

**FILED**

JAN 31 2011

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

No. 268161

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

JOSE LUIS SANCHEZ, JR.

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE JAMES P. HUTTON, JUDGE

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BRIEF OF RESPONDENT

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JAMES P. HAGARTY  
Prosecuting Attorney

Kenneth L. Ramm  
Deputy Prosecuting Attorney  
WSBA #16500  
Attorney for Respondent  
211, Courthouse  
Yakima, WA 98901  
(509) 574-1200

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred by disqualifying Sanchez's counsel?
2. Whether the trial court order disqualifying Sanchez's counsel denied Sanchez his Sixth Amendment Right to Counsel and his Fourteenth Amendment right to equal protection?
3. Whether the trial court erred in not including the appellant in an in camera meeting between the trial judge and the director of the department of assigned counsel regarding the progress in finding replacement counsel for the appellant?
4. Whether the trial court erred in admitting Michelle Kublic's identification of Sanchez?
5. Whether the trial court abused its discretion in conducting the trial in the security courtroom in the county jail?
6. Whether the trial court erred in denying Sanchez's motion to suppress the 9mm pistol?
7. Whether Sanchez was denied effective assistance of counsel when his attorneys did not move to suppress the evidence prior to trial on the murder/assault charges?

8. Whether the trial court erred by permitting the state to introduce the evidence of the 9mm pistol found when Sanchez was arrested or his attempted destruction of evidence in the hold cell.
9. Whether the trial court erred in not permitting the defense to inquire regarding third party suspect testimony regarding Manuel Sanchez?
10. Whether there was cumulative error committed by the trial court which denied Sanchez a fair trial?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court did not abuse its discretion in disqualifying Sanchez's counsel.
2. The trial court's order disqualifying Sanchez's counsel did not deny him his Sixth Amendment Right to Counsel or his Fourteenth Amendment right to equal protection.
3. The trial court's in camera meeting with the director of the department of assigned counsel regarding the progress in finding replacement counsel for the appellant was not a proceeding which would be required to be open to the public or to the appellant.

4. The trial court did not err in admitted Michelle Kublic's identification of Sanchez.
5. The trial court did not abuse its discretion in conducting the trial in the security courtroom of the Yakima County Jail.
6. The trial court did not err in denying the motion to suppress evidence of the 9mm pistol.
7. Sanchez was not denied effective assistance of counsel since the motion to suppress would have been denied.
8. The trial court did not abuse its discretion in denying defense motion to exclude the evidence of the 9mm pistol or the destruction of evidence.
9. The trial court did not abuse its discretion in denying the defense testimony regarding a third party suspect.
10. Since there was no error, there was no cumulative error.

## II. STATEMENT OF THE CASE

### Procedural facts.

Jose Luis Sanchez, the appellant herein, was initially charged on February 28, 2005, with the two counts of Aggravated First Degree Murder for the deaths of Ricky and Meya Causer; two counts of Attempted First Degree Murder or in the alternative, First Degree Assault,

the shooting of Angelica Causer and Michelle Kublic; one count of First Degree Robbery; one count of First Degree Burglary; all with a special firearm enhancements; and one count of First Degree Unlawful Possession of a Firearm. (CP 974-978). Numerous pretrial hearings were had between the date of arraignment and the date trial, which commenced on November 5, 2007. After 14 days of jury selection, testimony and argument, the jury returned guilty verdicts as charged, and answered in the affirmative as to the special firearm allegations. (CP 76, 73, 70, 67, 64, 63, 61, 60, 58, 56, 74-75, 68-69, 62, 59, 57, 55).

Trial Facts.

On February 19, 2010, Mario Mendez was at the home of Jose Luis Sanchez when he first heard the discussion of robbing Ricky Causer. (11-26-07 RP 1674). Present during the discussion was the appellant, Carlos Orozco, Rene Sanchez, and Carlos Sanchez. (11-26-07 RP 1674). They had information that Ricky Causer had a lot of money from selling marijuana, and had been saving in order to buy a house. (11-26-07 RP 1675). The plan was that everyone to have a gun and use a mask so that he wouldn't recognize them. (11-26-07 RP 1676). Mendez obtained a .38 caliber revolver the day before the robbery. (11-26-07 RP 1677).

The next day, Sunday, February 20, 2005, sometime around 11:00 a.m. and 12:00 p.m., Mendez returned to the 9<sup>th</sup> Street house were Jose

Luis Sanchez was living. When Mendez arrived there, Carlos Orozco and Jose Luis Sanchez were there. (11-26-07 RP 1677-78). They discussed the plan to rob Ricky Causor. They were to each have a gun and they would wear masks. At the time Orozco did not have a gun, so he asked to borrow one from Sanchez's brother, Rene Sanchez. (11-26-07 RP 1678). Jose Luis Sanchez had his .45 caliber handgun that he carried all the time. (11-26-07 RP 1678-79).

Carlos Orozco expressed hesitation to participating in the robbery Ricky Causor, thinking that since he had spent a lot of time around him, Ricky might recognize him. (11-26-07 RP 1679). They went to Rene Sanchez in order to borrow his gun, but Rene did not want to loan him his gun. In fact Rene Sanchez wanted to go along on the robbery himself. (11-26-07 RP 1679). They discussed the timing of the robbery and decided to wait until later in the evening. Jose Luis Sanchez asked Mendez to go with him to get some beer. So the two of them went to get beer, after which they went by the Causor residence to "scope it out" prior to the robbery. (11-26-07 RP 1680).

When they went by the Causor residence, they had three guns, Rene's 9mm pistol, Mendez's .38 caliber revolver, both of which were kept in a black ziplock bag. (11-26-07 RP 1681). Jose Luis Sanchez carried his .45 on his person. (11-26-07 RP 1681). Mendez had prepared

masks by cutting holes in beanies. (11-26-07 RP 1681). Driving Jose Luis Sanchez's blue pickup, they went to the apartment, parking on the left side of the driveway. (11-26-07 RP 1684). In discussing how they were going to commit the robbery, Mendez showed Sanchez the masks. Sanchez told Mendez that he was not going to wear a mask, that he didn't like masks. (11-26-07 RP 1684).

As they were sitting in Sanchez's pickup, a security guard drove in and stopped. The security guard asked if everything was alright, to which Mendez responded "yes." (11-26-07 RP 1685). The security guard then went on her way and left. (11-26-07 RP 1685). Mendez and Sanchez start drinking a beer. (11-26-07 RP 1686).

Michelle Kublic left the home she shared with her boyfriend Ricky Causor and her two daughters, Angelica and Maya, in order to buy cleaning supplies. (11-15-07 RP 1005). Ms. Kublic went to her car, a Chevrolet Suburban, was parked in the outside. (11-26-07 RP 1686). Mendez and Sanchez observe Ms. Kublic come out of the residence and get into her Suburban. (11-26-07 RP 1686). Sanchez says to Mendez, "this is the time," and they jump out of the truck and Mendez went to stand in front of the Suburban. (11-26-07 RP 1686).

As Ms. Kublic was starting the Suburban, she looked up and saw a man, Mario Mendez, pointing a gun at her in front of her vehicle. (11-15-

07 RP 1008-09; 11-26-07 RP 1688). A second man, who Ms. Kublic identified as the defendant, Jose Luis Sanchez, opened the door and pulled her out by her and put his gun to her head. (11-15-07 RP 1010-11, 1023). Sanchez takes Ms. Kublic by the hair and pointed the gun at her and said “don’t run bitch, or I’ll kill you.” (11-26-07 RP 1688). Sanchez told Mendez to park the Suburban. So Mendez parked the Suburban and then went to Sanchez’s truck and retrieved a mask and put it on and pulled up his hood. (11-26-07 RP 1686, 1690).

Jose Luis Sanchez forced Michelle Kublic to return to her apartment. When Ricky Causor open the door, Sanchez pointed his gun at him. (11-15-07 RP 1013). When the door opened, Ms. Kublic, fearing the worst, tried to take the gun from Sanchez, but Causor told her to stop and the everything would be all right and they would give the men what they wanted. (11-15-07 RP 1014). Sanchez forced them inside, and Mendez joined them inside, but by that time he was wearing a mask. (11-15-07 RP 1015, 1017; 11-26-07 RP 1689-90). Michelle noticed that Mendez was wearing his mask and that he was armed with a revolver. (11-15-07 RP 1018).

Sanchez ordered them to kneel in the living room with their two young children. Sanchez directed Causor into the kitchen. (11-15-07 RP 1015-17; 11-26-07 RP 1690). She heard them state that they wanted

everything. (11-15-07 RP 1018). Ricky was doing whatever they said to do. (11-15-07 RP 1018).

As Mendez is walking into the apartment he notices items broken by the front door. He then sees Ricky Causor coming from the kitchen with Jose Luis Sanchez in back of him with the gun pointed towards Causor's head. (11-26-07 RP 1690). Mendez asked Sanchez what happened, and Sanchez replied "she fucked up, she fucked up." (11-26-07 RP 1690). Causor was carrying some bags of marijuana in his hand. (11-26-07 RP 1691). Michelle Kublic was saying just give them everything, Ricky, give them everything so they can go, as she was crying. (11-26-07 RP 1691). She kept hugging her children, trying to keep them calm. (11-15-07 RP 1021).

Ricky Causor set the marijuana that he was carrying down on the coffee table. He reached towards his pocket and grabbed some money from his pocket and drops it on the ground. (11-26-07 RP 1692). Causor then and hugged Michelle, and said "take everything, just don't hurt my family." (11-26-07 RP 1692). Mendez and Sanchez then picked up the money that Causor had dropped. (11-26-07 RP 1693).

The two girls, Meya and Angelica, were in between Ricky and Michelle. Michelle was holding Angelica and next to her. Ricky and

Michelle were kneeling facing one another. Rickey looked at Michelle and mouthed the words "I'm sorry." (11-15-07 RP 1022).

Mendez picked up the marijuana, and as he is walking toward the door to leave, Sanchez says "she fucked up, guy, she fucked up." (11-26-07 RP 1693). Sanchez then takes a couple of steps to get in back of Ricky and points the gun at the back of Ricky's head and then Mendez hears a gunshot. (11-26-07 RP 1693-94). Michelle watched as Sanchez walked up behind Ricky and pointed his gun at Ricky. Sanchez had a really mad face and then shot. (11-15-07 RP 1022).

Mendez jumped towards the door and he sees Sanchez change targets and started shooting Michelle. Mendez took off running. (11-26-07 RP 1694). Mendez heard a number of gunshots, one after another. (11-26-07 RP 1694). Mendez ran toward Causor's Suburban in order to get away. He was carrying the marijuana and his .38 revolver. (11-26-07 RP 1695).

When Mendez got to the Suburban he found that it was locked. He thought that he had put the keys in his pocket, but after checking he could not find them. He then looked back and noticed a vehicle had just arrived. (11-26-07 RP 1695-96). He saw a lady look straight at him, so he ran around the Suburban. Mendez then heard Sanchez's truck peeling out. Mendez went toward the truck and jumped in the passenger side and they

left. (11-26-07 RP 1696-97). Sanchez turned left, and they headed out of Yakima. Sanchez decided to go to his uncle Gabriel's house in Toppenish. (11-26-07 RP 1697)

Michelle Kublic awakes in a pile of blood, laying there waiting to die. (11-15-07 RP 1023). She felt something move underneath her, and found that it was Angelica. (11-15-07 RP 1024). Michelle felt like she had been hit really hard in her chest. Then all of the sudden she could see anything, everything went black. (11-15-07 RP 1024). When she could see again, she reached for Angelica in order to cover her face so that she couldn't see anything. Michelle then got up and tried to get help. (11-15-07 RP 1024). She could hear Meya trying to breathe. (11-15-07 RP 1025).

Michelle then was able to get outside and the first person who came out, Michelle asked her if she could watch Angelica until the police came. (11-15-07 RP 1025). As Michelle tried to go back to her porch she noticed that blood was coming right above her chest and that it wouldn't stop. (11-15-07 RP 1026). The police and ambulance arrived after what seem a very long time. (11-15-07 RP 1026-27). Michelle did not remember if they asked any questions or describing anybody to them. (11-15-07 RP 1027).

