

No 66858-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PHONSAVANH PHONGMANIVAN,

Appellant.

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

The Honorable Michael C. Hayden  
The Honorable James E. Rogers

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

During a confrontation on a crowded Belltown street, Margilyn Umali was shot in the head. The bullet entered her cheek and lodged itself the center of her brain, causing severe permanent brain damage. For many months she had near total amnesia, lacking any memory of the incident which caused her to be hospitalized. She also lost both expressive and receptive communication abilities; i.e., she lost the ability to speak and understand language.

Following months of intensive therapy, Ms. Umali regained a limited ability to communicate. However, she lacked comprehension of abstract concepts. Testing suggested her cognitive functioning was impaired, and her speech and language pathologist acknowledged it was not clear whether her mental functioning had improved.

The police believed that appellant Sam Phongmanivan, Ms. Umali's boyfriend, had accidentally shot her, and he was charged in connection with the event. Ms. Umali's family members initially were resistant to this idea. Approximately nine months after the shooting, they accepted law enforcement's version of what had happened. Some time after that Ms. Umali began to profess a "memory" of Phongmanivan shooting her, and the State sought to call her as a trial witness.

Phongmanivan requested a forensic competency evaluation of Ms. Umali. The Washington Supreme Court recognizes that once a “red flag” is raised regarding a witness’s competency, due process requires further inquiry, and other jurisdictions authorize a psychological or psychiatric evaluation of the complainant where there has been a “compelling showing” of the need for such an evaluation.

The trial judge said Ms. Umali was the most profoundly disabled witness he had ever seen. He nevertheless denied Phongmanivan’s request out of concern for Ms. Umali’s privacy, and based upon the mistaken belief that no expert could tell him whether her memories were true or false. In so ruling, he failed to consider her incapacity to understand her oath as a witness and Phongmanivan’s inability to cross-examine her, and effectively prevented him from presenting the evidence necessary under the unique circumstances of her neurological condition to assess her competency as a witness. Because the admission of Ms. Umali’s incompetent testimony was prejudicial, Mr. Phongmanivan’s convictions must be reversed.

In addition, Phongmanivan requests reversal based upon the prosecutor’s violation of the witness sequestration rule. After opening statements, the prosecutor contacted two key witnesses, told them about the nature and severity of Ms. Umali’s injuries, and told them the defense

theory of the case – which was that one of the witnesses was the actual shooter, not Phongmanivan. The two witnesses, who had evaded law enforcement for two years, came to court and provided alibis for one another. The prosecutor’s deliberate and unethical contravention of the court’s witness sequestration rule deprived Phongmanivan of a fair trial, warranting reversal and dismissal.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment’s guarantee of due process of law and a fair trial, the trial court erred in denying Phongmanivan’s motion for a forensic competency evaluation of the complainant.

2. The complainant lacked testimonial competency and the admission of her testimony violated the due process cause of the Fourteenth Amendment.

3. In violation of Phongmanivan’s right to due process of law protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution, the trial court erred in denying Phongmanivan’s motion to dismiss for prosecutorial misconduct based on the prosecutor’s violation of the witness sequestration order.

4. The prosecutor's violation of the witness sequestration order violated Phongmanivan's right to a defense protected by the Sixth Amendment and article I, section 22.

5. The prosecutor's violation of the witness sequestration order violated the provisions of CrR 8.3(b).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the right under the due process clauses of the Fourteenth Amendment and article I, section 3 to be tried only upon competent evidence. The admission of testimony from an incompetent person violates due process. Washington has not expressly addressed the question whether a court may order a competency evaluation of a potential witness. However our Supreme Court has held that once a "red flag" of material impact upon competency of a witness is raised, the trial court must inquire into the relevant facts and circumstances, and in other contexts Washington has held that a psychiatric evaluation of a witness may be ordered upon a showing of compelling need. Should this Court adopt a similar rule in this instance? (Assignment of Error 1)

2. One of the victims in this case, Margilyn Umali, was shot in the head and suffered severe neurological impairment. The trial court described her as the most "profoundly disabled" adult he had ever seen asked to give testimony. Where an expert voiced concerns regarding her

testimonial competency, during a competency hearing Ms. Umali struggled to answer basic questions, and there were reasons to believe her testimony had been confabulated, did Phongmanivan establish a compelling need for a competency evaluation? Did the trial court err in refusing to order the evaluation? (Assignments of Error 1 and 2)

3. The trial judge ruled that Ms. Umali was competent to testify without the benefit of neuropsychological testing to determine the level of her impairment, and based solely upon his belief that no expert could tell him whether her memories were true or false. He did not address the question whether she understood her oath as a witness. Where the court prevented the defense from presenting evidence of incompetency through an evaluation and the court's assessment of competency was incomplete, was the court's finding improper and the admission of Ms. Umali's testimony a violation of due process? (Assignments of Error 1 and 2)

4. Ordinarily the appellate court reviews the entire record to determine whether a trial court's ruling that a witness was competent to testify was an abuse of discretion. If the witness was incompetent, then the conviction must be reversed unless the court can find the error was harmless beyond a reasonable doubt. Under the unique circumstances of this case, involving a witness whose ability to speak and understand language was severely impaired by a traumatic brain injury and in the

absence of neurological testing that would have determined her cognitive functioning, is the court unable to engage in such review here?

(Assignment of Error 2)

5. Margilyn Umali was permitted to testify without any clear showing that she understood the nature of her oath and possessed a memory of the incident. Because of her severe cognitive impairment, Phongmanivan was unable to conduct a meaningful cross-examination. If this Court finds that it is able to review the record and make an independent determination of her competency, should the Court find that Ms. Umali lacked testimonial competency? Where the evidence of guilt was otherwise equivocal, should this Court find the improper admission of Ms. Umali's testimony requires a new trial? (Assignments of Error 1 and 2)

6. Where the conduct of government actors is so shocking that it offends basic notions of fundamental fairness, this Court may reverse and dismiss a conviction. No witness placed Phongmanivan at the confrontation that led to the shooting. Phongmanivan's trial defense was that another man, Gabriel McBride, who matched eyewitness descriptions of the shooter, was the real shooter, and he told the jurors this defense in his opening statements. Following opening statements, the prosecutor located McBride and his girlfriend and told them of the nature and severity

of Ms. Umali's injuries and that Phongmanivan was trying to blame him for the crime. McBride and his girlfriend then testified, providing alibis for one another. Was the prosecutor's violation of the witness sequestration order which gutted Phongmanivan's defense egregious misconduct that warranted dismissal of the prosecution? (Assignments of Error 3-6)

7. In the alternative, should this Court conclude that the trial court erred in not (1) excluding the witnesses' testimony or (2) instructing the jury regarding the prosecutor's misconduct? (Assignments of Error 3-6)

#### D. STATEMENT OF THE CASE

Halloween in 2008 fell on a Friday. That night, the streets of Belltown, in Seattle, were thronged with people. 12/6/10 RP 166.<sup>1</sup> Phonsavanh Phongmanivan (referred to in this brief as "Sam") went out with his long-term girlfriend, Margilyn Umali,<sup>2</sup> his good friend Souksavanh Mekavong ("Noy"), and Noy's girlfriend Anitsa Siphandone ("Anitsa"). 1/4/11 RP 51-52. Sam and Noy did not wear costumes, but Margilyn dressed as a schoolteacher and Anitsa dressed as a French maid. 12/13/10 RP 118.

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<sup>1</sup> The verbatim report of proceedings generally is cited in this brief by date followed by page number. Other citation formats are as indicated infra.

<sup>2</sup> Several members of the Umali family testified at the trial. To avoid confusion, they are referred to herein by their first names. No disrespect is intended.

Noy drove, and they parked in a lot near E.E. Robbins, a jewelry store on First Avenue in Belltown. 12/10/10 RP 89-90. When they got out of the car, Sam said he wanted a hotdog from a stand that was near the bottom of the lot. 12/10/10 RP 92. Anitsa and Margilyn were both wearing heels and it took them longer to walk to the hotdog stand, and they became separated from their male companions. 12/10/10 RP 128. As they were standing in line, Anitsa heard someone say flirtatiously, “hey girl.” 12/10/10 RP 110, 114.

