. United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Calling the defendant a liar, saying he had no case, and was clearly guilty, constitutes reprehensible misconduct. Reed, 102 Wn.2d at 145-46.

Here, the prosecutor called Swenson a "coward" at least seven times in his closing argument, once referring to him dismissively as, "the coward behind me." 5/27/08RP 46, 47, 50, 69, 211, 217, 220, 225, 226. He told the jury that not only did Swenson lie, he was "conniving," "deceitful," "deceptive," and

“insincere” throughout the trial. Id. at 45, 93, 219. Even Detective O’Keefe believed Swenson was “manipulative.” Id. at 87. He was a “lying thieving” person. Id. at 213.

These remarks constituted a character assault on Swenson, unmistakably predicated on the prosecutor’s personal belief. They further denigrated Swenson’s right to represent himself, as it would be impossible for him to make an argument about the case or proffer a theory that would not be taken as unsworn testimony. Implicitly, the prosecutor accused Swenson of lacking the temerity to testify himself, all the while making “remarks” that bespoke deception.

Swenson raised numerous objections to the prosecutor’s misrepresentations of the record and the court strenuously discouraged him from raising such objections. See e.g., 5/27/08RP 46, 48-49, 210, 212, 213, 215, 228. The prosecutor’s flagrant efforts to focus on Swenson’s “cowardly” character as a basis for convicting him was an intentional effort to inflame the jury.

In State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956), defense counsel did not object to many instances of misconduct, but the Supreme Court found that the facts presented an occasion where the “cumulative effect of repetitive prejudicial error becomes

so flagrant that no instruction or series of instructions can erase it and cure the error.” 49 Wn.2d at 73. The court in Case found that the prosecutor's unobjected-to statement of his personal belief in the accused's guilt “was not only unethical but extremely prejudicial,” as an effort to impress upon the jury his personal opinion of the outcome of the case.

In the case at bar, the prosecutor engaged in numerous, pervasive instances of attempting to sway the jury based on matters that were both irrelevant and inflammatory, including commenting on Swenson's right to remain silent, and a thorough denigration of his character. The purpose of these remarks were aimed at discouraging the jury from believing that Swenson intended only to steal property and was not involved in the robbery. Even the central prosecution witness Gardner could not describe Swenson taking any active role in physically restraining Loucks, and the jury's failure to find he was deliberately cruel demonstrates the jury's agreement that Swenson's role in the incident was minimal. Had the prosecution not so thoroughly attacked his character and injected its personal belief in his guilt, the outcome of the case may have been different. Furthermore, had the proceedings been fundamentally fair, including allowing Swenson

to have a conflict-free lawyer, the outcome would have been different and reversal is required under the doctrine of cumulative error. United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); Case, 49 Wn.2d at 73.

6. BY FINDING THAT A WITNESS'S COMMENTS CONSTITUTED PREJUDICIAL INFORMATION THAT COULD NOT BE CURED BY ANY LIMITING INSTRUCTION, THE PROPER REMEDY WAS TO DECLARE A MISTRIAL

Before trial, the court asked all parties to refer to Swenson's earlier trial as another hearing. CP 423; 3/18/08RP 89-90. The court warned that the issue could potentially arise in Gardner's testimony. 3/18/08RP 92.

The principal prosecution witness against Swenson was Gardner, his one-time co-defendant who had pled guilty and agreed to testify against Swenson. In the course of discussing whether Gardner had pawned a ring purportedly taken from David Loucks, Gardner told the jury Swenson had been convicted a first time. Gardner said, "when you got convicted the first time," and then referred to learning about a ring while on the stand at that earlier trial. 5/19/08RP 153. Swenson did not object and moved on to another topic.

But Swenson later said, “if there is no mistrial,” the court should give a limiting instruction. 5/27/08RP 15. Gardner had testified that Swenson was previously convicted, and several witnesses testified that there had been a prior trial. 5/27/08RP 15. Swenson said when Gardner testified that Swenson had been convicted for “the first time,” he noticed the jurors looking at him as if the testimony proved something significant. Id. He asked the court to tell the jury that Swenson’s first conviction had been reversed because the State had not been properly required to prove all elements of guilt. Id.

The court agreed that “the conviction language was unfortunate,” and was not in direct response to a question from Swenson that would elicit such a response. Id. at 15-16. But the court concluded “there’s nothing I can tell the jury that’s going to ameliorate the effect of that, I believe.” Id. at 16. Thus, the court refused to give any curative instruction on the “unfortunate” reference to Swenson having been convicted at an earlier trial.

A court should declare a mistrial when there is a serious irregularity that cannot be cured by an instruction. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). “A trial in which irrelevant and inflammatory matter is introduced, which has a

natural tendency to prejudice the jury against the accused, is not a fair trial.” State v. Miles. 73 Wn.2d 67, 70, 436 P.2d 198 (1968). A mistrial is necessary when the error undermines the fairness of the proceedings.

Here, the court ruled that “there’s nothing I can tell the jury” to ameliorate the effect of the testimony that Swenson had been previously convicted. 5/27/08RP 16. The proper remedy in such a situation is a mistrial, to ensure the fairness of the proceedings and integrity of the verdict.

If a mistrial was not necessary, than the court should have given a limiting instruction. The jury should not have heard Swenson had been convicted after an earlier trial, as that verdict could readily influence the jurors and had no proper place in the trial. Swenson noticed the effect of the remark on the jury. Rather than instructing the jury to disregard the comment, or the truthful response that it was overturned because it was unfairly obtained, the court permitted the jury to consider Swenson’s previous conviction as substantive evidence admitted without limitation.

Furthermore, this error was not the only error in the trial. Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the

effect of multiple errors and the resulting prejudice on an accused person. Frederick, 78 F.3d at 1381; State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Here, a vast array of serious and substantial errors occurred. Swenson was effectively denied counsel without any in-depth court inquiry, he was forced to forgo the assistance of counsel based on the court's refusal to consider the conflict of interest between himself and his attorney, he was denied the ability to interview witnesses against him and prepare his defense, and the prosecution used improper efforts to sway the jury including commenting on his failure to testify in his defense. These errors, combined with the inability to "ameliorate" the prejudicial effect of the jury learning Swenson had been previously convicted, requires reversal.

F. CONCLUSION.

For the foregoing reasons, Mr. Swenson respectfully requests this Court reverse and dismiss his conviction for first degree murder, and order a new trial.

DATED this ___ day of July 2009.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 61852-1-I
v.)	
)	
SHAWN SWENSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X _____


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