As they are driving down to Toppenish, Mario Mendez realizes that he cannot find the keys to the Suburban nor can he find his cell phone. (11-26-07 RP 1698). Realizing that he must have lost his cell phone back at the scene of the robbery, Mendez starts freaking out and tells Sanchez that they have to go back. Sanchez tells him not to worry about it. (11-26-07 RP 1698). Mendez looks under his seat for the gun, he opens the door and the .38 revolver drops out of the truck as they are traveling down the road. (11-26-07 RP 1698). Mendez tells Sanchez that he dropped the gun, so Sanchez stops the truck and Mendez gets out and grabs his gun and jumps back into the truck. (11-26-07 RP 1698).

Sanchez and Mendez got on 16<sup>th</sup> Avenue and traveled to Ahtanum Road, and then they went to Union Gap. From Union Gap they took Highway 97 towards Toppenish. Upon reaching Lateral A, they took Lateral A and went to Sanchez's uncle's house through the back roads. (11-26-07 RP 1699). On the way, Mendez asked Sanchez whether he had hit the kids. Sanchez replied "don't worry about it. I didn't hit the kids. I know Michelle and Ricky are head. They're already fucking with my mind." (11-26-07 RP 1699). When they arrived at the uncle's house they split the marijuana and the money. (11-26-07 RP 1702). Mendez then had Sanchez drop him off at his house there in Toppenish. (11-26-07 RP 1703).

Prior to leaving, there was discussion about the Kimber .45 caliber pistol. The gun actually belonged to Gabriel, and Jose Luis Sanchez wanted to give it back, but Gabriel didn't want it back. He told him to sell it or get rid of it. (11-26-07 RP 1704).

Michelle Kublic could not recall when it was that the police first came to see her. (11-15-07 RP 1029). She recalled Detective Cortez and Detective Kellett coming to see her. (11-15-07 RP 1031). She recalled that they wanted to show her some pictures of people, although she did not recall her reaction to the pictures at the time that she testified at trial. (11-15-07 RP 1031). It was not until she got out of the hospital that she started to remember the events of the night of the shooting. (11-15-07 RP 1031). After leaving the hospital, she stayed with her dad, but could not sleep because she had really bad flashbacks and nightmares. (11-15-07 RP 1033). She tried to block out the events. (11-15-07 RP 1033).

Before Michelle Kublic talked with Detective Kellett on March 2, 2007, she began to recall more and more things about the night of the shooting. (11-15-07 RP 1034).

### III. ARGUMENT

#### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISQUALIFYING DEFENSE COUNSEL.

##### 1. Standard of Review.

Appellate courts review a trial court's disqualification of defense counsel for a conflict of interest for abuse of discretion. United States v. Wheat, 486 U.S. 153, 163, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). The question on appeal is whether the trial court acted arbitrarily in the disqualification of counsel. State v. Roberts, 142 Wn.2d 471, 516 (Wash. 2000). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The appellant bears the burden of showing abuse of discretion. State v. Sponburgh, 84 Wn.2d 203, 210, 525 P.2d 238 (1974); State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004).

##### 2. Argument.

In its Order on Sanctions, the trial court stated:

“The ‘serious potential for conflict’ is present in this case as it relates to the Mendez interviews by Witchley and Freeman. There appears to the Court to be an actual conflict as to the actions

relating to the movement of Carrillo children out of state by Walsh and Witchley since they had knowledge that they were material witnesses in this case and the attorneys will likely be called as witnesses in this case as the movement of the children.” (CP 871).

The trial court and the appellant, both cite P.U.D. No. 1 of Klickitat County, v. Int’l Ins. Co., 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994), as the frame work for analysis when considering disqualification of counsel under RPC 3.7. [CP 868; App. Br. Pg. 31]. P.U.D. No. 1 requires the following: first, there must be a showing that the attorney “will give evidence material to the issues being litigated.” Id. Second, the evidence must be “unobtainable elsewhere.” Id. Third, the court must find the testimony to be given is or may be prejudicial to the testifying attorney’s client. Id. And fourth, even if these criteria are met, the court may still refuse to disqualify counsel if disqualification would work a substantial hardship on the client.

The appellant asserts that (1) [t]he evidence was neither material nor contest, (2) [t]he evidence was easily obtainable elsewhere, (3) [t]he evidence – such as it existed – was not in the least prejudicial to Sanchez. [App. Br. 32, 38, 42]. The appellant tries to dismiss the fact that Walsh and Witchley whisked the material witnesses out of state without informing the State or the court. The appellant asserts there is not conflict

because they did so for humanitarian reasons and the Yakima Police detectives eventually located the children in California. (App. Br. pg. 34).

With regards to the first criteria, the trial court noted that “Witchley has already alluded in the Sanchez brief that he believes that Mendez has perjured himself in his declaration.” The conversations that Whitchley and Freeman had with Mendez clearly went to the heart of the matter, i.e., what happened during the robbery. Clearly the evidence was material at that point in time. And if one side is accusing the other of having perjured themselves, isn’t that a contested matter.

Regarding the application of the first criteria to the Carrillo children, removal of the children who were material witnesses was “evidence of consciousness of guilt.” Such evidence would be admissible against a party opponent under ER 402. The prerule case of State v. Kosanke, 23 Wn.2d 211, 160 P.2d 541 (1945), cited by Tegland, Washington Practice, Evidence Vol. 5, § 402.7, to the proposition that “[r]elevant misconduct includes offers to bribe witnesses, other efforts to prevent witnesses from testifying. . . .” Although a prerule case, Kosanke, remains good law. Sanchez’s attorney Witchley and Walsh would have to testify in order to rebut the adverse impact that such evidence would have against Sanchez. The appellant asserts that the children’s location was not a secret from either Mendez or the prosecutor. (11-17-0 RP 69). This may

be true as of the date of the interview. But for a period of time the children's whereabouts were unknown to law enforcement. The record indicates that Witchley and Walsh did not notify the court or the State of the location to which they moved the Carrillo children. (11-17-0 RP 69).

The court noted with regard to the movement out of state of the children, "[t]he difficulty for the Court in deciding this issue is that Walsh and Witchley have thrust themselves into the case as likely witnesses. Even if the Court decided that their actions in moving the children out of state had purely humanitarian motives, the fact that they assisted them leaves the clear appearance of impropriety." Moreover, as the court found, "[t]he removal of material witnesses from this jurisdiction with the assistance of defense counsel creates an appearance that Sanchez wanted them removed, particularly his girlfriend with whom he has a child and over whom one might presume he has some influence. The Court finds that RPC 1.8(e)(1) has been violated in this case." [CP 866].

Should Mendez testify, would Witchley, even if he does not himself testify, be able to cross examine Mendez without referring to his own recollection of the meetings? Would the State not be prejudiced by

the implication to the jury that Witchley's questions represented the truth based on his personal knowledge of what had occurred.

In United States v. Basham, 561 F.3d 302, 324-325 (4th Cir. S.C. 2009), a case that is similar to that of the present, the court stated:

On appeal, Basham argues vehemently that the district court abused its discretion in disqualifying his attorneys. In *Wheat*, the Supreme Court established the general rule that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 U.S. at 163. In response to concerns that the Government may attempt to "manufacture" conflicts of interest to remove able counsel, the Court responded, "trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of decision." *Id.* Thus, while recognizing "a presumption in favor of petitioner's counsel of choice," the *Wheat* Court found that such a "presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.* at 164 (emphasis added). And, "[t]he evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Id.* A district court is free to disqualify counsel even if the defendant is willing to waive a conflict of interest because of the judiciary's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160.

Following *Wheat*, we have upheld a district court's decision to disqualify counsel who had previously represented a witness at his current client's trial, *United States v. Williams*, 81 F.3d 1321, 1324-25 (4th Cir. 1996), and reversed for abuse of discretion a district court's failure to disqualify counsel who had represented the prosecution's "star witness" in a prior trial, *Hoffman v. Leeke*, 903 F.2d 280, 288-90 (4th Cir. 1990). We have made clear that HN12a

district court "must have sufficiently broad discretion to rule without fear that it is setting itself up for reversal on appeal" if it disqualifies counsel. *Williams*, 81 F.3d at 1324. And, "a district court has an obligation to foresee problems over representation that might arise at trial and head them off beforehand." *United States v. Howard*, 115 F.3d 1151, 1155 (4th Cir. 1997).

On balance, we cannot say that the district court abused its discretion in disqualifying Littlejohn and Monckton. Basham focuses on the fact that the district court later found the statements inadmissible, but that perspective overlooks a district court's ability to disqualify counsel in cases where the "potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 U.S. at 163. Although the district court eventually declined to admit the statements, there remained throughout the trial the possibility that Littlejohn could be called to testify. Moreover, if Littlejohn had remained as counsel, the potential remained that Basham could later argue that Littlejohn tried the case to avoid testifying in a way that would be prejudicial to Basham. As the district court explained: [O]ne could imagine a scenario in which Basham could argue that the court erred by keeping the original attorneys on the case, because once they knew they were in the case to stay, Littlejohn and Monckton would attempt to marshal the evidence and try the case in such a way as to ensure that their statements could not be an issue in the case. In other words, Basham could argue that his original attorneys had a vested interest in trying the case a certain way so as to minimize the possibility, however remote, that they might be called to testify.(J.A. at 3405.) In addition, the district court was also faced with Basham's statement that he had not authorized Littlejohn to make those disclosures to the investigators.

In sum, *Wheat* and our own precedent counsel deference to the district court in this area, particularly in anticipating potential conflicts before they come to bear. The district court held hearings, invited an expert witness to testify, and carefully considered the arguments on both sides before disqualifying Littlejohn and Monckton. In such circumstances, we cannot say that it abused its discretion.

The trial court primarily relied upon the case of Gonzalez v. State of Texas, 117 S.W. 3d 831, 837 (2003), which held:

If counsel were to have testified, the State would have been prejudiced not only by the undue weight jurors might have attach to counsel's testimony, but also by the confusion that would most likely have resulted during argument regarding whether counsel was summarizing evidence or further testifying as to personal knowledge. However, even if attorney Gonzalez did not testify, but referred to his own recollection of the events through cross-examination, the State would have been prejudiced by the implication to the jury that his questions represented the truth based on his personal knowledge of what had occurred. The State would have been prejudiced by the inability to clarify counsel's testimony and impeach counsel's credibility. Counsel's personal knowledge regarding the conversations with the State's witness would have affected the jury's perspective, not only on the witness tampering issue, but also on the credibility of the State's key witness against appellant regarding the facts of the charged crime. Therefore, the confusion resulting from counsel's dual roles would most likely have substantially affected the jury's verdict. If the confusion were such that it would have prevented an impartial verdict from being reached, it could have resulted in a mistrial, as the State argued.

The trial court herein, in the Order for Sanctions, noted that the Gonzalez court, in rejecting the appellant's arguments, stated:

However, even if the State had not met its burden, the trial court has an independent duty to ensure criminal defendants receive a fair trial that does not contravene the Sixth Amendment's central aim of providing effective assistance of counsel once issues are raised that indicate a concern. Counsel's dual role may also have prejudiced the defendant, especially if the State effectively impeached attorney Gonzalez on the stand. At the hearing for disqualification, the State discussed some evidence it intended to introduce, if necessary, to impeach counsel's credibility. For all these reasons, we find the court of appeals did not incorrectly analyze the actual prejudice requirement in making its determination. Appellant's second contention is overruled.

Gonzalez, supra at 840-41.

The appellant attempts to distinguish the facts in Gonzalez with those of the present case, but fails to differentiate the basic allegation of misconduct to the misconduct alleged in the present case. But as the trial court pointed out in the Order on Motion for Sanctions, “[w]ith respect to the Carrillo children, once the issue of bias or improper influence or witness tampering is raised, how else (or who else) is available to testify the “Nobody’s hiding anything” except Walsh and Witchley” The children are not shown to have knowledge of the financial arrangements or why they were removed from the State of Washington. The children are not shown to know what Walsh and Witchley knew about the consequences of their likely testimony when they were moved.” (CP 869).

