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NO. 60015-0-I

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

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King County Prosecutor
Appellate Unit

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STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TINH TRINH LAM,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel.

2. Appellant's right to a public trial was abridged.

Issue pertaining to Assignments of Error

1. Did trial counsel's inadequate cross examination of the State's forensic experts constitute a denial of effective counsel as guaranteed by U.S. Const. amend. VI and Wash. Const. art. I, § 22?

2. Did interviewing a juror in an in camera hearing, for which the record was sealed, violate the right to a public trial guaranteed by U.S. Const. amend. VI and Wash. Const. art I, § 22?

B. STATEMENT OF THE CASE

Nguyet Minh Nguyen was found dead in her Seattle apartment on Saturday, April 23, 2005. 7RP 9, 12.[1] The time of death was around noon on Friday, April 22, 2005. 7RP 65. The cause of death was asphyxia resulting from blunt force injuries to the head neck and trunk, and was characterized as a homicide. 7RP 66-67.

The apartment was very small (24 x 16 feet). 5RP 86. It was cluttered, and dirty. 5RP 46. When police arrived it was 78 degrees

[1] The trial dates were March 12, 2007 to March 27, 2007. The verbatim report of proceedings consists of nine volumes referenced as follows: 1RP - March 12, 2007; 2RP - March 13; 3RP - March 14; 4RP - March 15; 5RP - March 19; 6RP - March 20; 7RP - March 21; 8RP - March 22; and 9RP - March 27.

inside, even though a window was open and the temperature outside was 53 or 54 degrees. 5RP 118. The legs of the body were crossed, suggesting the body had been rolled over. 7RP at 87-88. A bloody fingerprint was found on the window frame, which matched the print on appellant Tinh Lam's right thumb. 5RP 100; 6RP 111-13.

The door to the apartment had not been forced. 5RP 37. But this did not mean an attacker did not force entry after the door was opened. 5RP 53. The body was near the front door. 5RP 26-27. A blood spatter expert testified that most of the beating occurred in the entrance area. 5RP 37-38.

The crime scene was very bloody, and the attacker must have gotten a considerable amount of blood on him. 5RP 55-57, 66. But testimony regarding the blood evidence was confused.

Beverly Himick, the blood spatter expert, found no blood in the bathroom sink or on the faucets. 5RP 19, 67, 69-70. In the kitchen, Himick found a few random spots on a cupboard above the sink and a few that fell onto the faucet area, but no blood on the taps themselves. 5RP 68. There were no fingerprints on any of the faucets. 6RP 116.

Seattle homicide detective Kevin O'Keefe testified, however, that he did find blood, both on the kitchen faucet handles and on the faucets themselves, which he collected as evidence. 5RP 113-14. O'Keefe also

said there were multiple bloody footprints in the hallway outside the apartment door. 5RP 86. Later he indicated there was only one. 5RP 89. O'Keefe thought fire department personnel left this print before police arrived. 5RP 95. The State offered no evidence that any attempt was made to identify the bloody boot print.

A bloody hammer and gloves were found in a garbage pail in the tiny kitchen. 5RP 39-40. The medical examiner thought it unlikely this hammer was used in the attack.[2] 7RP 54. The prosecutor nevertheless elicited speculation that a small, weak individual could strike multiple hammer blows to the head without damaging the bone. 7RP 55. A folding chair found near the body appeared to have been used as a weapon. 7RP 89-90.

The apartment was not ransacked. 7RP 96. In plain view on a couch in bedroom was a purse containing $172.42. 7RP 89, 97. But there was also an empty purse and wallet on the bedroom TV stand. 7RP 126. Some men's clothing was neatly folded in a bag on the bedroom sofa. 5RP 117.

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[2] The basis for the medical examiner's opinion was the fact that although there were cuts to the scalp, the skull bone was not dimpled or fractured as would be expected from hammer blows. 7RP 75.

The police charged Lam, Nguyen's long-time friend and business partner, with First Degree Murder – Domestic Violence. CP 1; 1RP 3. Lam was tried by jury and asserted the defense of general denial. 1RP 102.