Noy had stopped to pay for their parking spot but did not get an opportunity to do so: two young men, Roger Wright and Tim Bower, had approached Margilyn and Anitsa. 1/3/10 RP 58-59. Both of them had been drinking heavily all evening, and when Wright saw the “two attractive Asian women” he thought that he would try to pick one of them up. 1/3/10 RP 130.

When Noy realized what was happening he attempted to intervene, stating, “Hey, that’s somebody’s girlfriend, back off.” 1/4/11 RP 59. Wright and Bower were very drunk; Bower later ranked his level of intoxication as “10 out of 10.” 12/7/10 RP 157. After Noy tried to stop Wright and Bower from harassing Margilyn and Anitsa, he again went to pay for parking, but Wright and Bower followed him. 1/4/11 RP 65. Noy had the sense that they wanted to embarrass him by beating him up in

front of the girls. Id. Wright claimed that things were “pretty mellow at first” but acknowledged that “pretty soon” Bower and Noy were “exchanging words.” 1/4/11 RP 130, 132.

Noy was afraid to let the men get behind him and turned to defend himself. 1/4/11 RP 66. One of the two young men reached out and patted Noy’s stomach. 11/4/11 RP 67. It then appeared to Noy that Bower and Wright summoned more of their friends, who surrounded him. 11/4/11 RP 68. Noy estimated that there were six men around him. Id.

The men tried to rush Noy, and he turned to run. Id. The situation rapidly escalated, and between five and seven shots were fired by an unknown shooter. Id. It seemed to Noy that at that point “everyone scattered.” Id. Other people described a chaotic scene, with panicked people running around. 12/8/10 RP 34, 106.

Noy then heard Anitsa saying, “Marge is hit, Marge is hit.” 1/4/11 RP 68. Anitsa and Margilyn had taken cover behind a car; when the shooting ended, Anitsa saw that Margilyn was covered in blood. 12/13/10 RP 99. She was not moving. 12/13/10 RP 99-100.

When Margilyn collapsed Sam and Noy came running. 12/13/10 RP 129. Their only thought was to get to a hospital as quickly as possible. 12/13/10 RP 100; 1/4/11 RP 74. Sam and Noy carried Margilyn to the car. 1/4/11 RP 70-71. Noy drove and Sam sat in the back seat holding

Margilyn in his arms. 12/13/10 RP 130. Anitsa heard him saying, “I love you I love you don’t die.” Id.

They drove to Swedish Hospital where they notified emergency room staff of Margilyn’s condition. 1/4/11 RP 76. Sam got out of the car and Noy and Anitsa drove off because emergency room security personnel told Noy to move the car. Id.

A bullet had traveled through Margilyn’s cheek, cracked her mandible, transected an artery, and lodged itself in the corpus callosum, in the middle of her brain. 7/22/10 RP 6; 12/8/10 46. Margilyn survived but sustained significant permanent injuries, including brain damage and partial paralysis.<sup>3</sup> Wright was also shot, in the right thigh and in the buttock. 12/8/10.

Most people at the scene did not recall seeing the shooter because when the shooting began they took cover. The descriptions provided by the few eyewitnesses who claimed to have observed the shooter varied, although all who thought they saw him believed he was Asian. Three witnesses, Joe Rutter , Drew Kurata, and Prima Giangrosso, told police that the shooter was wearing a Seahawks jersey. 12/9/10 RP 50-51; CP

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<sup>3</sup> Margilyn Umali’s injuries are discussed in greater detail in Argument section 1a.

50-59.<sup>4</sup> Gabriel McBride, a friend of Wright and Bower who is half-Asian, was dressed as Matt Hasselbeck, a Seahawks quarterback. 12/7/10 RP 200, 237; 12/10/10 RP 49; 12/13/10 RP 210, 256. McBride also had a concealed weapons permit and owned at least two guns. 12/10/10 RP 49, 55; 12/13/10 RP 233, 235. McBride did not make himself available for interviews immediately following the incident, nor did he contact the police regarding what he witnessed, and, although his good friend had been shot, he apparently made little effort to follow up on Wright's condition while he was in the hospital. 12/13/10 RP 228-30, 245, 256.

Because an eyewitness identified the license plate on Noy's car, police included Noy and an old photograph of Sam Phongmanivan in photo montages. 12/9/10 RP 76, 78. Roger Wright picked the photograph of Phongmanivan from one of the montages as the shooter, and the police investigation rapidly centered on Phongmanivan. The police thus made no effort to show montages to Kurata or Rutter and did not otherwise pursue the lead regarding McBride's Seahawks jersey. 12/9/10 RP 119-23.

Phongmanivan was charged by information with two counts of assault in the first degree, both with firearm enhancements. CP 1-2. A jury convicted him of both counts as charged. CP 124, 126; Supp. CP \_\_\_ (Sub Nos. 187, 189). This appeal follows. CP 146-54.

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<sup>4</sup> A certified copy of a transcript of Rutter's 9-1-1 call is attached as Attachment D to Phongmanivan's trial brief. CP 50-59. Rutter's 9-1-1 call was played at trial.

E. ARGUMENT

1. **The trial court's ruling barring Phongmanivan from obtaining a forensic competency evaluation of the complainant violated his due process right to a fair trial.**

- a. As a result of the shooting, Margilyn Umali suffered significant brain trauma, including memory loss and profound speech and language comprehension impairment.

Following the shooting, Margilyn Umali was in a coma for two days. 12/7/10 RP 21. Due to the swelling in her face and brain, she required a craniotomy, which necessitated that she wear a helmet until the piece of her cranium that had been removed could safely be replaced.

7/22/10 RP 6; 12/6/10 RP 55-56; 12/7/10 RP 39, 43; 12/8/10 RP 44. She underwent multiple complex surgeries, and then was hospitalized for a further three months after her injury. 7/22/10 RP 6; 12/6/10 RP 65-66,68; 12/7/10 RP 45. The injury caused severe neurological impairment. 7/22/10 RP 6; CP 87.

Margilyn suffered mixed nonfluent aphasia, a serious cognitive communication disorder. 12/8/10 RP 61; 9/14/10 & 12/14/10 RP 45-47.<sup>5</sup> In layman's terms, this means that Margilyn had difficulty both expressing and understanding language. *Id.* She also had dysphasia, described as a

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<sup>5</sup> Two different court reporters transcribed the trial proceedings on December 14, 2010. The morning session was transcribed by Kimberly Girgus, who also transcribed a hearing on September 7, 2010. That volume is referenced herein as "9/7/10 & 12/14/10 RP" followed by page number. The other volume, transcribed by Joanne Liatiota, is referenced as "12/14/10 RP" followed by page number.

difficulty with comprehension and pronunciation of words. 12/8/10 RP 62. Indeed, initially, Margilyn could not speak at all; an attending physician described her as “essentially mute.” 12/7/10 RP 45, 49; 12/9/10 RP 166. Over the course of many months of intensive work with rehabilitative and speech therapists, she eventually began to use single words and short phrases. 12/7/10 RP 46.

Margilyn also suffered memory deficits. A traumatic brain injury will commonly cause retrograde amnesia; the likelihood of this depends upon the severity of the injury. 7/22/10 RP 8. For the first several months following the incident Margilyn did not remember what had happened to her; she did not recall the incident that caused her to be hospitalized, and eventually did not even recall that she had been injured. 7/22/10 RP 8; 12/6/10 RP 120; 12/10/10 RP 75.

As Margilyn learned to speak, she repeatedly asked those around her what had happened to her. 12/10/10 RP 95, 103. Eventually, as she learned short phrases, she would repeat, “I have been shot,” sometimes as many as 10 times per day. 12/14/10 RP 133-34. On some occasions, she would use short learned phrases such as “I want to go to the bathroom” or “I want a drink” in contexts where it was evident she meant something else. 12/14/10 RP 86.