As the court stated in citing Gonzalez, supra at 841-42, “[c]ounsel’s dual role may also have prejudiced the defendant, especially if the State effectively impeached attorney Gonzalez on the stand. At the hearing for disqualification, the State discussed some evidence it intended to introduce, if necessary, to impeach counsel’s credibility. Just as in Gonzalez, the State herein would have inquired of the Yakima Police detectives as to the efforts they undertook to locate the Carrillo children,

and the discovery that defense counsel whisked the children away without any notice.

The appellant has failed to show that the trial court abused its discretion in disqualifying defense counsel. The trial court's decision was not one made arbitrarily or capriciously.

**B. THE TRIAL COURT'S ORDER DID NOT IMPERMISSIBLY INTRUDE INTO SANCHEZ'S SIXTH AMENDMENT RIGHT NOR DID IT VIOLATE HIS RIGHT TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.**

Even if he had hired his own attorney, and could hire the attorney of his choice, the trial court still has supervisory power and a responsibility to ensure that lawyers before it comply with all ethical rules, including those barring conflicts of interest. RPC 3.7. In Wheat v. United States, the Supreme Court explained the judiciary's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Thus, a trial court may disqualify a defendant's chosen counsel, even if a defendant expressly waives any conflict of interest. *Id.* at 162. While the court should recognize "a presumption in favor of petitioner's counsel of choice," this "presumption may be overcome not only by a demonstration

of actual conflict but by a showing of a *serious potential for conflict*." See also United State v. Basham, 561 F.3d 302, 323 (4<sup>th</sup> Cir. 2009).

The trial court properly found that there was both the "serious potential for conflict" as it related to the Mendez interviews by Witchley and Freeman, but also the *actual* conflict as to the actions relating to the movement of the Carrillo children out of state by Walsh and Witchley. (CP 871). These findings, supported by the record, clearly permit the court to disqualify those attorneys in order to safeguard the appellant's Sixth Amendment right to have conflict free counsel, but also, as the court noted, "[a]lthough a party's choice of counsel is important, it "is secondary in importance to preserving the integrity of the judicial process, maintaining the public confidence in the legal system and enforcing the ethical standards of professional conduct." Koch v. Koch Indus., 798 F. Supp. 1525, 1530 n.2 (D. Kan. 1992)." (CP 872).

C. THE TRIAL COURT DID NOT VIOLATE SANCHEZ'S RIGHT TO BE PRESENT NOR THE GUARANTEE OF A PUBLIC TRIAL UNDER THE SIXTH AMENDMENT OR ARTICLE 1, SECTIONS 10 AND 22 OF THE WASHINGTON STATE CONSTITUTION, BY MEETING WITH THE DIRECTOR OF ASSIGNED COUNSEL FOR YAKIMA COUNTY OUTSIDE THE COURTROOM.

1. Sanchez's exclusion from the meeting regarding appointment of new counsel did not violate his state and federal constitutional right to be present at a critical stage of the proceedings.

The appellant claims that he was denied his right to be present pursuant to the Sixth Amendment and/or Article 1, Section 10, or alternatively under the public trial right under the Sixth Amendment and/or Article 1, Section 22. The event to which the appellant claims he was entitled to be present at was a meeting between the trial judge and the director of the County Department of Assigned Counsel. The meeting was in order for the director to give the judge an update on the effort in obtaining new counsel for the appellant. (12-21-06 RP 18-19).

Under the confrontation clause of the Sixth Amendment, and the due process clause of the Fourteenth Amendment, a criminal defendant has the right to be present during all critical states of criminal proceedings. State v. Wilson, 141 Wn. App. 597, 603-604, 171 P.3d 501 (2007). A critical state is one in which there is a possibility that a defendant is or would be prejudiced in the defense of his case. Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 91 (1968). “[D]ue process requires that a defendant be allowed to be present ‘to the extent that a fair and just hearing would be thwarted by his absence. . . .’” State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (quoting Snyder v. Massachusetts, 291 U.S. 97, 108, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). This right is limited, however, when the defendant’s “presence would be useless, or the benefit but a shadow.” Rice, 110 Wn.2d at 616 (quoting Snyder, 291 U.S. at

106-107). “The core of the constitutional right to be present at all critical stages of the proceedings is the right to be present when evidence is being presented or whenever a defendant’s presence has “a relation, reasonably substantial,’ to the fulness [sic] of his opportunity to defend against the charge.” State v. Corbin, 79 Wn. App. 446, 449, 903 P.2d 999 (1995) (quoting *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)).

“The right to be present at every stage of trial does not confer upon the defendant the right to be present at every conference at which a matter pertinent to the case is discussed, or even at every conference with the trial judge at which a matter relative to the case is discussed. See *United States v. Howell*, 514 F.2d 710, 714 (5th Cir.), cert. denied, 423 U.S. 914, 96 S. Ct. 220, 46 L. Ed. 2d 143 (1975). In *Howell*, the Court stated that the defendant had no right to be present at a conference with the judge and a juror on the subject of the attempted bribery of the juror, or at an in camera conference with the judge and all counsel in the case at which the earlier conference was discussed. *Id.* The Court concluded that these in camera conferences were not critical stages in the trial proceedings and therefore the defendant had no right to be present. *Id.*; see also *United States v. Jorgenson*, 451 F.2d 516, 521 (10th Cir.1971), cert. denied, 405 U.S. 922, 92 S. Ct. 959, 30 L. Ed. 2d 793 (1972) (defendant has no right to be present at in camera conference on evidentiary matters when his lawyer

was present at the conference). Similarly, we conclude that a bench conference, attended by appellant's counsel and called to discuss an evidentiary matter relative to appellant's own cross-examination, is not a critical stage of the trial proceedings at which appellant has a right to be present.” United States v. Vasquez, 732 F.2d 846, 848-849 (11th Cir. Fla. 1984).

In State v. Corbin, supra at 449, the court held that “a defendant does not have a right to be present, for example, during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts. n1 Lord, 123 Wn.2d at 306 (citing United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857, 34 L. Ed. 2d 102, 93 S. Ct. 140 (1972)); People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992)).” The Corban case is probably the closest case to the facts presented in the present case, and even then it is different in the timing of the event complained of. Corban involved the defendant therein being left out of a post trial entry of findings of fact conference. Whereas, the complained of discussions that the appellant herein grieves being left out of, relates to the issue of appointment of new counsel for defendant for which he would have nothing to add to those discussions.

In State v. Rooks, 130 Wn. App. 787, 800, 125 P.3d 192 (2005), the court was presented with a similar situation, dealing with the defendant being excluded from an in-chambers conference to address his attorneys' motion to withdraw based on a conflict of interest. There, the court held that “ the in-chambers hearing was not a critical stage of the proceedings at which Rooks had a right to be present because, as a matter of law, Rooks' attorneys had a conflict of interest requiring withdrawal.”

Additionally, under Criminal Rule 3.4 PRESENCE OF THE DEFENDANT , wherein the court rule states:

- (a) When Necessary. The defendant shall be present at the arraignment, at every state of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

The situation complained of does not even come within the perimeters of the court rule regarding presence of the defendant. There is nothing in the discussions that the trial court and the director of Assigned Counsel had that could in any way be argued to be within the rule. Although it was post arraignment, it was a fact finding hearing, in fact, it wasn't even reported as part of the case record. It had nothing to do with empaneling

the jury, fact finding or return of the verdict. The trial court ruled against Garcia and as is the standard in this type of action the trial court will only be overturned if there is a showing that the court abused its discretion. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The decision of the trial court to not to have Sanchez involved in the discussion was one of discretion. The court did not abuse its discretion. The actions of the trial court should not be overturned without a showing that there was a manifest abuse of discretion. In State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001), the court held:

An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

2. The in-chambers meeting did not violate the state and federal constitutional right to a public trial.

The trial court's meeting with the director of assigned counsel regarding the progress in finding replacements for disqualified counsel

was not a proceeding in which the “open administration of justice” provision of Article 1, Section 10 of the Washington State Constitution is applicable.

In Cohen v. Everett City Council, 85 Wn.2d 385, 389 (1975), the court analyzed the issue as follows: “we must determine whether the trial court's action in this case had reached a stage where justice was being “administered” and therefore constitutionally required to be open.” The Cohen court held that “[t]he trial court's review of the proceedings of the city council's action was a review of the transcript of those proceedings. That was the record before the court; in essence that record was the equivalent of testimony. As such it became public property. In the usual case, testimony cannot be taken in or kept secret. Once the court reached the merits of the controversy, the testimony -- transcript -- had to be part of the public record. While the purpose of the trial court was laudable, there was no statutory basis for its action, and we conclude that the court's reasons for secret adjudication in this matter are not of sufficient public importance to justify exception to the requirement of Const. art. 1, § 10.

What constitutes “administration of justice”? The Cohen court found it when the court was deciding the merits of a controversy. Cohen v. Everett City Council, supra at 389. In the case at hand, the trial

judge was not deciding the merits of a controversy, he was merely collecting information regarding the appointment of new counsel for the appellant, which didn't involve deciding on any issue, thus it did not constitute the "administration of justice."

D. THE TRIAL COURT PROPERLY ADMITTED THE IDENTIFICATION OF SANCHEZ BY MICHELLE KUBLIC.

A. Standard of Review.

"Admission of a photo identification or a photomontage is, reduced to its essence, the admission of evidence in a criminal case. *See State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961). It should therefore be subject to the sound discretion of the trial court. *State v. Harris*, 97 Wn. App. 865, 870, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017 (2000). And the test, a deferential test, is whether there are tenable grounds or reasons for the trial court's decision. *Id.*" *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001).

B. Argument

1. The trial court did not abuse its discretion in find that the photographic identification procedures used in this case were not impermissible suggestive.

"An out-of-court photographic identification meets due process requirements if it is not so impermissibly suggestive as to create a substantial

likelihood of irreparable misidentification. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984)), review denied, 140 Wn.2d 1027, 10 P.3d 406 (2000); *State v. Weddel*, 29 Wn. App. 461, 476-77, 629 P.2d 912 (1981). Vickers bore the burden of first showing that the procedure was impermissibly suggestive. *Linares*, 98 Wn. App. at 401 (citing *Vaughn*, 101 Wn.2d at 604). When a defendant fails to show impermissible suggestiveness, the inquiry ends. *Vaughn*, 101 Wn.2d at 609-10. n10” *State v. Vickers*, 107 Wn. App. 960, 967 (2001).

“An out-of-court photographic identification violates due process if it is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." To establish a violation, Petitioner Paul Vickers bears the burden of showing that the identification procedure was impermissibly suggestive. If he fails, the inquiry ends. If he proves the procedure was suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.” (Citations omitted). *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

The appellant tries to reargue the matter before this court those same points that the trial court heard and held otherwise. The trial court determined that Detectives Cortez or Kellett did not do anything that would

be construed as unduly suggestive. (10-11-2007 RP 654). The trial court noted that there was nothing about the pictures shown to Ms. Kublic, such as the background, that would be suggestive. There was nothing by what was said by the officers, such as pointing out the suspect, that was suggestive. (10-11-2007 RP 655). The trial court further stated that although the police did not administer an admonition with each demonstration of an array, and that Detective Kellett, as lead detective, knew there was a suspect and knew that the Sanchez had been arrested, there is no indication that he told that to Ms. Kublic in an effort to get her to pick Sanchez out of the photo array. (10-11-2007 RP 655).

The court, in deciding that the identification procedures were not suggestive, considered the events that transpired in a practical way. (10-11-2007 RP 652). The trial court took into consideration what the police were dealing with. The witness, Ms. Kublic, “had not only witnessed the death of her husband and perhaps her three year old daughter, but who had been severely injured herself with three gunshot wounds, including one that passed through her neck and exited her jaw, shattering the jaw. I believe the court can clearly draw the inference that she was severely wounded and in pain and that she was under medication that was probably sedative in nature.” (10-11-2007 RP 655).