Lam and Nguyen had been close friends for years and were equal partners in a restaurant called "Miss Saigon". 7RP 86, 97. They loved each other. 7RP 22. Nguyen lived in the Downtowner Apartments, low-income housing operated by the Seattle Housing Authority. Visiting hours were 8:00 a.m. to 10:00 p.m. 5RP 141. For years, Lam came every day as soon as visiting hours opened. Often, he was waiting outside. 7RP 148-49. He had visited Nguyen's apartment perhaps a thousand times. 7RP 98. But he never stayed overnight. 7RP 122; 8RP 42.

After interviewing Nguyen's sister at the scene on Saturday evening, lead detective Rolf Norton went to Miss Saigon and talked to Lam. 8RP 9. Norton noticed a small cut on Nam's left cheek and one on his right index finger. 8RP 12-13. Norton told Lam Nguyen was in the hospital, implying she had survived the attack. 8RP 15.

Lam told Norton he last saw Nguyen on the Thursday night at the restaurant. He said he had argued with Nguyen, trying to dissuade her from carrying $13,000 in cash when she left. Lam said he was concerned about a long-haired Vietnamese man he'd noticed walking back and forth

outside the restaurant. 6RP 89. Lam said he had not been to Nguyen's apartment for about a month.

The Downtowner lobby was monitored by a video surveillance camera. 5RP 136. Visitors also had to check in with security in the lobby. The video showed Nguyen returning home alone at 10:38 p.m. on the Thursday night. 8RP 17. The video also showed Lam arriving on the Friday morning and leaving after about an hour. 6RP 6. Lam had a unique, shuffling gait. 7RP 87.

A forensic video analyst testified that Lam appeared to sign in and out but actually did not. 6RP 28, 40. But Lam gave the desk clerk what looked like a driver's license and took it back when he left. 6RP 31. Security personnel testified that Lam often walked past the desk, or tried to, without signing in. 7RP 112. This was not unusual. It was common for regular visitors not to sign in. 7RP 98.

The video showed Lam wearing different shoes when he left than when he arrived. 6RP 45. But he wore the same jacket in and out. 6RP 44. He carried a plastic bag in and out. Two witnesses testified that Lam invariably carried a plastic grocery bag. 7RP 88, 128.

On Sunday evening, after reviewing the video, Norton went to Lam's apartment. He was told Lam had jumped from the 10th floor. 8RP 18-20. Lam had previously attempted suicide in 1999. 8RP 37.

Norton obtained a warrant and searched Lam's apartment. 8RP 19. He was looking for two sets of shoes, a jacket and hood, the hat Lam wore in the video, and bloody clothing. But he found nothing. No blood, no dark shoes. 8RP 20. Later, the manager of Lam's apartment building gave Norton a light-colored cap found near the window Lam jumped from. 8RP 18. Norton also obtained a warrant to take fingerprints and a DNA sample from Lam, who was unconscious at the hospital. 8RP 19.

Jennifer Reid, a Washington State Patrol Crime Laboratory DNA expert, testified she found a tiny speck of Nguyen's blood on the cap. 9RP 10, 92. This barely-visible speck was the only blood found on any of Lam's clothing. 9RP 96.

The forensic video analyst did not eliminate this cap as the one Lam was wearing in the video, even though it had a dark stain that was absent from the cap depicted in the video. 6RP 48, 61-62. Lam invariably wore a baseball cap. 7RP 28. He had worn the same tan-colored baseball cap for years. 7RP 127-28.

The defense rested at the close of the State's case. 9RP 151. The jury found Lam guilty of first degree murder. CP 72. He was sentenced to the high end of the standard range. CP 75, 77.