Cognitive testing indicated that Margilyn's accuracy in communication was inconsistent. In cognitive word-image matching tests conducted January 6, 2009, Margilyn had a 66% accuracy rate when asked to identify images of family members in response to spoken words. 12/10/10 RP 83; CP 92. During a second trial, this percentage decreased to 33%. 12/10/10 RP 83. One of her physicians, Dr. Jennifer Zumsteg, documented that Margilyn was not reliable in her responses to non-egocentric verbal yes/no questions. CP 92. Zumsteg wrote that her cognitive deficits had not been tested due to the severity of her communication impairments, but it was believed that her attention, orientation, and memory all had been impaired by the injury. Id.

When, shortly before trial, it was reported that Margilyn had a memory of what had happened to her, there was a substantial concern regarding confabulation – that her “memories” were created by external suggestions. 7/22/10 RP 17.<sup>6</sup> Because of Margilyn's condition, a hearing was held to determine her testimonial competency.

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<sup>6</sup> On January 2, 2010, Margilyn was interviewed by case Detective Shandy Cobane. (A transcript of the interview was attached to Phongmanivan's trial brief as Appendix E. CP 59-69.) She had difficulty answering open-ended questions and so the interview proceeded entirely through leading, directed questions that suggested an answer. Ms. Umali's responses to Cobane's questions were almost exclusively one-word answers.

At the hearing, with considerable direction, Margilyn was able to answer rudimentary factual questions dealing with very concrete issues. So, for example, when Margilyn was asked who her boyfriend was in October 2008, she responded, “Me and Sam.” Pretrial RP (2) 229.<sup>7</sup> When asked what Noy and Anitsa’s relationship to one another was she responded, “boyfriend.” Pretrial RP (2) 230.

Once the conversation proceeded to a more abstract discussion of general competency issues necessary to determine her ability to understand her oath as a witness, however, Margilyn had considerable difficulties. She did not answer the prosecutor’s question regarding the difference between right and wrong. Pretrial RP (2) 232-33. Only after the prosecutor asked very directed, leading questions did Margilyn give “correct” answers. Pretrial RP (2) 233. She could not answer whether “somebody [who] is lying” is “doing what’s right or . . . doing what’s wrong.” *Id.* She also could not answer whether “being good” was “right” or “wrong.” Pretrial RP (2) 234. Even when the prosecutor tried to apply the abstract inquiry regarding right and wrong to the specific by asking

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<sup>7</sup> Several transcripts contain pretrial hearings from multiple dates. The volume containing hearings from August 5, 2009, August 25, 2009, March 4, 2010, and March 9, 2010 is referenced as “Pretrial RP (1)” followed by page number. The volume containing hearings from March 10, 2010, March 17, 2010, April 16, 2010, April 29, 2010 and June 11, 2010 is referenced as “Pretrial RP (2)” followed by page number.

Margilyn whether she wanted her daughter Alana to lie or not, Margilyn appeared confused by the question. Id.

The prosecutor eventually moved back to the events of the evening, which she asked Margilyn to draw. Margilyn at that point drew a picture that apparently depicted Sam Phongmanivan with a gun. Pretrial RP (2) 235. However, when the prosecutor attempted to return to the inquiry regarding “good” and “bad,” Margilyn again could not provide a clear response to the question. Id.

Defense counsel was permitted only a truncated cross-examination, during which counsel was unable to elicit any substantive response from Margilyn, before Judge Michael C. Hayden ruled, “I’m persuaded that she does have memories of that day that are legally acceptable to put into evidence in some fashion.” Pretrial RP (2) 256. Judge Hayden then barred defense counsel from questioning Margilyn further, stating, “This is not a deposition . . . It’s not a pretrial discovery process.” Id. Judge Hayden acknowledged, “[C]ertainly this is the most profoundly disabled adult I’ve ever seen on the stand where testimony is being offered from that witness.” Pretrial RP (2) 246.

At a subsequent hearing Phongmanivan requested the court compel a forensic examination of Margilyn to determine her testimonial competency. 5/20/10 RP 2. He noted that in other jurisdictions, such an

examination may be required based upon a showing of compelling reasons. 7/2/10 RP 3-5. He contended that his right to due process outweighed her right to privacy. 7/2/10 RP 5. Judge Hayden explained that the issue was “not so much” Margilyn’s privacy but the concern that a forensic neuropsychological evaluation might be traumatic for her. Id.

Phongmanivan noted that Margilyn’s cognitive difficulties were so significant that for many months she could barely speak. 7/2/10 RP 10-11. He noted that there was a legitimate question whether she was able to comprehend her oath as a witness and whether he would be able to effectively exercise his right to cross-examine her. 7/2/10 RP 14, 21. He indicated that he would be willing to agree that the evaluation could be performed by an expert appointed by the court. 7/2/10 RP 8.

Judge Hayden reiterated that he had never presided over a case involving such a profoundly disabled witness. 7/2/10 RP 23. Nevertheless he opined that he did not believe any expert would be able to testify that Margilyn’s memory was “wrong.” 7/2/10 RP 20.

Dr. Kenneth Muscatel, a forensic psychologist, submitted a letter to the court in which he outlined his concerns regarding Margilyn’s incompetency. Supp. CP \_\_ (Sub No. 144, Appendix A). He also testified that despite reviewing 11 CDs of medical records and her testimony at the competency hearing, he was unable to form an opinion regarding

Margilyn's competency. 7/22/10 RP 3-5. He explained that her answers were largely "yes" or "no" and he could not tell whether she really understood the questions that were posed to her, or whether the nature of her injuries precluded her from being a competent witness. 7/22/10 RP 5, 7. He expressed the concern that due to her traumatic brain injury, she could not understand or give non-directed responses. 7/22/10 RP 12. For the same reason, he noted she might not be able to respond effectively to cross-examination. 7/22/10 RP 17. He indicated that he had tested for testimonial competency in the past. 7/22/10 RP 24.

Dr. Muscatel did not believe that neuropsychological testing would be traumatic to Margilyn. 7/22/10 RP 34-35. He stated that he would make every effort to ensure the environment would be supportive and positive, and would only spend as much time with her as she could tolerate. 7/22/10 RP 35. He testified he would spend at most two to three hours with her, and if at any point the testing became upsetting, he would terminate the process. 7/22/10 RP 36. He recommended an evaluation, and said that he "[could see] no alternative but to examine Ms. Umali" to determine her competency. 7/22/10 RP 36; Supp. CP \_\_ (Sub No. 144, Appendix A).

Judge Hayden stated that Dr. Muscatel said "exactly what I expected him to say"; namely that he would not be able to tell if her

memory was real or false. 7/22/10 RP 38-39. He further believed that in ruling upon the motion, it was appropriate to distinguish between witnesses who suffer from a mental disability at the time of the crime and witnesses whose disability was caused by the crime, like Margilyn Umali. 7/22/10 RP 55. He felt that in the latter instance he should not traumatize her by requiring her to go through forensic testing. *Id.* He denied the motion for a forensic competency evaluation, ruling that it would be difficult and psychologically taxing for Margilyn and reiterated that the testing would not establish whether her memory was false. 7/22/10 RP 57-58; 12/1/10 RP 14; Supp. CP \_\_ (Sub No. 172) at 2. When, during the trial, Phongmanivan renewed the motion for a competency evaluation, the trial judge, James E. Rogers, denied it on the same basis, but added that he was “persuaded . . . that Ms. Umali appears to understand the difference between right and wrong in regard to giving an oath.”<sup>8</sup> 12/13/10 RP 204.

During her trial testimony, Margilyn displayed confusion and inconsistency. After she had testified for fifteen minutes, the court admonished the prosecutor not to ask leading questions or questions that called for a yes or no answer, but to ask open-ended questions. 1/3/11 RP 10-11, 16. Margilyn stated haltingly, using a combination of oral

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<sup>8</sup> Judge Rogers reviewed the same materials that are before this Court in making this ruling.

testimony, drawings, and written words, that on Halloween night 2008 she went out with Sam and friends. 12/13/10 RP 266-68; 1/5/11 RP 79-81. She then drew a picture of Sam and a gun. 1/5/11 RP 83. Even though she had not yet testified what Sam did with the gun, the prosecutor asked her, “[W]here is Noy when the gun gets fired?” 1/5/11 RP 84. Margilyn responded, “Um, um . . . I got shot too.” Id.