The court further described the identification procedure, stating that

she described and differentiated between two suspects. The court also thought that at the time she made the description she may not have been competent to do so considering her health at the time. (10-11-2007 RP 653). The court relied upon the case of U.S. v. Peel, 574 F.2d 489, 491 (9<sup>th</sup> Cir. 1978), which examined whether the witness's mind has been "so clouded by suggestions from non governmental sources that a conviction based primarily on the testimony of that witness violates due process."

In Peele, supra, the court held that "it was not error for the court to permit the witness to testify on direct, leaving questions relating to the allegedly suggestive influences to be explored by defense counsel on cross-examination. Only where there is grave doubt as to the admissibility of the witness' testimony would it be necessary to consider whether a hearing on the preliminary question of competency should be held outside the presence of the jury, and even this determination lies largely within the discretion of the trial court."

The action of publishing the defendant's picture in the newspaper and posting it on the wall of the convenience store was the result of nongovernmental action. The decision to publish was determined by the staff of the newspaper. In United States v. Zeiler, 470 F.2d 717, 720 (3d Cir. 1972), the court held:

When, as in the present case, there is no evidence that law

enforcement officials encouraged or assisted in impermissible identification procedures, the proper means of testing eyewitness testimony is through cross-examination. n3 The credibility of witnesses' subsequent identifications can be weighed by the jury in light of the witnesses' statements as to their reactions to television or newspaper pictures. The danger that the jury may give undue weight to eye-witnesses' testimony can be further guarded against by appropriate jury instructions. n4

In State v. Bundy, 455 So. 2d 330, 343-44 (1984) the Florida

Supreme Court stated:

We also find that Ms. Neary's having seen pictures of Bundy in the newspaper did not render the identification procedure impermissibly suggestive. Some courts have held that the holding in *Simmons*, that a photographic identification will not be admissible where the procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, does not apply to situations where a witness had earlier observed a picture of the defendant in the news media. *United States v. Peele*, 574 F.2d 489 (9th Cir. 1978); *United States v. Zeiler*, 470 F.2d 717 (3d Cir. 1972); *Stroud v. State*, 246 Ga. 717, 273 S.E.2d 155 (1980); *Norris v. State*, 265 Ind. 508, 356 N.E.2d 204 (1976); *Sanders v. State*, 612 P.2d 1363 (Okla. Crim. App. 1980). Others have found that there was not a substantial likelihood of misidentification where, as in this case, the witness asserted that seeing the suspect's picture in the news media did not influence his or her identification. *United States v. Grose*, 525 F.2d 1115 (7th Cir. 1975), *cert. denied*, 424 U.S. 973, 47 L. Ed. 2d 743, 96 S. Ct. 1477 (1976); *United States v. Boston*, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001, 44 L. Ed. 2d 669, 95 S. Ct. 2401 (1975); *United States v. Milano*, 443 F.2d 1022 (10th Cir.), *cert. denied*, 404 U.S. 943, 30 L. Ed. 2d 258, 92 S. Ct. 294 (1971); *Fitchard v. State*, 424 So.2d 674 (Ala. Crim. App. 1982).

In the present case there is nothing to suggest that that law enforcement attempted to influence the witness through the use of the newspaper's publishing of the defendant's photograph. The trial court

recognized this by stating “[i]t would be absurd for a court to impose upon law enforcement an obligation to make sure that no news coverage went out or that a witness or witnesses didn’t view such coverage.” (10-11-07 RP 655).

The trial court, citing U.S. v. Briggs, 700 F.2d 408 (1983) and Johnson v. McCaughtry, 92 F.3d 585, 597 (7th Cir. 1996), stated “[t]he fact that eye witnesses to an occurrence cannot make a positive identification of an individual from an examination of photographs of a number of persons does not necessarily detract from the validity of their in-court identification where they see the individual in person. The weight to be given to their in-court identification is for the jury to determine.” (10-11-10 RP 656).

2. The appellant’s claims of suggestiveness in the photomontage procedure do not rise to the level of a due process violation under either state or federal law.

The appellant relies on the criticisms of the police procedures by their expert witness Robert Shomer. Shomer opined that each time a witness is asked to make an identification an admonition should precede the showing of a montage or a lineup. (App. Br. pg. 69). This criticism is unjustified since the testimony of Detectives Cortez and Kellett was that they did admonish Ms. Kublic every time they showed her photomontage or array. (10-03-07 RP 99-100). Second, that the entire session should be recorded for future forensic examination. (App. Br. pg. 70). This claim is meritless

since has nothing to do with the witness and is speculative at best. Furthermore, the detectives did document their contacts with Ms. Kublic in their reports. (10-03-07 RP 83; 10-03-07 RP 162).

Third, that the procedure should be conducted using a double blind process. (App. Br. pg. 70). In point of fact, Detective Cortez did not know that Jose Sanchez was a suspect at the time he showed the photomontage to Ms. Kublic which contained Sanchez's picture in it. (10-03-07 RP 172). The only non-double blind was the sequential photo array which was shown by Detective Kellett to Ms. Kublic. However, there was no identification of Sanchez by Ms. Kublic out of the sequential photo procedure. She did pick out co-defendant Mendez, who was placed in the #3 position. (10-03-07 RP 187).

Shomer also opined that the initial description serves as a baseline, and demonstrates how the witness has processed the information. (Ap. Br. 70). The appellant argues the combination of view Sanchez in a simultaneous montage, then in the "improperly-administered" serial montage, then in a newspaper clipping, and finally in the news media, "irrevocably tainted Kublic's memory of the primary suspect." (App. Br. 71). What Shomer wasn't able to testify to was the effect of the physical and emotional trauma that Ms. Kublic suffered as a result of the assault.

The appellant argues that the procedures utilized by the Yakima

police were “unduly suggestive.” (App. Br. pg. 77). The trial court ruled otherwise and was presented with everything which the appellant has argued in their brief. The appellant argues that the research demonstrates a “systemic problem with procedures utilized by law enforcement agencies as well as the innate limitations of human memory, and as a result both the American Psychology and Law Society and the United States Justice Department have published guides to reform the way the criminal justice system approaches eyewitness identifications.

However, there is contrary research regarding such methodology. In State v. Marquez, 291 Conn. 122, 153-156, 967 A.2d 56 (2009) the court concluded:

the scientific evidence regarding the value of sequential procedures is more nuanced and uncertain than portrayed by the defendant, and, therefore, it cannot definitively answer the question of whether the procedures used in this case were unnecessarily suggestive. n29 For instance, the research indicates that, in multiple perpetrator scenarios, the use of sequential identification procedures may not be advisable, or even practical: “[I]f multiple perpetrators were involved in the crime and more than one suspect is to be shown to the witness, it is not clear how a sequential procedure should be used, and traditional methods have not been shown to be inferior in such cases.” J. Turtle, R. Lindsay & G. Wells, *supra*, 1 Canadian J. Police & Security Serv. 5. In this case, for example, the detectives knew from eyewitness statements that the robbery had been committed by two individuals. As a result, the value of using a sequential procedure is at least questionable. Moreover, although the scientific community recommends the use of a double-blind identification procedure, and such a procedure has intuitive appeal, we never have held that the failure to use such a procedure carries such a substantial risk of misidentification that its use must be required to avoid unnecessary

suggestiveness.n30

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n29 The defendant's contrary contention notwithstanding, it is appropriate for this court to engage in close scrutiny of the scientific evidence presented to the trial court; see *State v. Ledbetter*, supra, 275 Conn. 568; and to review the legal conclusions drawn from such evidence de novo. See *State v. Porter*, 241 Conn. 57, 94-95, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). The defendant's citation to our opinion in *Schoonmaker v. Cummings & Lockwood of Connecticut, P. C.*, 252 Conn. 416, 747 A.2d 1017 (2000), simply does not support his proposition that our review of this evidence would constitute "an unwarranted interpretation of the evidence before the trial court."

n30 For instance, in a case very similar to the present case, both factually and in terms of the claims raised, the Appellate Court concluded, rather persuasively, that, "[g]iven the limited number of studies on the subject [at that time], [the court is] not convinced . . . that [the] state constitution requires . . . [the] adopt[ion] [of] double-blind, sequential identification procedures because the traditional procedures are unnecessarily suggestive." *State v. Nunez*, supra, 93 Conn. App. 832; see also *State v. Nieves*, 106 Conn. App. 40, 50, 941 A.2d 358 ("[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure"), cert. denied, 286 Conn. 922, 949 A.2d 482 (2008). As we have noted in this opinion, we are convinced that the research is even more unsettled today in light of the introduction of the Mecklenburg Report and the other field reports cited therein. See *S. Mecklenburg*, supra, pp. 42-43 (referring to field studies conducted in Hennepin County, Minnesota, and Queens, New York).

Upon consideration of the scientific literature, we conclude that one thing is clear, namely, that the judgment of the relevant scientific community with respect to eyewitness identification procedures is far from universal or even well established, and that the research is in great flux. n31 Indeed, when the reported research was seemingly more uniform, we still found that "[t]he scientific studies are not definitive." n32 *State v. Ledbetter*, supra, 275 Conn. 568. The more recent research offered by the state muddies the water further and

only confirms this view. Thus, this continues to be an issue particularly ill suited to generic, bright line rules. Indeed, we repeatedly have insisted that this inquiry be made on an ad hoc basis, and we affirm that the courts of this state should continue to evaluate "whether individual identification procedures are unnecessarily suggestive on the basis of the totality of the circumstances surrounding the procedure, rather than replacing that inquiry with a per se rule." *Id.*, 574. We agree with the Appellate Court that, until the scientific research produces more definitive answers with respect to the effects of various procedures, "[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure." *n33 State v. Smith*, 107 Conn. App. 666, 674, 946 A.2d 319, cert. denied, 288 Conn. 902, 952 A.2d 811 (2008).

Such is the situation in the case at hand. There were two perpetrators of the robbery/murder of Ricky Causor and his daughter Meya. Detective Kellett included both suspects in the sequential photo compilation. This resulted in Ms. Kublic to focus on the first suspect that she saw, #3 Mario Mendez. (10-03-07 RP 164).

In *State v. Outing*, 298 Conn. 34, 49-50, 3 A.3d 1 (Conn. 2010), the court held that:

A simultaneous photographic array is not unnecessarily suggestive per se, however, even if it was not administered in a double-blind procedure. See *State v. Marquez*, supra, 291 Conn. at 143 ("to be unnecessarily suggestive, variations in array photographs must highlight [the] defendant to [the] point that it affects [the] witness' selection"); *id.*, 144 ("[a] procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police" [internal quotation marks omitted]); see also *State v. Ledbetter*, supra, 275 Conn. at 574 ("the trial courts should continue to determine whether individual identification procedures are unnecessarily suggestive on the basis of the totality of the circumstances

surrounding the procedure, rather than replacing that inquiry with a per se rule").

In Marquez, *infra*, the court noted that in an article referenced by the appellant therein, found in Canadian Journal of Police and Security Services. J. Turtle, R. Lindsay & G. Wells, "Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case," 1 Canadian J. Police & Security Serv. 5 (2003)

The article cites studies indicating that, although simultaneous identification procedures are three times more likely to yield misidentifications than sequential procedures, sequential procedures also yield lower correct identification rates than simultaneous procedures. Moreover, the article highlights a number of circumstances in which the use of a sequential procedure "may be no better or even worse than the traditional simultaneous line-up." Such circumstances include (1) identifications by child witnesses, who can become confused by a sequential procedure, (2) scenarios in which a witness is asked to identify multiple perpetrators, and (3) situations involving "cross-race identifications," in which a witness is asked to identify a person of a different race. Although the authors of this article clearly advocate the use of sequential procedures generally, the authors nevertheless conclude that "the sequential line-up has not been demonstrated to show its superiority under these conditions and, in fact, some data exist suggesting that there may be some disadvantage to using the procedure under these conditions. Until more and better data are available, we do not recommend using sequential line-ups in these particular situations."

State v. Marquez, 291 Conn. at 149-150.