C. ARGUMENT

1. LAM WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Both the United States and Washington Constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish ineffective assistance, the appellant must show counsel's performance was deficient, and that the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Washington courts presume criminal defendants are properly represented. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Appellant can overcome this presumption by showing errors "so serious that his lawyer was not functioning as the counsel guaranteed by the Sixth Amendment." State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992), quoting Strickland, 466 U.S. at 687. This burden is met where, under the specific facts of the case, counsel's conduct failed to meet an objective standard of reasonableness and resulted in prejudice. State v. Huddleston, 80 Wn. App. 916, 926, 912

P.2d 1068 (1996). "Deficient performance is not shown by matters that go to trial strategy or tactics." Hendrickson, 129 Wn.2d at 77-78.

Here, the State's case against Lam was entirely circumstantial and relied heavily on the testimony of forensic experts. When the State's evidence is overwhelmingly scientific and forensic, an effective defense surely must at least attempt to raise questions about the reliability– and thus the relevance – of that evidence. By missing one crucial opportunity after another to challenge the weight of the State's forensic evidence, Lam's lawyers[3] were not functioning as the counsel guaranteed by the Sixth Amendment. Howland, 66 Wn. App. at 594.

(a) DNA Evidence. Essential to the State's case was the testimony of Washington State Patrol Crime Laboratory DNA specialist, Jennifer Reid. 9RP. The record shows Reid's testimony was often inconsistent and occasionally bizarre, but defense counsel failed to develop the weaknesses in Reid's evidence and bring them to the attention of the jury. This prejudiced Lam because, if the jury lost confidence in the DNA evidence, the rest of the State's circumstantial case left significant room for reasonable doubt.

(i) Wrong Database. Forensic evidence must be based on principles accepted by the relevant scientific community. State v.

[3] Lam had two trial lawyers. 1RP 2.

Russell, 125 Wn.2d 24, 40, 882 P.2d 747 (1994), citing Frye v. United States, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir.1923).

Reid compared DNA samples from several items of evidence with the known DNA of Nguyen and Lam. 9RP 41-42. She obtained DNA from the folding chair, the hammer head, the hammer handle, the blood-soaked gloves, and the hat. 9RP 42; 61.

Reid expressed all DNA match probability statistics in terms of the U.S. population as a whole. 9RP 35, 36, 41, 45, 46, 55, 56. Later, she admitted she used an FBI database consisting of Caucasians, African Americans and Hispanics, but no Asians. 9RP 110. Reid said it is not considered helpful to use a database specific to a known suspect's racial or ethnic subgroup. 9RP 121. She said the method she used to calculate the DNA probability statistics is generally accepted in the scientific community. 9RP 36.

But it is well-settled in the relevant scientific community that the statistical database should match the ethnic group of a suspect known to be of a particular racial or ethnic group. Committee on DNA Forensic Science: An Update, The Evaluation of Forensic DNA Evidence (National Academy Press 1996) (NRC)[4] at 114 (if it is known that the

[4] Judicially accepted as authoritative. See, e.g., State v. Gore, 143 Wn.2d 288, 311, 21 P.3d 262 (2001). The FBI recommends the standards in the

contributor of the evidence DNA and the suspect are from the same subpopulation and there are data for that subpopulation, "this is clearly the set of frequencies to use.") Sufficient data existed as early as 1996 for various groups and subgroups within the United States so that "analysts should present the best estimates for profile frequencies." NRC at 122. Databases for American Asians were available at the time of the investigation into Nguyen's death. U.S. Department of Justice, Office of Justice Programs, National Institute of Justice: THE FUTURE OF PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP, NCJ 183697, November 2000, Section 5, page 16. (Allele frequencies between groups differ enough that separate databases have been developed for Caucasian Americans, African Americans, Hispanic Americans, and Asian Americans.)

The statistical validity of DNA matches presumes a history of random mating. NRC at 90; State v. Gore, 143 Wn.2d 288, 308, 21 P.3d 262 (2001). The white population of the United States is a mixture of people of various origins, mostly European, and the black and Hispanic populations also have multiple origins. NRC at 98. But this is not

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1996 NRC report for statistical interpretation, specifically that calculations be based on "a documented population database *appropriate for the calculation*." FBI, http://www.fbi.gov/hq/lab/codis/forensic.htm, Standards for Forensic DNA Testing Labs, §9.6.3 (emphasis added).

necessarily true of Asian Americans in general and Vietnamese in particular. Therefore, a Vietnamese database should have been used.