In response to questions about where she was or where Sam was when the shooting occurred she said she did not know. 1/5/11 RP 87. She said there was a fight. Soon, however, she simply repeated the words, “a gun.” 1/5/11 RP 89. Only in response to very leading questions was the prosecutor able to establish any kind of narrative, however it was not clear that Margilyn understood what she was being asked. 1/5/11 RP 91-92. Again, in response to leading questions, using broken words, Margilyn testified that Sam brought the gun with him, shot her in the face, and later said, “I’m sorry.” 1/5/11 RP 93-94.

On cross-examination, Margilyn displayed profound memory deficits. She denied asking her family members or physical or speech therapists what happened to her. 1/5/11 RP 115-17. She denied any memory of stating she did not know what happened to her during a pretrial defense interview. 1/5/11 RP 121. Subsequently, in response to several

questions from defense counsel, Margilyn simply repeated, “the gun.”

1/5/11 RP 125-27.

- b. Due process protects an accused person against conviction based upon incompetent evidence.

Principles of due process protect an accused person from a conviction based upon incompetent evidence. Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932); State v. Brousseau, 172 Wn.2d 331, 335, 259 P.3d 209 (2011); U.S. Const. amend. XIV; Const. art. I, § 3. All witnesses are presumed competent; however, according to statute, the following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050.

An accused person challenging a witness’s competency bears the burden of proving incompetency by a preponderance of the evidence. Brousseau, 172 Wn.2d at 341-42; State v. S.J.W., 170 Wn.2d 92, 102, 239 P.2d 578 (2010). The appellate court ordinarily reviews a trial court’s determination that a witness is competent to testify based upon the entire

record.<sup>9</sup> Brousseau, 172 Wn.2d at 340-41. The admission of an incompetent witness's testimony violates the accused's due process rights and requires reversal of the conviction unless the error is proven beyond a reasonable doubt to be harmless. Id. at 344 (citing Sinclair v. Wainwright, 814 F.2d 1516, 1523 (11th Cir. 1987)).

- c. The trial court had the authority to order Margilyn Umali to undergo a forensic evaluation of her competency in order to protect Phongmanivan's due process rights.

Only one Washington decision, State v. Mines, 25 Wn. App. 932, 935, 671 P.2d 273 (1983), has addressed the precise question whether an accused person may compel a forensic evaluation of a witness to determine her competency.<sup>10</sup> The issue arose in the context of whether the trial court erred in denying Mines' request for a publicly funded expert, and on the facts of the case the Court concluded the trial court did

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<sup>9</sup> As is argued infra, this type of review is impossible in this case.

<sup>10</sup> While not expressly addressing the issue, both Brousseau and S.J.W. suggest that under appropriate circumstances such an evaluation may be proper. Brousseau, 172 Wn.2d at 342 (noting, "once a "'red flag' of material impact upon competency of a witness" is raised, "an inquiry must be made into the facts and circumstances relevant thereto" (emphasis in original)); S.J.W., 170 Wn.2d at 102 (holding that party challenging a child witness's competency has the burden of producing "evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly"). Washington also permits a psychiatric examination of a witness in a sex crime case where the defense establishes a compelling reason to order the exam. State v. Demos, 94 Wn.2d 733, 738, 619 P.2d 968 (1980); accord State v. Tobias, 53 Wn. App. 635, 637, 769 P.2d 868 (1989).

not abuse its discretion in refusing to appoint an expert.<sup>11</sup> However there was no question that under appropriate circumstances such an evaluation would be proper.<sup>12</sup> Mines, 35 Wn. App. at 936.

In State v. Demos, 94 Wn.2d 733, 619 P.2d 968 (1980), our Supreme Court held that a psychiatric evaluation of a victim in a sex crime may be ordered upon a showing of compelling need. 94 Wn.2d at 738. Other jurisdictions supply convincing rationales for permitting trial courts to order a witness to submit to a psychological evaluation where, as here, there is substantial reason to doubt a witness's competency.

In In re Michael H., 360 S.C. 540, 602 S.E.2d 529 (2004), the South Carolina Supreme Court held that a trial court abused its discretion in refusing to authorize an evaluation of a child complainant in a sex case. Id. at 546, 550-51. The complainant had heard voices in his head, which prompted concerns regarding his competency to testify to the charged sexual assault. Id. at 544-45. Nevertheless the juvenile court denied Michael H.'s motion to require the complainant to submit to a psychological evaluation and also denied his motion to strike the complainant's testimony as incompetent. Id.

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<sup>11</sup> The case has since been cited primarily for the standard it articulated regarding when an accused person will be entitled to expert services at public expense.

<sup>12</sup> The Court in Mines intimated that the accused would need to show that the evaluation was "necessary for an adequate defense" or that the witness's mental condition caused her to be of unsound mind. Mines, 35 Wn. App. at 936 (citation omitted).

The Court first reviewed the division of authority in other jurisdictions on this issue. Id. at 547-48. The Court was unpersuaded by the decisions concluding that a victim's right to privacy outweighs the defendant's interest in a fair trial. For example, on this basis the North Carolina Supreme Court had adopted an absolute bar on such evaluations, and held that the defendant's right to a fair trial is sufficiently protected by the trial judge allowing the defendant to present evidence rebutting the complainant's mentally deficient status. State v. Horn, 337 N.C. 449, 446 S.E.2d 52, 54 (1994). The South Carolina Supreme Court responded that such a rule does not fully protect accused persons' right to confrontation:

This assertion provides scant support for denying trial judges' discretion to consider ordering psychological evaluations of complainants. In particular, cross-examination of a complainant who is incompetent to testify, a condition that could be established through a psychological evaluation, would be wholly ineffective in protecting a defendant's right to a fair trial. A complainant who is incompetent to testify may not fully understand or convey the implications of his or her psychological condition on cross examination.

Id. at 550-51. The Court accordingly held, “a victim’s rights will not be compromised where compelling need is the standard for ordering psychological evaluations. . .”<sup>13</sup> Id. at 551 (emphasis in original).

In Hamill v. Powers, 164 P.3d 1083 (Ok. App. 2007), the defendant sought a writ of mandamus to order the State to permit a psychological evaluation of the complainant in a case involving a charge of rape where the victim was incapable of consent due to her mental retardation. 164 P.3d at 1084. The Court issued the writ, finding it warranted in light of “the overarching constitutional right to a fair trial.” Id. at 1086. Indeed, the result was compelled based upon considerations of fundamental fairness:

[W]hen the criminally accused intends to offer evidence of his own mental condition to support an insanity defense at trial, this Court has never questioned the district court’s inherent authority to “level the playing field” by permitting the State to evaluate him with its own mental-health experts. Surely, the criminally accused, facing a serious loss of liberty, is entitled to the same quality of discovery granted to every other type of litigant in our justice system.

Id. at 1088.

The Court accordingly broadly held that “the trial court has inherent authority to order a psychological or psychiatric evaluation of the complainant in a criminal prosecution, when the defendant has

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<sup>13</sup> The South Carolina Supreme Court considered this issue in the context of competency evaluations of child complainants in sex cases and limited its holding to these circumstances. 602 S.E.2d at 552.

demonstrated sufficient compelling circumstances.” Id. This inherent authority derived, in part, from the court’s statutory authority to supervise and modify the discovery process.<sup>14</sup>

In Lickey v. State, 108 Nev. 191, 827 P.2d 824 (1992), considering the question in the context of the defendant’s right to rebut the State’s evidence, the Nevada Supreme Court held that the defendant should have been permitted to have a child complainant evaluated by a defense psychologist. 827 P.2d at 826. The Court held that “because Lickey was denied the assistance of an expert psychiatric witness, when the State was provided such a resource . . . Lickey did not receive a fair trial.” Id. at 828. Other jurisdictions have reached similar results. See e.g. State v. Doremus, 2 Neb. App. 784, 514 N.W.2d 649 (1994); State v. Maday, 179 Wis. 346, 507 N.W.2d 365 (1993); People v. Wheeler, 151 Ill.2d 298, 602 N.E.2d 826 (1992).