The state offers two documents presumably intended to highlight the lack of scientific consensus in the eyewitness identification field. The first document, which was a report to the Illinois legislature; see S. Mecklenburg, Report to the Legislature of the

State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures (2006) (Mecklenburg Report); was the product of a year long pilot program conducted at three police departments in the Chicago area. n24 The results of this field study, which the author [\*152] characterized as surprising, were that "sequential, double-blind procedures resulted in an overall higher rate of known false identifications than did the simultaneous lineups." n25 (Emphasis in original.) Id., p. iv. The author concluded that "the sequential, double-blind method [could not] be regarded as superior to the simultaneous [\*\*\*50] method"; id., p. 64; and emphasized the need for further study. Id., p. 65. n26

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n24 The pilot program was designed to compare the effectiveness of the sequential, double-blind method with the traditional, nonblind (or, more accurately, single-blind) simultaneous lineup procedure. See S. Mecklenburg, *supra*, p. ii. In her concurrence, Justice Katz claims that "the conclusions [of the Mecklenburg Report] have been discredited as the product of an unsound, unscientific methodology that does not support the conclusions reached therein." We believe that this is an overblown and inaccurate assessment of the criticism of the report. Although some commentators have sharply criticized the methodologies employed in the report, at least one prominent researcher in the field has recognized that "partisans on both sides of the debate over procedures have unfairly dismissed some criticism and praise of the . . . [r]eport as reflecting nothing more than the scientific commentators' stubborn loyalty to their own preexisting beliefs." D. Schacter et al., "Policy Forum: Studying Eyewitness Investigations in the Field," 32 *Law & Hum. Behav.* 3, 4 (2007). Other prominent academics in the field, commenting [\*\*\*51] on the debate surrounding the supposed inadequacies of the report, have declared: "Given that there is so much left unresolved we believe it premature to advocate policy change, especially since the policy communities are so dispersed and since psychological science will both take a black eye and have difficulty implementing alternative policies if current advocacy is found to be incorrect, oversold or both." S. Ross & R. Malpass, "Moving Forward: Response to 'Studying Eyewitness Investigations in the Field,'" 32 *Law & Hum. Behav.* 16, 17 (2007). The same authors opined that the purported

methodological flaw was not particularly important, in light of the purposes of the Mecklenburg Report: "After carefully examining the arguments and the available research, we find little evidence that the blind confound is important even for an academic interpretation of the Illinois study." *Id.* Thus, we think it is hyperbole to state that the Mecklenburg Report has been "discredited" [\*\*\*52] or that its conclusions are unsupported. We believe the very controversy and debate engendered by this report is but further evidence that all of the research in this area must be taken with a substantial dose of salt.

n25 The author of the report also collected and analyzed surveys from officers in the field, highlighting practical challenges in implementing the procedures.

n26 In the appendix to his reply brief, the defendant included an article that is highly critical of the methodologies employed in the Mecklenburg Report. That article calls for further, better designed field studies and recognizes that "[a] standoff has arisen" in the field. See D. Schacter et al., "Policy Forum: Studying Eyewitness Investigations in the Field," 32 *Law & Hum. Behav.* 3, 4 (2007).

The second document that the state submits is a 2006 article from *Psychology, Public Policy, and Law*. See D. McQuiston-Surrett, [\*\*76] R. Malpass & C. Tredoux, "Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory," 12 *Psychol., Pub. Policy & L.* 137 (2006). In this article, written after the release of the Mecklenburg Report, the authors maintain some reservations about the methodologies and significance of that report but nonetheless conclude that "the literature concerning [simultaneous lineups] versus [sequential lineups] may be underdeveloped in some important ways . . ." *Id.*, 141. In addition, "the research base for [sequential lineups] may not be sufficiently developed from a methodological or theoretical point of view to . . . advocate for its implementation to the exclusion of other procedures." *Id.*, 162. n27

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n27 This article also highlights the inherent uncertainty in laboratory studies in which many aspects of the study methodology that may significantly impact results are unknown or underreported. See McQuiston-Surrett, R. Malpass & C. Tredoux, *supra*, 12 *Psychol.*,

Pub. Policy & L. 160-61.

Presented with the foregoing research, the trial court considered several factors in determining that the procedures used in this case were unnecessarily suggestive. First, the court concluded, in the abstract, that "the simultaneous showing of all photo[graphs] to each witness on a single . . . board created an unnecessary risk of producing irreparable misidentifications by enabling the witnesses to make side-by-side comparisons of the photo[graphs], and thus to select one of them simply by eliminating [\*\*\*54] all the others in an unreliable exercise of relative judgment." The court based this judgment on the "unchallenged findings of the scientific research studies . . . ." n28

The Marquez court concluded by hold that:

Upon consideration of the scientific literature, we conclude that one thing is clear, namely, that the judgment of the relevant scientific community with respect to eyewitness identification procedures is far from universal or even well established, and that the research is in great flux. <sup>n31</sup> Indeed, when the reported research was seemingly more uniform, we still found that "[t]he scientific studies are not definitive." <sup>n32</sup> *State v. Ledbetter*, supra, 275 Conn. 568. The more recent research offered by the state muddies the water further and only confirms this view. Thus, this continues to be an issue particularly ill suited to generic, bright line rules. Indeed, we repeatedly have insisted that this inquiry be made on an ad hoc basis, and we affirm that the courts of this state should continue to evaluate "whether individual identification procedures are unnecessarily suggestive on the basis of the totality of the circumstances surrounding the procedure, rather than replacing that inquiry with a per se rule." *Id.*, 574. We agree with the Appellate Court that, until the scientific research produces more definitive answers with respect to the effects of various procedures, "[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure." <sup>n33</sup> *State v. Smith*, 107 Conn. App. 666, 674, 946 A.2d 319, cert. denied, 288 Conn. 902, 952 A.2d 811 (2008).

State v. Marquez, 291 Conn. 122, 155-156 (Conn. 2009).

In this case, there is insufficient evidence that the two photographic identification procedures utilized by the police created a substantial likelihood of irreparable misidentification. Therefore, based upon the above cases, the inquiry should end and the defendant's motion should be denied.

3. The action relating to news media accounts or private citizen conduct did not involve state action and thus cannot support a due process violation.

In this case, there is no identification based upon the two photographic identification procedures utilized by the police. Without law enforcement involvement in the identification procedure, there cannot be a due process violation. Absent government action there is no due process violation by conduct of private citizens under either the U.S. Constitution's Fourteenth Amendment and the Washington State Constitution due process protection. State v. McCullough, 56 Wn. App. 655, 658-59, 784 P.2d 566 (1990).

In United State v. Peele, 574 F.2d 489, 491 (9<sup>th</sup> Cir. 1978), the court held that "it was not error for the court to permit the witness to testify on direct, leaving questions relating to the allegedly suggestive influences to be explored by defense counsel on cross-examination. Only where there is grave doubt as to the admissibility of the witness' testimony would it be necessary to consider whether a hearing on the preliminary question of competency should be held outside the presence of the jury, and even this

determination lies largely within the discretion of the trial court.”

The action of publishing the defendant’s picture in the newspaper was the result of nongovernmental action. The decision to publish was determined by the staff of the newspaper. In *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972), the court held:

When, as in the present case, there is no evidence that law enforcement officials encouraged or assisted in impermissible identification procedures, the proper means of testing eyewitness testimony is through cross-examination. n3 The credibility of witnesses' subsequent identifications can be weighed by the jury in light of the witnesses' statements as to their reactions to television or newspaper pictures. The danger that the jury may give undue weight to eye-witnesses' testimony can be further guarded against by appropriate jury instructions. n4

In *State v. Bundy*, 455 So. 2d 330, 343-44 (1984) the Florida

Supreme Court stated:

We also find that Ms. Neary's having seen pictures of Bundy in the newspaper did not render the identification procedure impermissibly suggestive. Some courts have held that the holding in *Simmons*, that a photographic identification will not be admissible where the procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, does not apply to situations where a witness had earlier observed a picture of the defendant in the news media. *United States v. Peele*, 574 F.2d 489 (9th Cir. 1978); *United States v. Zeiler*, 470 F.2d 717 (3d Cir. 1972); *Stroud v. State*, 246 Ga. 717, 273 S.E.2d 155 (1980); *Norris v. State*, 265 Ind. 508, 356 N.E.2d 204 (1976); *Sanders v. State*, 612 P.2d 1363 (Okla. Crim. App. 1980). Others have found that there was not a substantial likelihood of misidentification where, as in this case, the witness asserted that seeing the suspect's picture in the news media did not influence his or her identification. *United States v. Grose*, 525 F.2d 1115 (7th Cir. 1975), *cert. denied*, 424 U.S. 973, 47 L. Ed. 2d

743, 96 S. Ct. 1477 (1976); *United States v. Boston*, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001, 44 L. Ed. 2d 669, 95 S. Ct. 2401 (1975); *United States v. Milano*, 443 F.2d 1022 (10th Cir.), *cert. denied*, 404 U.S. 943, 30 L. Ed. 2d 258, 92 S. Ct. 294 (1971); *Fitchard v. State*, 424 So.2d 674 (Ala. Crim. App. 1982).

In the present case there is nothing to suggest that that law enforcement attempted to influence the witness through the use of the newspaper's publishing of the defendant's photograph. Likewise there is nothing presented by the defense that raise a grave doubt that the witness's identification was influenced by observing the defendant's photograph in the newspaper.

4. Assuming state action is not necessary to establish a due process violation, in any event the appellant fails to establish that the newspaper view was so impermissibly suggestive that there is a substantial likelihood of misidentification.

The defendant contends that the observation of his photograph in the local newspaper by the witness was impermissibly suggestive and violated his due process rights and his right to a fair trial. The defendant claims the identification was impermissible because the witness first made it when she saw the defendant's photograph in at a local mini mart.

The burden is on the defendant to prove that the identification was impermissibly suggestive. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990) (citing *State v. Guzman-Cuellar*, 47 Wash. App. 326, 335, 734 P.2d 966, review denied, 108 Wash. 2d 1027 (1987)).

The standards for determining the constitutionality of an in-court identification where the witness has already identified a photograph of the accused is well settled. Such an in-court identification comports with the requirements of due process unless the photographic identification process "was so unnecessarily suggestive and conducive to irreparable mistaken identification [as to deny] due process of law." Stovall v. Denno, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967) (holding that even a suggestive one-person show-up, if it appears to be necessary, does not per se violate due process). The due process evaluation must be made "based on the totality of the circumstances," *id.*, and "each case must be considered on its own facts." Simmons v. United States, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968).

A "conviction based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . only if the photographic identification was so impermissively suggestive as to give rise to a very substantial likelihood of misidentification." *Id.* The due process determination rests primarily on the issue of reliability of the identification. Watkins v. Sowders, 449 U.S. 341, 347, 66 L. Ed. 2d 549, 101 S. Ct. 654 (1981); Manson v. Brathwaite, 432 U.S. 98, 104, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977). Reliability, i.e., the likelihood of misidentification, is to be examined in the totality of the circumstances, as

determined by five primary factors: 1) the witness' opportunity to view the criminal at the time of the crime, 2) the witness' degree of attention at that time, 3) the accuracy of the witness' description prior to the suggestive line-up, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972).

The Ninth Circuit has considered an in-court identification made by a witness who had previously seen a suggestive newspaper photograph of the accused on at least two occasions, and has upheld convictions based on such identifications. See United States v. Peele, 574 F.2d 489 (9th Cir. 1978); Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1972). Peele, 574 F.2d at 490. The appellant fled from the scene of the crime in an automobile with one of two other participants in the hold-up. *Id.* During ten minutes between the time of the robbery and the time the appellant was arrested, newspaper reporters were "chasing around" the appellant and his partner, and were present at the scene of the arrest. *Id.* During the appellant's trial, the defense learned that one of the prosecution witnesses had seen at least one of the photographs taken during this time in a newspaper, and that she told prosecutors that her identification of the appellant in a police line-up

had been aided by the newspaper photo. *Id.* The Ninth Circuit upheld the conviction, stating that "[a] case might arise where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based primarily on the testimony of that witness violates due process, but that point was not approached in the instant case." *Id.* at 491 (internal citation omitted).

