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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 26899-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HILTON,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT
RE: STATE v. MARTIN

LENELL NUSSBAUM
Attorney for Kevin Hilton
Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

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STATUTES AND OTHER AUTHORITIES

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The Washington Supreme Court decided State v. Martin, No. 83709-1, on May 19, 2011, after oral argument in this case. Appellant submits this Supplemental Brief, as directed by this Court, to address this authority.

1. Art. I, Section 22 Provides More Protection Than The Sixth Amendment.

The Supreme Court issued three separate opinions in Martin. The Court unanimously agreed that Art. I, § 22, of the Washington Constitution must be analyzed independently of the Sixth Amendment. Martin, Majority Slip Op. at 13 (Alexander, J., with JJ. Madsen, C. Johnson, Owens, J. Johnson); Slip Op. at 1 (Stephens, J., concurring/dissenting, with JJ. Chambers & Fairhurst); Slip Op. at 2-3 (Sanders, J., dissenting).

In conclusion, we hold that in the context of prosecutorial suggestions of tailoring, article I, section 22 is more protective than the Sixth Amendment. For this reason, the United States Supreme Court's decision in Portuondo is not controlling in this case. We conclude, however, that our state constitution was not violated when a deputy prosecutor, **in response to testimony Martin had given on direct examination**, asked Martin if he had tailored his testimony to conform to testimony given by other witnesses.

Majority Slip Op. at 17-18 (emphasis added).

In Martin, the defendant's specific testimony involved the question of what time he illegally entered a van. "I would guess 11:30, 12:00, 12:30 at night. **From prior testimony, I know** it had to be before one." Majority Op. at 3 (emphasis added).

Justice Alexander wrote an opinion for five members, holding:

In our judgment, **this testimony** opened the door to questions on cross-examination about whether he tailored his testimony to evidence presented by other witnesses.

Majority Op. at 16 (emphasis added). The majority explicitly limited its holding, however:

Because the accusation of tailoring in this case was specific rather than generic, we do not decide whether generic accusations are prohibited under article I, section 22.

Majority Opinion at 15-16 n.8.

The Martin majority also rejected the United States Supreme Court opinion in Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), which permitted a prosecutor to argue in closing argument, without conducting any cross-examination, that the defendant had used his right to be present at trial to tailor his testimony

after hearing the other witnesses. Majority Slip Op. at 13-15.

In Martin, Justice Stephens concurred only in the result because she believed the error was harmless. "The untainted evidence overwhelmingly implicated Martin in this crime." Slip Op. (Stephens, J.) at 5. But four members of the Court agreed completely with Justice Stephens's broader conclusion:

Respect for the rights of the accused under article I, section 22 should compel this court to hold that accusations of tailoring based on the defendant's exercise of his trial rights are improper.

Slip Op. (Stephens, J., with Chambers and Fairhurst, JJ.) at 6; Slip Op. (Sanders, J., dissenting).

The junction of these three opinions leads at most to the conclusion that a prosecutor may cross-examine a defendant about whether he tailored his testimony to the testimony of other witnesses if the defendant testified that he did so -- as Mr. Martin did. Nonetheless, appellant respectfully urges that the correct legal ruling is found in the opinions of Justices Stephens and Sanders.

Despite the majority's very narrow opinion, article I, section 22, prevents the prosecutor from generically questioning every criminal defendant by suggesting he is lying because he has been present throughout the trial and has heard others testify. Presence is not merely a constitutional right. The law requires the defendant to be present, under threat of arrest and forced appearance. It violates due process to require a person to appear, then argue the jury should not believe him because he complied with the law by being present for his trial.

2. Martin Does Not Address Other Issues of Prosecutorial Misconduct Raised in this Case.

Appellant's claims of prosecutorial misconduct were not limited to cross-examination of Mr. Hilton about whether he heard other witnesses testify. This case also presents the issue of whether a prosecutor may raise in cross-examination and in closing arguments: (1) the defendant's exercise of his right to remain silent before and during a prior trial, (2) his confiding in his counsel but not in police, and (3) his relying on an

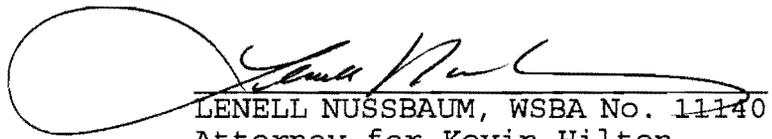
investigator before trial. See Appellant's Brief at 55-61, 114-31.

Article I, section 22 prevents the prosecutor from generically questioning every criminal defendant by suggesting he is lying because he had the right to counsel and to an investigator, because he did not give every detail of his testimony to the police before the trial, or because he did not testify at a prior trial. The Martin court did not address these issues.

3. Conclusion

For these reasons and the reasons and authority in the Appellant's Brief and Appellant's Reply Brief, this Court should reverse Mr. Hilton's convictions.

DATED this 6th day of June, 2011.


LENELL NUSSBAUM, WSBA No. 11140
Attorney for Kevin Hilton