The California Supreme Court has held that a trial court is vested with the discretion to order a competency evaluation where the competency of a witness is in doubt, although it need not order such an evaluation be conducted sua sponte. People v. Anderson, 25 Cal. 4<sup>th</sup> 543,

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<sup>14</sup> 22 Okl. St. Ann. § 2002, governing discovery in criminal cases, is substantially similar to CrR 4.7.

22 P.3d 347, 370 (2001).<sup>15</sup> Connecticut and Pennsylvania courts have likewise held that a trial court has discretion to order an evaluation of a witness where the circumstances warrant such an examination. Com. v. Counterman, 553 Pa. 370, 719 A.2d 284, 295 (1998) (indicating that obligation to order a competency evaluation may arise where trial court has some doubt as to witness's competency from having observed the witness, but holding no evaluation required under circumstances of case); State v. Morant, 242 Conn. 666, 701 A.2d 1, 8 (1997) (holding that trial court did not abuse its discretion in refusing to order the evaluation where trial court had a "face-to-face opportunity" to determine that witness "could testify in a coherent manner with an appreciation of the oath and [his] testimony was substantially corroborated").

In federal court, the right to have a potential witness's competency examined by a psychologist or psychiatrist is protected by statute. 18 U.S.C. § 3509(c)(9).<sup>16</sup> The statute requires a predicate showing of "compelling need." Id.; see also United States v. Street, 531 F.3d 703,

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<sup>15</sup> In Anderson, the defendant contended that the trial court should have required such an examination of a key witness because of her mental illness for the first time on appeal. 22 P.3d at 368. After finding no duty to order such an evaluation sua sponte where none was requested by the defense, the Court concluded the record disclosed that the witness was "a coherent communicator" and that her "understanding of the specific duty to give truthful testimony was also not in serious dispute or doubt." Id. at 370.

<sup>16</sup> The statute pertains to child witnesses, however federal decisions suggest that district courts have the discretion to order competency evaluations of witnesses upon a showing of compelling need.

707 (8th Cir. 2008) (recognizing district court’s discretion to order a witness to undergo a psychological evaluation upon a “strong showing of need”). This rule, and the similar rule adopted by the courts that authorize a competency evaluation of a witness under appropriate circumstances, is consistent with Washington jurisprudence.

As the Washington Supreme Court noted in Brousseau, “once a “red flag’ of material impact upon competency of a witness” is raised, “an inquiry must be made into the facts and circumstances relevant thereto.” 172 Wn.2d at 344 (emphasis in original). The Court also recognized that this inquiry is required to protect the defendant’s right to due process. Id. (citing Sinclair v. Wainwright, 814 F.2d at 1523); see also Mines, 35 Wn. App. at 936 (recognizing that right to a defense or evidence that the witness is of unsound mind may justify a court-ordered competency evaluation). In short, the trial court had the discretion to order a forensic competency evaluation of Margilyn Umali.

d. The trial court’s refusal to require a competency evaluation of Margilyn Umali violated Phongmanivan’s right to a fair trial.

Based upon the record, the trial court’s failure to require Margilyn Umali to submit to a competency evaluation violated Phongmanivan’s due process right to a fair trial. First, the trial court was presented with ample evidence to conclude that the threshold showing of compelling need

necessary to order an evaluation had been made. Second, the court could have tailored its order to satisfy any concerns it had about the potential burden of such an evaluation upon Margilyn. Third, given the unique circumstances of Margilyn's injury and neurological impairment, the court could not assess competency without a forensic evaluation. Finally, even setting aside the court's error, the record as a whole does not support a finding on appeal that Margilyn was a competent witness. Because the admission of her testimony prejudiced Phongmanivan, he is entitled to reversal of his convictions.

- i. *Given Margilyn Umali's "profound disability," there were compelling reasons to doubt her memory and ability to understand her oath as a witness.*

The trial court called Margilyn Umali "the most profoundly disabled adult I've ever seen on the stand where testimony is being offered from that witness." Pretrial RP (2) 246. This was an apt description; Margilyn Umali exhibited significant difficulties in comprehending and responding to questions during the competency hearing. She could not answer the question whether "right is good or bad." Pretrial RP (2) 232. After prompting she assented that telling the truth was "right" but she did not appear to understand the prosecutor's questions about whether someone who is lying is doing something wrong. Pretrial RP (2) 233. In fact, when the prosecutor began to ask, "When somebody's lying, are they

doing something right --” Margilyn interrupted her and said, “Yeah.” Id. At this point the prosecutor changed tack and attempted to ask whether “being good” was “being right or being wrong.” Pretrial RP (2) 234. Margilyn could not answer this question. Id.

In addition to Margilyn Umali’s testimony at the competency hearing, Judge Hayden had her medical records, which were submitted in support of the defense request for a competency evaluation. Supp. CP \_\_\_ (Sub No. 144, Appendix D). He also had the benefit of Dr. Muscatel’s observations. Dr. Mustcatel voiced substantial concerns regarding Margilyn Umali’s competency and saw “no alternative” to an examination. 7/22/10 RP 3-36; Supp. CP \_\_\_ (Sub No. 144, Appendix A).

Of importance here, Dr. Muscatel reviewed the transcript and the audiotape of the competency hearing as well as a transcript of Cobane’s interview and could not determine based upon Margilyn’s responses that she was competent. 7/22/10 RP 3-5. He felt uncomfortable because nearly all of the questions asked of her were “very leading, very specific” yes-no questions. 7/22/10 RP 3-4. He could not tell based upon her responses whether she understood what was being asked of her. 7/22/10 RP 7.

Dr. Muscatel characterized her traumatic brain injury as “terrible” and her neurological impairment as “very significant,” noting that she had

suffered effects upon expressive and receptive language. 7/22/10 RP 5-6. He noted that in the left temporal lobe there is an area relevant to speech perception and decoding and another area called “Broca’s area” which governs speech production. “[T]he entire area was injured,” he stated. 7/22/10 RP 6-7.

The State did not present any evidence to contradict Dr. Muscatel’s testimony and conclusions. Nevertheless, the court denied Phongmanivan’s request for a competency evaluation.

As noted, Judge Hayden admitted that Margilyn Umali was the “most profoundly disabled adult” he had ever seen on the witness stand. If Margilyn’s “profound disability” alone did not create a compelling basis to question her competency, it is difficult to imagine what case would satisfy the standard.

It appears from the record that one of Judge Hayden’s reasons for denying the defense request was his belief that an expert hired by the defense would have a “subconscious motivation” to offer testimony favorable to the defense. 7/22/10 RP 25. This is not a legitimate reason to refuse to permit the expert to acquire the information necessary to offer an opinion. Further, in the event that Dr. Muscatel offered an opinion favorable to the defense, the State would be free to offer its own evidence to counter his opinion or to explore potential bias on cross-examination.

Either way, however, the court would have the benefit of neuropsychological testing in making its determination regarding testimonial competency. In short, on this record, given the medical evidence, given Dr. Muscatel's testimony, and given the court's correct observation regarding Margilyn's profound disability, Phongmanivan met his burden of establishing a compelling reason to order a forensic competency evaluation.

ii. *An order for a forensic competency evaluation could have been tailored to address concerns regarding any possible traumatic effect the evaluation could have had upon Margilyn Umali.*

Judge Hayden's primary justification for denying Phongmanivan's motion for a forensic psychological evaluation of Margilyn Umali was his view the evaluation could be traumatic or stressful to her. 7/22/10 RP 57-58. As other courts have recognized, the trial court easily could have structured the order authorizing an evaluation to ensure that it was not unduly intrusive.

The trial court's authority includes the discretion to determine the time, place, and manner of such examinations, including who may be present and what subjects may be covered. We are confident that the trial court will use that authority to allay any concerns that the complainant might be unduly inconvenienced or embarrassed. . .

Hamill v. Powers, 164 P.3d at 1088-89.