The *Dearinger* court reached a similar result in another bank robbery case in which key prosecution witnesses saw newspaper photographs of the suspects accompanied by detailed descriptions of the robbery prior to identifying the suspect in police line-ups. *Dearinger*, 468 F.2d at 1033. The Ninth Circuit considered the totality of the circumstances surrounding the identification, including 1) that the robbery took place in a well-lit bank, and 2) that the witnesses reported that the newspaper photographs were confusing and did not improve their ability to identify the suspects, and found "the record disclosed no basis to indicate that the prior newspaper publication had any impermissible effect on the later lineups and the in court identification." *Id.* at 1036.

While both *Peele* and *Dearinger* pre-date *Watkins v. Sowders*, and *Dearinger* also pre-dates *Manson v. Braithwaite*, and *Neil v. Biggers*, none of the subsequent Supreme Court cases calls into question the Ninth Circuit analysis. Indeed, other circuits have examined this issue more

recently and have come to similar results. See United States v. Elliott, 915 F.2d 1455, 1457 (10th Cir. 1990), cert. denied, 111 S. Ct. 2020 (1991) (upholding the admission of an in-court identification by a witness who had seen a 15-year old photograph of the accused in a local paper prior to identifying him in a police line-up); Kubat v. Thieret, 867 F.2d 351, 357 (7th Cir.), cert. denied, 493 U.S. 874 (1989) (one of several witnesses who identified appellant in police line-ups as a murderer "expressed concern that she might have recognized [the appellant's] photograph because she had seen it in a newspaper). The circuit courts considering the impact of a key prosecution witness viewing a newspaper photograph of the accused prior to making an official identification have held in each of these cases that the identification process did not violate the accused's due process rights.

Thus, under the authority of these cases, the appellant's claim has no merit. Ms. Kublic recognized the photograph of the defendant at the Exxon Mini Mart based upon her memory of the event. (10-05-07 RP 510-514). Assuming arguendo that an accidental and unofficial pretrial encounter between a witness and the accused can form the basis for a due process violation, the defendant cannot colorably argue that the photographic identification was "so impermissively suggestive as to give rise to a very substantial likelihood of misidentification," *Simmons v.*

*United States*, 390 U.S. at 384, when the totality of the circumstances are considered under the five factors set out in *Neil v. Biggers*, 409 U.S. 188 at 199, 34 L. Ed. 2d 401, 93 S. Ct. 375.

The defendant asserts that the identification procedure used in this case was impermissibly suggestive because the witness saw two photo arrays shown to her by Officer Cortez and Detective Kellett. It is true that Detective Cortez showed Ms. Kublic a photo montage and that Detective Kellett showed her a photo serial array. She had observed Sanchez photo, along with photos of others, on a bulletin board at the Exxon Food mart.

Notwithstanding the defendant's argument, these short observations of the defendant's photo do not necessarily create a substantial likelihood of irreparable misidentification. In *State v. Williams*, 96 Wn.2d 215, 224, 634 P.2d 868 (1981), the Court held that "the momentary exhibiting of the robbery-in-progress photograph was not so impermissibly suggestive as to give rise to a 'very substantial likelihood of irreparable misidentification,' *Simmons v. United States*, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968)."

5. APPLICATION OF THE BIGGERS FACTORS ESTABLISHES THE RELIABILITY OF THE IDENTIFICATION.

Under the totality of the circumstances, considering five primary factors: 1) the witness' opportunity to view the criminal at the time of the

crime, 2) the witness' degree of attention at that time, 3) the accuracy of the witness' description prior to the suggestive line-up, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972).

Applying the first factor, the witness's opportunity to view the criminal at the time of the crime, Ms. Kublic was in the appellant's presence for several minutes. From the time that he grabbed her by the hair until the time she looked back saw his face with the mean look on it, when he fired the deadly shots. The second factor, the degree of attention at the time, supports reliability. Considering the length of time that she was with the appellant, through the point in time that she fought with him over the gun at the door step, and observed him standing behind her husband with a mean look on his face when he fired the shots supports reliability.

The third factor, the accuracy of the witness' description prior to the suggestive line-up, must be viewed as a neutral factor, As the court noted, at the time Ms. Kublic made the description she may not have been competent to do so considering her health at the time. (10-11-2007 RP 653). It would not be appropriate to say one way or the other that her description was accurate or inaccurate. The fourth factor, the level of

certainty demonstrated by the witness at the confrontation, Detective Kellett did not determine her level of confidence based upon the picture she observed during the March 2, 2005 interview.

Overall, one cannot say that under all the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." Without that, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.

6. THIS COURT SHOULD LOOK AT THE OTHER EVIDENCE OF GUILT TO ESTABLISH RELIABILITY.

Assuming arguendo that the identification procedure was suggestive and that there is insufficient circumstances based upon observations of the suspect other than the improper lineup identification, the court should look at other evidence of guilt since the Brathwaite analysis is one "totality of the circumstances" as to reliability of the identification.

In U.S. v. Rogers, 73 F.3d 774 (1996), the court held that additional identification evidence diminished any likelihood of irreparable misidentification. The court concluded, "while Collins' identification of Rogers may have been tainted, we cannot say that the procedures used in

this case violated Rogers' due process rights." Rogers, supra at 778. In U.S. v. Wilkerson, 84 F.3d 692, 695 (1996), "[c]ourts may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification."

The other evidence as it relates to the identity of the killer can be found in the testimony of Mario Mendez, identifying Jose Sanchez as the killer, establishing the reliability of the identification by Ms. Kublic. (11-26-07 RP 1678). Another piece of evidence of guilt is the .45 Kimber discovered at the Carrillo residence that was determined to be the murder weapon, that was identified by Roberta Carrillo as belonging to the appellant. (11-20-07 RP 1457; 11-20-07 RP 1467; 11-26-07 RP 1628). And third, the defendant owned a blue pickup truck which was consistent with the description of the getaway vehicle. (11-13-07 RP 789-90; 11-14-07 RP 816).

7. INDEPENDENT STATE PROVISION DOES NOT SUPPORT BROADER INTERPRETATION THAN FEDERAL COUNTERPART.

In State v. E.J.Y., 113 Wn. App. 940, 951 (2002), the court held that "Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment."<sup>n38</sup> (n38 Dyer, 143 Wn.2d at 394. See also State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992); State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517

(1994); *In re Matter of the Personal Restraint Petition of Matteson*, 142 Wn.2d 298, 12 P.3d 585 (2000)).”

In *State v. Wittenbarger*, 124 Wn.2d 467, 479-481 (1994), the court held that:

In *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), HN7 we enumerated six nonexclusive neutral criteria that must be addressed before we will engage in state constitutional analysis: (1) the textual language of the [\*480] state provision; (2) significant differences in the federal and state texts; (3) state constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest or local concern.

Const. art. 1, § 3 provides: No person shall be deprived of life, liberty, or property without due process of law. This language is nearly identical to the federal provision, and no legislative history indicates that the state provision should be interpreted differently. Although our constitution may generally provide more protection than the federal, we must analyze each particular issue individually.

Defendants rely primarily on factors 4 and 6. First they argue chemical breath testing is strictly a matter of local concern because the State is charged with developing testing and maintenance procedures for the DataMaster. Law enforcement, however, is always a matter of local concern. Defendants have failed to demonstrate how the State's involvement in administering the breath testing program and enforcing our DWI laws relates to our inquiry of whether the preservation of potentially exculpatory evidence is a matter of particular state interest or local concern. Although they point to other jurisdictions that have rejected the *Youngblood* analysis under their state constitutions, we are not persuaded that the preservation of potentially exculpatory evidence is of particular local interest in Washington. This factor does not further our analysis of the particular question in this case.

Next, Defendants rely on preexisting case law in Washington to

argue that we should retain the standard adopted in *State v. Vaster*, supra. Under *Vaster* a criminal defendant must show that there is a reasonable possibility the unavailable evidence would affect the defense. The court must then balance this possibility against the ability of the State to preserve the evidence, the nature of the evidence and the circumstances surrounding its loss. *Vaster*, 99 Wn.2d at 52. Neither *Vaster* nor the cases cited in *Vaster*, however, included analysis of state law, and, as noted earlier, the federal principles applied in *Vaster* have been supplanted by the holdings in *Trombetta* and *Youngblood*. See *Straka*, 116 Wn.2d at 883; *Ortiz*, 119 Wn.2d at 303-04.

The defense also argues that, given the unique nature of DWI cases, we should place a heightened duty on the State to preserve evidence that could be used in a DWI defense. In their support, the Defendants cite to cases involving a DWI defendant's right to counsel. These cases, however, analyze the right to counsel not only under the constitution, but also under the preexisting state court rule JCrR 2.11. See *Spokane v. Kruger*, 116 Wn.2d 135, 142, 803 P.2d 305 (1991); *State v. Fitzsimmons*, 94 Wn.2d 858, 620 P.2d 999 (1980) [\*\*\*27] (*Fitzsimmons II*); *State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893, vacated and remanded, 449 U.S. 977, 66 L. Ed. 2d 240, 101 S. Ct. 390, aff'd on remand, 94 Wn.2d 858, 620 P.2d 999 (1980). Because any independent state analysis is based on the existence of former JCrR 2.11, these cases shed no light on any preexisting law regarding the state due process clause and are not helpful in this case.

We are not convinced separate and independent state grounds exist to support a broader interpretation of the state due process clause in the context of preservation of evidence. We hold *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988) provides the proper standard for preservation of exculpatory the evidence, and under our analysis above, we find no due process violation. Accordingly, we reverse the District Court's suppression order and reinstate the DWI charges under RCW 46.61.502(1).

Contrary to appellant's argument, only a few courts have followed the *Ramirez* approach. Others, like *State v. Marquez*, 291 Conn. 122, 136,

(2009), have stated “[w]e reaffirm the congruence between the protections afforded by our state constitution and the federal constitution in the area of pretrial identification and therefore proceed to analyze the question in the same fashion under both provisions.”

In any event, when one analyzes the issue under the *Gunwall* factors, one finds that under the first criteria, the textual language of the state provision, the language is identical. The second criteria, significant differences in the federal and state texts, there is no difference in the texts. Under the third criteria, as the appellant concedes, there is no legislative history to establish that there was an intent to provide greater protection. (App. Br. pg. 91).

The fourth criteria, the appellant argues that the Washington State Supreme Court has held that the reliability of evidence standard embodied in the state constitutional provision provides broader protection than the federal due process. This argument stretches the holdings in the various cases. As stated in the *Wittenbarger* court’s interpretation, *infra*, preexisting state law clearly relies on the federal analysis. The appellant argues that the preexisting state law addresses both fairness of the procedures and provides greater protection against the admissibility of unreliable evidence in a criminal trial. (App. Br. 93). The federal

standard currently does the same thing. The appellant merely want to provide for a per se exclusion of eyewitness identification evidence.

The fifth criteria, the appellant is correct that under State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994), differences in structure between the state and federal constitutions, will always support an independent constitutional analysis. The sixth criteria, matters of particular state interest or local concern, the state has a dual interest in ensuring that suspects identified as murdering other people are held accountable for their actions as well as ensuring that fundamental fairness of trials are held in this state.

The court should not change the status quo. The current analysis adequately ensures that reliable evidence is admitted into evidence. The appellant's proposed remedy of suppression of the identification where there is suggestive police procedures will lead to an increase in contested matters before courts merely based upon some psychologist's opinion that the police could have done a better job at presenting a photo montage.

E. THE TRIAL COURT COMPLIED WITH HARTZOG AND FOUND PROPERLY BALANCED THOSE FACTORS IN CONCLUDING THAT THE TRIAL SHOULD BE HELD IN THE JAIL COURTROOM, WHICH COMPORTS WITH THE JAIMIE DECISION.

1. THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION.

The appellant asserts that the trial court abused its discretion in ruling that the trial of Sanchez would take place in the security courtroom in the Yakima County Jail. [App. Br. pg. 106-108]. In making its decision to hold the trial in the securing courtroom, the court applied the standards of State v. Hartzog, 96 Wn.2d 383, 401, 635 P.2d 694 (1981).

There the court held that:

A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record. A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be "potentially dangerous" is a failure to exercise discretion. *People v. Duran*, supra (overruling three California appellate cases based on such a general policy). See also *Woodards v. Cardwell*, 430 F.2d 978 (6th Cir. 1970), cert. denied, 401 U.S. 911, 27 L. Ed. 2d 809, 91 S. Ct. 874 (1971); *State v. Roberts*, 86 N.J. Super. 159, 206 A.2d 200 (1965); *Moore v. State*, 535 S.W.2d 357 (Tex. Crim. App. 1976). The activities of other persons, either unrelated or not imputable to an accused, may not be used as a basis for shackling a criminal defendant. *Willocks v. State*, 546 S.W.2d 819, 821 (Tenn. Crim. App. 1976).

The Court of Appeals, which considered this issue carefully, set forth standards for the trial court to consider when it is faced with a physical restraint issue: *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353 (1976), sets forth several factors which the trial court may consider, inter alia, in determining whether to use physical restraints on an inmate defendant or inmate witnesses:

[T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the

audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

We recognize in appropriate circumstances additional security measures must be taken to provide for the safety of the public and those in attendance upon the courts of this state. Such security measures, including physical restraints, are within the inherent power and discretion of the trial judge. The necessity for those measures must be made on a case-by-case basis after a hearing with a record evidencing the reasons for the action taken. . . . In weighing the protection of persons in the courtroom and the rights of a defendant, the trial judge must choose from "a wide variety of possible choices all within the permissible areas of judicial discretion." *State v. Basford*, 1 Wn. App. 1044, 1050, 467 P.2d 352 (1970). For example, the relocation of the witness stand and the reasonable use of additional security personnel are proper precautions. Further, if restraints are found necessary, those persons shackled may be in place at the time the jury is brought into the courtroom and remain so until the jury leaves, so the physical restraints will make less impact. The court may also consider the use of metal detectors and other security devices. The court may take such measures on an individualized basis without the necessity of a general security order. *State v. Hartzog*, 26 Wn. App. 576, 588-89, 615 P.2d 480 (1980). We adopt these standards as a practical solution to this problem, and further agree with the Court of Appeals that the standard for appellate review will be whether the trial court has abused its broad discretion to provide for order and security in the courtroom. See *People v. Duran*, *supra*, at 293.

In the present case the trial court held a hearing on the defense motion to hold the trial in the county courthouse. (10-23-07 RP 6-85). The court first heard testimony from Joel Clifford, a Sergeant with the Yakima County Sheriff's Department, the officer responsible for security in Yakima County courtrooms and county facilities. (10-23-07 RP 11).

Sgt. Clifford explained that the primary difference between the courtrooms located at the jail and those located at the courthouse is that there is a metal detector for people entering into the jail prior to going to the basement courtrooms. (10-23-07 RP 14). Sgt. Clifford stated that he did not have the manpower to have one person stay in one courtroom all day. (10-23-07 RP 13). Sgt. Clifford also noted that at the Sanchez's arraignment, there was a fight in the hallway. (10-23-07 RP 15).

Chief Will Paulakis of the Yakima County Department of Corrections also testified regarding security of the courtrooms. Chief Paulakis testified that there are three courtrooms in the basement of the jail. That access to those courtrooms is only through the public lobby where there is a metal detector, thus ensuring a secure courtroom. (10-23-07 RP 17). The only method to provide for a secure courtroom in the Yakima County Courthouse would be to use a handheld detector. (10-23-07 RP 18). With regard to the appellant Sanchez, Chief Paulakis stated that it would take no less than three officers to transport Mr. Sanchez and be present with him in or around the courtroom. (10-23-07 RP 18).

Chief Paulakis testified that with the one entrance through the public lobby at the jail, they have a bottleneck that permits better control access to the courtrooms in the basement. (10-23-07 RP 19). If there is a problem, additional officers are close by who would be available if an

emergency arose. (10-23-07 RP 19). That same setup is not present at the Yakima County Courthouse. If the trial occurred at the courthouse, more officers would be visible there, as well as it would be difficult to maintain the security of the courtroom there due to the number of public access points in the courthouse. (10-23-07 RP 20).

Chief Paulakis stated that in order to have proper security at the Yakima County Courthouse they would have to put metal detectors at every entry point in that facility or block off those entry points, or block off those additional entry points. In addition to the metal detectors, you would have to have four officers to man those at all times. (10-23-07 RP 31). Chief Paulakis also stated that there is no per se policy that if your charged with murder that you are prohibited from having a trial or a hearing in the main courthouse. (10-23-07 RP 31).

Chief Michael Williams of the Yakima County Department of Corrections (YCDOC) also testified concerning specifics regarding the appellant. Chief Williams' current role with the YCDOC is overseeing the classification of prisoners. The classification process entails placement within the classifications of prisoners for security, both the inmates and other inmates protection, based upon their behavior during custody and other factors. (10-23-07 RP 36-38).

Chief Williams noted that up until one month prior to the hearing date, appellant Sanchez was primarily in either protective custody, closed supervision or administrative segregation. (10-23-07 RP 38). Appellant Sanchez was placed into general population at the request of his attorney, and shortly thereafter he was involved in another incident that placed him back into a disciplinary unit. That incident involved a weapon found in his housing unit. The weapon was a shank, found in his cell. (10-23-07 RP 38).

Another incident occurred on July 3<sup>rd</sup>, while he was in an administrative segregation unit where he was accused of making threats towards another inmate. Approximately one year earlier, appellant Sanchez was involved in a threat toward his codefendant Mario Mendez. (10-23-07 RP 39). Chief Williams also testified that appellant Sanchez was involved in a general disturbance linked to gang activities, which involved a flooding incident that occurred in January. (10-23-07 RP 40). Another incident earlier that year resulted in the SRT team being called out for an incident involving appellant Sanchez's housing unit. (10-23-07 RP 41).

Chief Williams noted that appellant Sanchez's classification was maximum security. That classification was based upon his age, 26, as well as his criminal history and his existing charges. (10-23-07 RP 41).

Chief Williams also noted that there was an issue with restricting phone calls because of information that he was making threats towards witnesses. (10-23-07 RP 42). Furthermore, Chief Williams stated that because appellant Sanchez was a fairly physically fit young man, he posed a risk to others. (10-23-07 RP 43). There was also a report from July 18, 2007, that Mr. Sanchez was planning to commit suicide. He indicated in a letter that he was going to hoard medication to help facilitate the slitting of his wrists. (10-23-07 RP 45).

Chief Williams also indicated that, although he was unaware of any direct threats toward appellant Sanchez, that based upon the nature of the case, his gang being the minority within the jail, his security is at risk. (10-23-07 RP 46). Chief Williams indicated that although there was no reported gang activity involving Sanchez, he was likely involved in a riot in his housing unit, and he a "shank" was found in his cell. (10-23-07 RP 39, 49). Detective Dave Kellett, of the Yakima Police Department also testified. Detective Kellett testified that the defendant had previously been convicted of second degree assault, third degree assault and three malicious mischief convictions. (10-23-07 RP 59). Detective Kellett also that at the time of the arrest the defendant threatened him. He also noted that he had information that the defendant had threatened his codefendant while in the jail. (10-23-07 RP 60).

In its ruling, the trial court noted that a number of serious violent cases had been tried in the Yakima County Courthouse. But that each of those cases the Department of Corrections and the court were of the opinion that those particular defendant, for a variety of factors did not pose a risk of escape or a risk of violence while being transported or being a target for violence while being transported. In each of those cases, the court's decision to hold the trial in the courthouse was that those potential problems either didn't exist or were all mitigated in some way. (10-23-07 RP 80).

The court specifically noted regarding the facts of this case, that the jail courtroom is within a secure facility where all participants must pass through a metal detector before they can enter the facility. That factor is significant because there is a history in this case, of members of either the victim's family or the defendant's, having altercations with each other. (10-23-07 RP 80). The court noted that should the court install a metal detector for this case, that that may show that there is something unusual about this particular case. That "suddenly we have a portable metal detector or we have wandering going on at the entrance either to the courthouse or the courtroom itself. (10-23-07 RP 81).

The court also noted that it is very probable that juries will generally infer that a person charged with a serious crime, as Sanchez, is

in custody. (10-23-07 RP 81-82). The court continued by noting that jail courtroom two has a holding cell immediately with steps from where the defendant would be seated in this particular case. And if there were violence or threat to Sanchez, jail security can immediately get him out of the courtroom and into that holding cell for his safety. (10-23-07 RP 82). Such is not the case in courtroom two at the courthouse. Because of the much larger space, security must seat themselves away from the defendant. If there were a disturbance in the courthouse, the defendant's personal security would not be as secure as it would be in jail courtroom two. (10-23-07 RP 82).

Additionally, the court noted that it does not make any sense to have a courthouse courtroom crawling with additional uniform guards versus having a smaller or more limited number of them present and having a presence in a jail courtroom. This cuts both ways. (10-23-07 RP 83). The manifestations of heightened security will be evident if the trial were in the courthouse with the additional security officers present. (10-23-07 RP 83).

The court noted that some of the mitigating factors would be that Sanchez is going to be attired in civilian clothes. The jury is not going to view him in shackles, handcuffs, leg irons or other restraints. (10-23-07 RP 83). The court noted also that although the Yakima County Jail is a

monolithic concrete building, it is not much different that the Kent Regional Justice Center in King County, which is probably one of the more state of the art facilities in the state, but it still gives the court the impression that it's a large correctional facility even though the courtrooms are in a different segment of that building from the jail. (10-23-07 RP 84).

The trial court concluded that in order to minimize the risks in this case the trial must be held in jail courtroom number two. That given Sanchez's behavioral history, considering the factors articulated in the Hartzog, the seriousness of the charges, his relatively young age, physical condition, which appears to be good, the assaultive behavior that he's exhibited and been convicted of in the past, even though that may have been something that doesn't rise to the level of the charges in this case, the threat he's made to himself, the threat that he's apparently made to others in the jail and the concern that the court has about the fact that this case is going to get publicity, in that there are people who have strong views about this case and potentially would have thoughts of doing harm to either the defendant or other participants in the trial. (10-23-07 RP 85).

Just as required by State v. Hartzog, supra, State v. Gonzalez, 129 Wn. App. 895, 120 P.3d 645 (2005) and State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), the trial court herein, as stated above conducted a

hearing, took testimony, heard argument and made an informed, reasoned decision as required by the case law.

In State v. Jaime, 168 Wn.2d 857, 866, 233 P.3d 554 (2010), the court held that “without a factual record that Jaime’s trial presented particular security concerns, it cannot be said that the prejudicial measures of holding the trial in the jail was “necessary to further an essential state interest.” However, the court also state that “[o]ur decision should not be misunderstood to suggest that a jailhouse courtroom may never be used for a jury trial. As with other inherently prejudicial practices such as shackling, a jailhouse setting may be the “fairest and most reasonable way to handle” defendants who are found to present a serious safety risk. *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (acknowledging that shackles or other restraints, while inherently prejudicial, may in some cases be necessary). But as with shackling, trial courts are obligated to undertake a careful analysis of the facts of the situation to determine whether the extraordinary measure is warranted.”

The court further state that the appellate courts “review trial management decisions for abuse of discretion. ‘A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury.’ *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). But “‘[c]lose judicial scrutiny’ is

required to ensure that inherently prejudicial measures are necessary to further an essential state interest.” *Finch*, 137 Wn.2d at 846, 137 Wn.2d at 846 (quoting *Estelle*, 425 U.S. at 504). In particular, a trial court may impose restraints upon a defendant “‘only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.’” *Id.* (quoting *Hartzog*, 96 Wn.2d at 398). The judge’s decision must take into account “specific facts relating to the individual” and be “founded upon a factual basis set forth in the record.” *Hartzog*, 96 Wn.2d at 399-400 (emphasis added).” *Id.* at 865-66.”

The trial court herein conducted an individualized examination of the factors that would justify holding a trial in the security courtroom of the Yakima County Jail. Having done so and stating its reasons for the record, it cannot be said that the trial court made its decision in an arbitrary or capricious manner, and thus abusing its discretion.

F. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OBTAINED FOLLOWING SANCHEZ’S DETENTION AND ARREST BASED UPON THE INFORMATION THE POLICE POSSESSED.