Here, there was no indication that a competency evaluation would actually have been stressful for Margilyn. Rather, the court speculated that this might be the case, and so did not investigate or consider alternatives. However as the Court in Hamill v. Powers recognized, it was well within the court's authority to regulate the manner of the testing to minimize stress to Margilyn.

Thus, for example, the court here could have ordered the evaluation take place in Margilyn's home or another environment in which she felt comfortable. The court could have limited the duration of the evaluation or the number of tests that would be administered. The court could have required the evaluation be done by one of Margilyn's treating physicians, assuming one existed who was qualified to perform the evaluation, or could have required that the expert be approved by both the State and the defense. In short, the court readily could have tailored the evaluation to accommodate any concerns regarding potential upset to her.

iii. *The trial court could not assess Margilyn Umali's testimonial competency without an evaluation.*

A judge is not a neuropsychological expert. Judge Hayden wrongly believed that the assessment of Margilyn Umali's competency was analogous to a court's competency determination of any other witness. He was mistaken, and the characteristic testimonial competency

situation, usually involving a child witness in a sex case, is a poor analogue for Margilyn Umali.

Child cognitive development is within the understanding of a lay judge, and a judge generally can accurately determine testimonial competency based upon a child's ability to accurately recount historical events, distinguish between right and wrong, and differentiate truth from fiction. Margilyn Umali's traumatic brain injury, however, presented an entirely different circumstance. The entire left temporal lobe of her brain, the area responsible for speech decoding and production, was damaged by the shooting. 7/22/10 RP 5-6. Her injuries were extremely severe and their impact upon her ability to speak and understand profound. Because of Margilyn's neurological impairment, her responses to questions were neither reliable nor accurate. After reviewing Margilyn's medical records and testimony, Dr. Muscatel, who conducted thousands of competency evaluations for both the State and the defense, felt unable to make an assessment of her testimonial competency. He saw "no alternative" to the evaluation. Supp. CP \_\_ (Sub No. 144, Appendix A).

The evidence rules contemplate that expert testimony may be necessary to "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Judge Hayden willfully closed off the possibility of neurological testing which would have illuminated whether

Margilyn in fact was capable of decoding language, and whether she suffered from memory deficits that would have called into question the reliability of her “memories” of the shooting. Without this evidence, his assessment of her competency was at best a guess.

As is extensively chronicled above, there was ample reason to doubt Margilyn’s competency. This Court should conclude that Judge Hayden improperly determined that Margilyn Umali was competent to testify at trial.

- iv. *Because this court does not have any information regarding Margilyn Umali’s cognitive impairment, and her speech is an unreliable indicator of her comprehension and communication ability, this Court lacks the record necessary to conduct meaningful appellate review.*

For much the same reason, this Court cannot engage in the customary review of the record to determine competency on its own. See Brousseau, 172 Wn.2d at 340-41. While Margilyn testified to some “memories” of the shooting, this Court cannot discern whether those memories are confabulated. Nor is it possible to tell from the record of the competency hearing, the interview with Detective Cobane, or Margilyn’s trial testimony whether Margilyn understood her oath as a witness and her duty to relate the facts truly. RCW 5.60.050. Equally troubling, as predicted, Phongmanivan’s efforts to cross-examine Margilyn were largely ineffective.

The trial court's order denying Phongmanivan the right to an expert evaluation of Margilyn's competency effectively prevented him from presenting this Court with the evidence it needs to interpret her confusing testimony and assess her cognitive functioning. Under the unusual facts of this case, this Court should conclude that the customary review of the record "as a whole" sheds no light on the difficult question whether Margilyn Umali had testimonial competency. Because there is little basis to otherwise conclude that she understood her oath as a witness and had a true memory of the events, this Court should find that Margilyn was not competent to testify.

f. The error in admitting Margilyn Umali's incompetent testimony was prejudicial.

This Court reviews the admission of incompetent testimony under the constitutional harmless error standard. Brousseau, 172 Wn.2d at 344. Under this standard, an error is presumed prejudicial and requires reversal unless the State can prove beyond a reasonable doubt that it did not affect the verdict. Id.; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In this case it bears repeating that not a single independent witness placed Phongmanivan at the scene with a gun in his hand. In contrast, several witnesses believed that McBride was the shooter.

The only individuals to claim that Phongmanivan was the shooter were Margilyn Umali and the other victim, Roger Wright. Wright claimed he got a “good look” at the shooter. 1/4/11 RP 138. He also claimed he was not impaired by alcohol. 1/4/11 RP 138. When tested at the hospital, Wright had a blood alcohol level of .177, meaning that he probably drank the equivalent of about nine ounces of 80-proof alcohol before the incident. 1/4/11 RP 205. Additionally, Wright had been shot in the thigh and buttock, strongly raising the inference that like everyone else at the scene, when the shooting started he fled and took cover.

The jury submitted three notes to the court during its deliberations. In two of these the jury requested to listen to recordings of the 9-1-1 calls made by independent witnesses. CP 128-29, 132-33. The jury also asked for a transcript of another witness’s testimony. CP 130-31. The jury indicated at one point that it was at an impasse. Id.

The explosive testimony elicited from Margilyn Umali could only have had a profound impact upon the jury. Given the equivocal evidence of Phongmanivan’s guilt, this Court should conclude that the admission of her testimony requires reversal of his convictions.

**2. The prosecutor's intentional and malicious violation of the witness sequestration order violated Phongmanivan's rights to a defense and to a fair trial.**

- a. The prosecutor intentionally told Gabriel McBride and Jenelle Dalit – according to the defense, the real shooter and his girlfriend – the defense theory of the case after the start of trial to induce them to testify.

Phongmanivan's trial commenced on December 6, 2010. That day, a Monday, both the prosecutor and defense counsel laid out their theories of the case in opening statements. Defense counsel told the jury that Drew Kurata, Prima Giangrosso and Joe Rutter all described the shooter as wearing a Seahawks football jersey. RP (Opening Statements) 31.<sup>17</sup> Counsel noted that Giangrosso and Rutter met with police some days after the incident and did not select Phongmanivan's photograph when it was included in a montage. RP (Opening Statements) 33-34. Defense counsel noted that no witness stated Phongmanivan was involved in an argument. RP (Opening Statements) 38-39. Defense counsel's presentation culminated with an identification of the person in the football jersey: Gabriel McBride, who avoided contact with the police for the two-plus years that the case was pending, and who had a concealed weapons permit; i.e., the ostensible shooter. RP (Opening Statements) 44.

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<sup>17</sup> Opening statements were transcribed pursuant to a supplemental IFP and designation; that transcript is referenced herein as "RP (Opening Statements)" followed by page number.

The following day, defense counsel interviewed Jenelle Dalit, McBride's girlfriend. During that interview, counsel learned that after the trial commenced, the prosecutor met with Dalit and McBride and informed them that Phongmanivan had blamed McBride for the crime. 12/7/10 RP 116-17. Counsel further learned that the prosecutor told Dalit that the victim in the case, Margilyn Umali, was severely disabled, had been shot in the eye, and that her brother had left school and made sacrifices for her. 12/7/10 RP 117. Counsel asked for exclusion of Dalit and McBride's testimony on the basis that the prosecutor had violated the court's witness sequestration order. Id.

The prosecutor admitted that she had told the witness the defense was trying to blame "someone else,"<sup>18</sup> although she denied mentioning opening statements. 12/7/10 RP 118. She acknowledged, however, that she spoke with McBride on December 6<sup>th</sup> at 4:30, after opening statements. 12/8/10 RP 239. She stated,

I told [Dalit] I needed her to come in, there was someone seriously injured and that defense counsel were attempting to place the blame on somebody else. I think that all of these things are permissible things to say to a witness to get them to come in.

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<sup>18</sup> It is not clear why the prosecutor did not simply admit to telling the witnesses that defense counsel had suggested McBride was the shooter, since Jenelle Dalit acknowledged that the prosecutor specifically told her "the defense is pointing the finger at Gabe." 12/7/10 RP 242.

Id. Dalit was scheduled to testify the afternoon of December 7<sup>th</sup>, and provided an alibi for McBride. 12/7/10 RP 120.

The court was very troubled by counsel's report. The court cautioned the parties not to tell witnesses anything about what happened in court or what was said in opening statements. 12/7/10 RP 125. The court emphasized, "you really shouldn't be talking to [witnesses] at all about any other part of the case. I thought that would be clear." 12/7/10 RP 126.

Later that day, Defense counsel noted that it was "clear" that Dalit was discussing her testimony with McBride and moved for dismissal. 12/7/10 RP 179-80. Counsel alternatively asked the court to tell the jury that the prosecutor had violated a court order. 12/7/10 RP 182.

The court admonished the prosecutor:

I don't think I stated this strongly enough. No witness may be shown or discuss any witness's testimony in this trial . . . You cannot show another witness any other witness's statements, depositions, interviews, transcripts, period. I don't think it was appropriate – so I disagree with Ms. Miller's [the prosecutor's] position. I don't think it was appropriate to discuss the defense theory that the defense is attempting to blame Mr. McBride as another suspect.

12/7/10 RP 177.

Nevertheless, despite finding that the prosecutor's actions were improper, the court declined to dismiss the matter, and instead ruled that

Phongmanivan could cross-examine the witness on anything the prosecutor told her. 12/7/10 RP 178. The court denied Phongmanivan's request for a jury instruction on the prosecutor's misconduct but the court ruled that this was not evidence. 12/7/10 RP 182.

Phongmanivan renewed the motion to dismiss after Dalit's testimony and again prior to McBride's testimony. 12/8/10 RP 127. The court denied the motion and after sentencing entered a written order in support of its ruling. CP 142-45.

b. The prosecutor's violation of the witness sequestration order was misconduct.

A prosecutor serves two equally important functions. She enforces the law by prosecuting those who have violated the peace and dignity of the state by breaking it, and she functions as the representative of the people in a quasijudicial search for justice. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Defendants are among the people the prosecutor represents. Id. (citation omitted). Thus, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.; see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935) (prosecutor has the obligation to ensure that the accused receives a fair trial); U.S. Const. amend. XIV; Const. art. I, § 3.

ER 615, pertaining to the exclusion of witnesses, authorizes the court at the request of a party or on its own motion to exclude witnesses from a trial so that they do not hear the testimony of others. ER 615.

The exclusion of witnesses from the courtroom during trial is a time-honored practice designed to prevent the shaping of testimony by hearing what other witnesses say . . . [A] circumvention of the rule [occurs] where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify.

United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir. 1978) (construing Fed. R. Evid. 615).<sup>19</sup>

The United States Supreme Court acknowledges that witness sequestration rules “lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and . . . increase the likelihood that they will confine themselves to truthful statements based on their own recollections.” Perry v. Leeke, 488 U.S. 272, 281-82, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). Indeed,

The merit of [a witness sequestration rule] has been recognized since at least biblical times. The Apocrypha, vv. 36-64, relates how Daniel vindicated Susanna of adultery by sequestering the two elders who had accused her and asking each of them under which tree her alleged adulterous act took place. When they gave different answers, they were convicted of falsely testifying. . . It is now well recognized that sequestering witnesses “is (next to cross-examination)

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<sup>19</sup> Fed. R. Evid. 615 is similar to ER 615 except that the federal provision provides that the trial court must order the exclusion of witnesses.

one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.”

Opus 3 Ltd. v. Heritage Park, Inc., 95 F.3d 625, 628 (4th Cir. 1996) (quoting 6 John H. Wigmore, Wigmore on Evidence § 1838 at 463 (James H. Chadborn ed., 1976)).

The purpose of witness exclusion rules is “to discourage or expose inconsistencies, fabrication, or collusion.” State v. Skuza, 156 Wn. App. 886, 896, 235 P.3d 842 (2011) (citation omitted); see also Advisory Committee Notes, Fed. R. Evid. 615. Washington has recognized this principle for over 100 years. Hendelman v. Kahan, 50 Wash. 247, 252, 97 P. 109 (1908); State v. Lee Doon, 7 Wash. 308, 311-12, 34 P. 1103 (1893); State v. Ilomaki, 40 Wash. 629, 631, 82 P. 873 (1905). “There is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change.” Wigmore, supra, at 437.

In addition to the long-standing judicial disfavor of violations of witness sequestration rules, RPC 3.6 broadly prohibits lawyers who are participating in litigation from making extrajudicial statements that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” RPC 3.6(a). RPC 3.8(f), pertaining to the special obligations of prosecutors, supplements this rule and specifically

imposes upon prosecutors a duty of care with regard to extrajudicial statements.<sup>20</sup> RPC 3.8(f).

Strict adherence to witness sequestration rules is most important when the witness is a key fact witness. Opus 3 Ltd., 91 F.3d at 629. In this circumstance, “the outcome depends on the relative credibility of the parties’ witnesses,” and violation of sequestration rules undermines the truth-seeking function of the adversarial process. Id.

This prosecutor was a seasoned deputy trying a serious case on behalf of the King County Prosecutor’s Office. She surely knew that telling material witnesses – one of whom had been named by the defense as the real shooter in the case – about the defense theory and the severity of the permanent injuries to the victim would give the witnesses a strong incentive to minimize their involvement, fabricate their testimony, and collude to create a plausible story that exonerated McBride.

In analyzing the issue, it is important to differentiate the hypothetical circumstance of a prosecutor speaking with a potential witness regarding case scheduling matters or to secure their presence at trial, which is permissible, from what occurred here. Ms. Miller did not merely tell Dalit and McBride that they needed to appear or risk arrest on

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<sup>20</sup> Although RPC 3.8(f) has been traditionally construed as dealing primarily with improper extrajudicial statements to the media, the comment to the rule stresses the “unique dangers of improper extrajudicial statements in a criminal case.” Comment, RPC 3.8.

a material witness warrant. Nor did she limit herself to advising them of the extent of Margilyn Umali's injuries which, while problematic and inappropriate, might not have had an immediate and direct impact upon the fairness of the proceedings. Instead, in addition to doing both of these things, Ms. Miller purposefully told them the defense theory, which was that McBride was the shooter. It simply is not conceivable that Ms. Miller could legitimately have believed this was "permissible." 12/7/10 RP 118.

Possibly as a consequence of the information she received from Ms. Miller, Dalit testified she was "sure" that McBride was with her during the shooting. 12/7/10 RP 239-40. She stressed this point after initially stating that he could have been some distance away from her. 12/7/10 RP 238. McBride also specifically testified that he "pushed Jenelle and ducked left." 12/13/10 RP 220.

If Ms. Miller's intention was to secure testimony favorable to the State, her actions had the desired effect. Ms. Miller's statements to Dalit and McBride about the defense theory in violation of the witness sequestration rule were misconduct.

- c. Dismissal with prejudice was the proper remedy under the Fourteenth Amendment guarantee of due process and the provisions of CrR 8.3(b).

“In the drive to achieve successful prosecutions, the end cannot justify the means.” State v. Martinez, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004) (upholding dismissal under CrR 8.3(b)).

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example.

Id. (quoting Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)).

This Court may dismiss a prosecution where the conduct of government actors is “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)).

When determining whether a prosecutor’s conduct merits dismissal, the court looks to whether the conduct “violates “fundamental conceptions of justice which lie at the base of our civil and political institutions.”” State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003)

(citation omitted). A trial court's ruling on a motion to dismiss for government misconduct is reviewed for an abuse of discretion. Id.

The witness sequestration rule is a fundamental and long-standing precept of our system of justice. "In essence, [sequestration] helps to ensure that the trial is fair." State v. Robinson, 230 Conn. 591, 600, 646 A.2d 118 (1994). However, what remedy will lie for a violation of the witness sequestration rule is "largely determinable by the fault or want of fault of the party or his counsel in behalf of whom the testimony is offered." State v. Colotis, 151 Wash. 557, 560, 257 P. 857 (1929).