1. Standard of Review.

“On appeal, the court reviews solely whether the trial court’s findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court’s conclusions of law. The party

challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence." "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

2. Argument.

The trial court concluded in its written findings that “[b]ased upon the information received by Sgt. Castillo, the nature of the offense, and the additional information regarding the blue pickup truck parked at the 303 S. 9<sup>th</sup> Street residence, the officers had sufficient information to conduct an (sic) investigative detention of Mr. Sanchez. That once he was taken into custody, officers learned from the residents (sic) that Mr. Sanchez was involved in the murder. The murder weapon was later recovered from that location upon execution of a search warrant.” (CP 23).

The appellant argues that Sanchez was arrested for purposes of an Article 1, Section 7 analysis. Appellant relies on a finding of fact, specifically “4. Yakima Police Officer Kasey Hampton, driving a marked patrol vehicle was requested to conduct a traffic stop of the vehicle by Sgt. Bardwell. Mr. Sanchez was order out of the car and placed into custody. Mr. Sanchez had been seated in the front passenger’s seat at the time of the stop.” (CP 22). This argument is without merit and

ignores the conclusion of law that the court made. Namely, that the police conducted an investigative detention of Jose Sanchez. (CP 23).

a. The police conducted a lawful Terry stop investigative detention of Sanchez.

A seizure is reasonable if there is an articulable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868 (1968). Considerations of the constitutionality of a seizure involve weighing “(1) the gravity of the public concern, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.” *Stroud* at 397. The central theme of this balancing test is that the seizure must be reasonable. *Stroud* at 396. While the circumstances must be more consistent with criminal than innocent conduct, *reasonableness is measured not by exactitudes, but by probabilities.*” State v. Samsel, 39 Wn. App. 564, 571; 694 P.2d 670 (1985) (Emphasis added).

In reviewing those circumstances, courts may consider such factors as the officer's training and experience, the location of the stop, and the conduct of the person detained. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992) citing *State v. Glover*, 116 Wn. 2d 509, 513, 806 P.2d 760 (1991). Another important factor compromising the totality of the circumstances, that must be examined, is the nature of the suspected

crime; a violent felony crime provides an officer with more leeway to act than does a gross misdemeanor. State v. Randall, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994); State v. Thiery, 60 Wn. App. 445, 803 P.2d 844 (1991) (“Officers may do far more if the suspect conduct endangers life or personal safety than if it does not”); State v. McCord, 19 Wn. App. 250, 576 P.2d 892, review denied, 90 Wn.2d 1013 (1978) (seriousness of suspected crime bears on the degree of suspicion needed to make a stop and the extent of the permissible intrusion after the stop).

The appellant argues that the fact that Sanchez was ordered out of the car at gunpoint, handcuffed, placed in the back of a patrol car transformed the stop into an arrest. Contrary to appellant’s assertion, there is nothing to indicate that Sanchez was immediately transported to the police department prior to the police obtaining the information regarding Sanchez’s involvement in the homicides from the residents at 303 S. Ninth Street. The appellant cites State v. Belieu, 112 Wn.2d 587, 598-99, 73 P.2d 46 (1989), for the proposition that ordering suspects of their car, at gunpoint, handcuffing them, and placing them in a patrol car transforms an investigative detention into an arrest. [App. Br. Pg. 116]. This however, isn’t quite the what the court in Belieu held. In Belieu, the court held that:

[A]specific fear that particular persons may be armed because of the nature of the criminal activity of which they are suspected has been found sufficient to support the use of drawn weapons. See *State v. Thornton*, 41 Wn. App. 506, 507, 705 P.2d 271, review denied, 104 Wn.2d 1022 (1985). There, suspicion of armed robbery gave a reasonable inference that the detainees were armed, and the investigative stop was not so disproportionately invasive as to be an arrest. Thus it was permissible to stop the suspects and order them out of their car at gunpoint without probable cause sufficient for an arrest.

The facts of this case support specific fear on the officers' part. Because the occupants of the white Torino were suspected of burglary or attempted burglary in an area where numerous burglaries had resulted in weapons being stolen, there was a reasonable inference that they might have been armed. Generally, a suspicion of burglary by itself would not support an inference that a suspect was armed. 9 But see *State v. Harvey*, 41 Wn. App. 870, 875, 707 P.2d 146 (1985) (officer justified in making a protective search of a burglary suspect on the ground that it is well known that burglars often carry weapons).

Belieu, supra at 603-604.

The use of felony procedures in taking Sanchez into custody was justified based upon all of the information known to the police. The trial court's finding is supported by substantial evidence. Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

- b. The informants' tips were reliable based upon information regarding the crime and that discovered following the investigative detention.

As noted above, courts review the reasonableness of the stop based upon the totality of the circumstances. As noted in State v. Lesnick, 84 Wn.2d 940, 944-45, 530 P.2d 243 (1975), “[w]e now emphasize a matter of some importance. The State, in its petition for review, alleges that law enforcement will no longer be able to make even reasonable and limited inquiries into possible criminal conduct based upon the tips of informants. Such is not at all the result of this holding. Both *Terry* and *Adams* emphasize that no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer. In this case, the suspected crime was a gross misdemeanor. It posed no threat of physical violence or harm to society or the officers. Indeed it involved only an activity which was so openly tolerated in some areas that taxes were collected on the business of persons such as the defendant. *This is quite a different matter from the hypothetical tips involving murder or threatened school bombings* which were used by the State in its argument to illustrate the purported result of the holding of the Court of Appeals. While we are obviously not passing upon such matters, we do emphasize that if and when other cases arise

they will necessarily be judged in light of their particular facts, which is the very clear, basic premise of *Terry* and *Adams*.” (emphasis added).

This legal principle was recognized by the trial court in its findings, wherein the court concluded: “[b]ased upon the information received by Sgt. Castillo, the nature of the offense, and the additional information regarding the blue pickup truck parked at the 303 S. 9<sup>th</sup> Street residence, the officers had sufficient information to conduct an investigative detention of Mr. Sanchez.” (CP 23).

Additionally, there was independent investigation with the observation of the blue pickup truck seen at the scene of the murders. This fact corroborates the tip provided to the police. In State v. Jackson, 102 Wn.2d 432, 439-440, 688 P.2d 136 (1984) the court stated that “[i]n *Sieler*, this court enumerated the required criteria which must be met to create these "indicia of reliability": While the police may have a duty to investigate tips which sound reasonable, [1] absent circumstances suggesting the informant's reliability, or *some corroborative observation which suggest either [2] the presence of criminal activity* or [3] that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.

In this case the in police knew that a violent crime had been committed and they were looking for the perpetrators. The information

from the anonymous was corroborated by the presence of the pickup truck located at the scene in which Sanchez was located. The investigative detention was thus supported by reasonable suspicion.

G. SANCHEZ'S TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY NOT MOVING TO SUPPRESS EVIDENCE PRIOR TO TRIAL.

1. Standard of review.

To establish ineffective assistance of counsel, the appellant must prove that his counsel's performance was deficient and that this deficient performance resulted in prejudice. State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). The failure to bring a pretrial suppression motion is not per se deficient representation. McFarland, supra at 337.

2. Argument.

To prevail here, Sanchez must show based on the record before us that the trial court would have granted such a motion if made and the outcome of the trial would have differed. *See* State v. Contreras, 92 Wn. App. 307, 318-19, 966 P.2d 915 (1998); McFarland, 127 Wn.2d at 337, 337 n.2.

Here, the trial court made written findings regarding the detention and search. Based upon the argument in the previous section, whether his

motion was before or after the trial on the main charges, he still would not have prevailed.

H. EVIDENCE OF SANCHEZ'S POSSESSION OF A FIREARM AT THE TIME OF HIS ARREST AND THE POST ARREST CONDUCT OF ATTEMPTING TO EAT THE MONEY HE HAD ON HIS PERSON WAS PROPERLY ADMITTED.

1. Standard of review.

“Whether excluding or admitting evidence at trial, this court reviews such decisions under the same standard of review: abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).” *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

2. Argument.

“Admissibility of evidence lies within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that

discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). Under ER 402 all relevant evidence is admissible subject to constitutional requirements, statutory provisions, the rules of evidence and other rules and regulations in Washington. Relevant evidence is evidence which has a ‘tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ ER 401. ER 403 provides for exclusion of relevant evidence if it is unduly prejudicial.” *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

i) Evidence of the 9mm pistol found in the car.

The trial court, after hearing argument of counsel regarding the admission of the 9mm pistol, held that the facts presented in this case are significantly different than those in *State v. Freeburg*. 105 Wn. App. 492, 20 P.3d 984 (2001). In *Freeburg*, the defendant’s possession of the firearm was two and a half years after the killing in the case. Here, Sanchez was found in a vehicle within three days of the killings. The weapon was found under the passenger seat which he occupied at the time he was apprehended. (10-23-07 RP 153). Mario Mendez testified that the defendant possessed both the .45 and the 9mm, and that others testified that he gave the .45 to be held for him which explains why he was only in possession of the 9mm. (10-23-07 RP 153; 11-26-07 RP 1681).

The trial court held that the trier of fact could at least infer that Mr. Sanchez had both weapons in this possession at some point in time, including the .45 that was used in the killings. (10-23-07 RP 153). This evidence corroborated the testimony of the testifying co-defendant, Mario Mendez. As the court stated in State v. Yates, 161 Wn.2d 714, 775, 168 P.3d 359 (2007), “[w]here a defendant's ownership of a gun is relevant to an issue at stake in the trial, we recognize no special rule that would prevent that evidence from being admitted.”

ii) Evidence of Sanchez eating the money.

The appellant asserts that the evidence is highly prejudicial, but fails to state that it is “unfairly prejudicial” as required by ER 403. As stated in Tegland, Evidence vol. 5, WA Prac. Pg. 442 (2007), “unfair prejudice” usually means prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among jurors. Now how can it be said that the such evidence would raise an emotional response?

The testimony and video evidence of the appellant eating the money while he is in the holding cell was highly probative of his state of mind and consciousness of guilt. See State v. Parr, 64 Wn.2d 921, 395 P.2d 196 (1964) (the destruction of the guns alleged to have been used in the robbery was material to the issues and charges, and the absence of a

connecting description went only to the weight of the testimony which was for the jury to determine).

I. THE TRIAL COURT DID NOT ERR BY PROHIBITING TESTIMONY CONCERNING THIRD PARTY SUSPECTS WHERE THERE WAS NO FOUNDATION FOR SUCH EVIDENCE.

1. Standard of review.

“[A]dmission or refusal of evidence lies largely within the sound discretion of the trial court; its decision will not be reversed on appeal absent an abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).” *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

2. Argument.

“[E]vidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party. See also *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933).” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 316 (1994).

The appellant relies upon the case of State v. Maupin, 128 Wn.2d 918, 924-925, 913 P.2d 808 (1996). There, the court reversed the conviction because a witness would have testified that he had observed the murder victim after she was taken from her home with another identified subject. The Maupin court reaffirmed the rule regarding third party suspect evidence, stating: “[t]he right to present defense witnesses is not absolute as ‘a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.’ *Hudlow*, 99 Wn.2d at 15.”

Here, the appellant has no such evidence that would exculpate him. Nor does the appellant have a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party. Contrary to the appellant’s assertion, there was no testimony that the composite sketch prepared by Detective Kellett and Michelle Kubic resembled Manuel Sanchez. Furthermore, Detective Kellett testified that the sketch itself was incomplete. (10-04-07 RP 389).

J. THERE WAS NO CUMULATIVE ERROR NOR WAS SANCHEZ’S RIGHT TO A FUNDAMENTALLY FAIR TRIAL DENIED TO HIM.

“Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*,

141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id.” State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Contrary to the appellant’s assertions, the trial court did not commit error and any of its pretrial rules.

#### IV. CONCLUSION

Based upon the foregoing argument, this Court should affirm the conviction.

Respectfully submitted this 28<sup>th</sup> day of January, 2011.

  
Kenneth L. Ramm WSBA 16500  
Deputy Prosecuting Attorney  
Attorney for Yakima County