Thus, while a witness's intentional violation of witness sequestration rules may rightly prompt judicial opprobrium, Hendelman, 50 Wash. at 252, a prosecutor's knowing breach of a court order excluding witnesses merits even harsher treatment. By virtue of her special role in the proceedings, the prosecutor understands that witness sequestration rules are designed to further a trial's truth-seeking function. Additionally, the prosecutor has a duty to act in the interests of justice rather than to zealously pursue convictions. Monday, 171 Wn.2d at 676. Thus, the prosecutor shares the court's interest in ensuring a witness gives truthful testimony and understands that this objective outweighs the government's interest in securing that witness's presence at trial.

Construing Fed. R. Evid. 615, the Fourth Circuit Court of Appeals for the United States held that prejudice should be presumed following a violation of the witness sequestration rule:

[W]e understand the mandatory, unambiguous language of the rule to reflect the drafters' recognition that any defendant . . . would find it almost impossible to sustain the burden of proving the negative inference that the [witness's] testimony would have been different had he been sequestered. A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts. Rule 615 thus reflects an a priori judgment in favor of sequestration, and the exceptions should be construed narrowly in favor of the party requesting sequestration.

United States v. Farnham, 791 F.2d 331 (4th Cir. 1986).

A similar rule makes sense here. Dalit and McBride were recalcitrant about coming to court or participating in defense interviews until Ms. Miller and the case detective met with them. During that meeting, rather than taking pains to ensure that their memories of the evening remained pristine and their potential testimony untainted, Ms. Miller told them that McBride had been identified as the shooter by the defense and that they were material witnesses. It is not surprising that both witnesses insisted McBride was with Dalit.

As in Farnham, because of Ms. Miller's interference, Phongmanivan had no way of showing what Dalit and McBride would

have said or that their testimony would have been different if Ms. Miller had not violated the witness sequestration rule. This Court should presume that Ms. Miller's action was prejudicial.

“The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” Monday, 171 Wn.2d at 676. Phongmanivan's right to a fair trial included the right to a defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI; Const. art. I, § 22. Phongmanivan's defense was that McBride was the shooter.

Ms. Miller's discussion of Phongmanivan's defense with McBride eviscerated the defense. Since Dalit supplied McBride's alibi, her testimony was of particular importance to the State's case. If Dalit intentionally altered her testimony as a result of what Ms. Miller told her about the defense theory, or if she did so unconsciously, the result is the same: her testimony directly subverted Phongmanivan's defense, thereby benefiting the prosecution and hindering the truth-seeking process.

With regard to whether Ms. Miller's conduct merited the punitive sanction of dismissal, her likely bad faith is a material consideration. It simply is inconceivable that Ms. Miller did not realize it would be improper to tell the person Phongmanivan had named as the other suspect

in the case, whom she sought to induce to testify against him, that this was Phongmanivan's defense. Ms. Miller's claim that it was necessary to disclose the defense theory in order to persuade Dalit and McBride to testify, 12/7/10 RP 118, is neither a plausible nor a legitimate excuse. This information was in no way germane to the narrow question whether Dalit and McBride needed to honor their subpoenas, and instead was calculatedly conveyed to them to provide a personal incentive to come to court.

In its written ruling denying dismissal with regard to McBride, entered 13 days after sentencing, the trial court opined that the prosecutor was "ethically required" to explore with McBride whether he was the shooter because he could have had a Fifth Amendment right with regard to his testimony. CP 143. This post-hoc justification is unconvincing. As evidenced by its utter disinterest during the two years that the case was pending in pursuing or investigating whether McBride was the shooter, the State did not believe that its focus upon Phongmanivan was ill-conceived or unjustified. The State was aware at least since March 9, 2010, nine months before the start of trial (if not before), that Phongmanivan intended to argue that McBride was the real shooter. Pretrial RP (1) 97-102. If the State genuinely had concerns about the shooter's identity, it had ample time to thoroughly investigate McBride. It did not do so.

Nor did Ms. Miller claim that she divulged the defense theory to McBride and Dalit so as to fully discharge her ethical obligations; rather she admitted that she did this “to get them to come in.” 12/7/10 RP 118. Her doing so after opening statements smacks unpleasantly of a deliberate strategy to sabotage Phongmanivan by cutting his defense off at the knees. She succeeded in this objective.

This Court may dismiss a case for outrageous government conduct even without a showing of a separate constitutional violation. Lively, 130 Wn.2d at 20. Here, however, Phongmanivan has shown an act of remarkably egregious, cynical, and unethical sabotage by the prosecutor that violated his Sixth Amendment right to a defense. This Court should reverse and dismiss his convictions.

- d. Alternatively, the trial court should have excluded the witnesses’ testimony or instructed the jury regarding the prosecutor’s violation of the witness sequestration rule.

Dismissal was the appropriate sanction for Ms. Miller’s misconduct. Barring dismissal, however, Phongmanivan asked the court to exclude McBride and Dalit from testifying and to instruct the jury regarding the prosecutor’s misconduct. Both of these would have been suitable remedies given Ms. Miller’s extraordinary transgression of her professional and ethical duties here.

Federal authorities make it plain that an instruction to the jury, holding the witness in contempt, and, in drastic cases, exclusion of the witness's testimony are proper remedies for a violation of a witness sequestration order. Holder v. United States, 150 U.S. 91, 92, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); see also, e.g., United States v. Washington, 653 F.3d 1251, 1259 (11th Cir. 2011) (noting that a party's culpability in a violation of a witness sequestration order will be a "significant factor" in determining whether the witness's testimony should be excluded); United States v. Rhynes, 218 F.3d 318, 323 (4th Cir. 2000) (upholding rule that district court sanctioning a violation of a witness sequestration order can hold the witness in contempt, limit the scope of the witness's testimony, and instruct the jury "that they may consider the violation toward the issue of credibility"); United States v. Cropp, 127 F.3d 354, 363 (4th Cir. 1997) (finding no abuse of discretion in exclusion of witness where violation of witness sequestration rule was the fault of counsel); United States v. Jiminez, 780 F.2d 975, 981 (11th Cir. 1986) (concluding the district court "adequately responded to the possibility of prejudice by specifically instructing the jury" that a violation of the sequestration rule had occurred, and that violation could be used in evaluating the credibility of the witness).

The trial court permitted Phongmanivan to cross-examine Dalit and McBride regarding what Ms. Miller told them, but was hesitant to exclude their testimony. Because Ms. Miller's misconduct was not evidence the court refused to issue a jury instruction. 12/7/10 RP 182. As the above authorities demonstrate, the court had the discretion to order either remedy and the fact that Ms. Miller's violation was "not evidence" was immaterial. The record established that Ms. Miller engaged in reprehensible misconduct. Mere cross-examination was a toothless remedy. If this Court does not dismiss this matter, this Court should conclude that the trial court should have excluded Dalit and McBride's testimony or issued the jury a limiting instruction regarding the misconduct.

F. CONCLUSION

This Court should conclude that the prosecutor's violation of the witness sequestration order merits dismissal of Phongmanivan's convictions. If this Court does not dismiss, this Court should conclude that the admission of Margilyn Umali's incompetent testimony violated due process and prevented Phongmanivan from receiving a fair trial. On remand, should the State seek to call her as a witness the Court should authorize a competency evaluation first. The Court should also require either exclusion of Jenelle Dalit and Gabriel McBride's testimony, or issuance of an instruction informing the jury of Ms. Miller's misconduct.

DATED this 25 day of April, 2012.

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. 66858-7-I
v.	)	
	)	
PHONGSAVANH PHONGMANIVAN,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF APRIL, 2012, 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:

- |   |                            |  |
|---|----------------------------|--|
| <p>[X] KING COUNTY PROSECUTING ATTORNEY<br/>APPELLATE UNIT<br/>KING COUNTY COURTHOUSE<br/>516 THIRD AVENUE, W-554<br/>SEATTLE, WA 98104</p> | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |
| <p>[X] PHONGSAVANH PHONGMANIVAN<br/>348561<br/>WASHINGTON STATE PENITENTIARY<br/>1313 N 13<sup>TH</sup> AVE<br/>WALLA WALLA, WA 99362</p>   | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF APRIL, 2012.

X \_\_\_\_\_ 

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