Counsel simply failed to address this, even when Reid later conceded that she used the Caucasian, African American, Hispanic database simply because that was what was already "set up." 9RP 121.

(ii) The Chair. Reid first took a blood sample from the top of a folding metal chair thought to have inflicted wounds to the head. 9RP 43. As expected, she found only Nguyen's blood, with a random match probability of one in 900 quadrillion. 9RP 45.

Reid then swabbed the legs of the chair for 'handler' DNA. This is extracted from skin cells often left when a person grabs something and applies friction to it. 9RP 136, 141. Norton had asked Reid to look for perpetrator DNA on the chair legs. 9RP 43-44; 124. The skin cells on the chair legs produced a mixed profile of DNA from both Nguyen and Lam. 9RP 45-46.

Defense counsel failed to impress upon the jury that this evidence of 'handler' DNA on the chair legs proved nothing. It was a folding chair in a tiny apartment. Both Nguyen and Lam likely would have handled the chair legs frequently while folding and unfolding the chair.

(iii) The Gloves. Reid testified that existing procedures did not permit her to determine the precise quantity of DNA in any sample. She

said quantity was estimated by comparing the test sample with a 'known' sample that was itself an estimate. 9RP 22-23. But she later testified that she extracted precisely 0.9 nanograms (ng) of DNA from the gloves. 9RP 85. Not 1 ng or approximately 1 ng, but exactly 0.9 ng.

Counsel disputed whether this was sufficient for a meaningful result. But he missed completely another opportunity to undermine the jury's confidence in Reid by contrasting this alleged precision with her earlier testimony that precision was not possible.

(iv) The Hammer Handle. Reid said she carefully selected an area of the hammer handle with no blood to test for handler DNA. She swabbed the cleanest-looking part of the handle for skin cells, being careful to avoid any blood. 9RP 66, 67. On direct examination, she presented her results as a DNA profile of the handler, giving the clear impression that the profile came from a sample with no blood. 9RP 55. But the DNA matched only Nguyen, not Lam, to a certainty of one in 130 trillion. 9RP 55.

On cross examination, apparently realizing that Lam's DNA, not Nguyen's, was supposed to be on the hammer handle, Reid started to backtrack. 9RP 66. Her written report said she obtained skin cell DNA. 9RP 66-67. On cross examination, she said for the first time she probably inadvertently got some blood in the sample, after all. 9RP 67. When

pressed, she looked at her lab notes and discovered she had actually tested the swab with phenolphthalein – a chemical reagent used to detect the presence of blood – and it tested positive. 9RP 67-68. In other words, she had known from the outset the sample had blood in it.

Defense counsel did not press Reid to explain why, if she knew all along the supposed skin cell sample was actually blood, she did not say so in her direct testimony, instead of implying she had obtained a clean skin cell sample and successfully profiled the handler DNA. Counsel could also have informed the jury at this point, but did not, that Reid had received job training on how to testify. 9RP 123.

After establishing that only the victim apparently handled the hammer, Reid testified about the blood on the hammer handle. This was another surprise: the blood was mixed. Nguyen was the major contributor with a one in 900 quadrillion chance of error. 9RP 56. But there was a second contributor, namely Lam, with a likelihood of 580,000 to one. 9RP 56.

Defense counsel failed to challenge Reid's conclusion that a significant amount of Lam's blood – at least enough to produce a mixed DNA profile – was present on the hammer handle. He did not invite the jury to consider how it got there. While Nguyen was bleeding profusely from massive wounds, Lam had no more than a tiny cut on one finger.

8RP 12. Moreover, according to the State's own theory, the attacker wore gloves during the attack. 9RP 125. (The State did not think the gloves were worn during the attack with the folding chair, obviously, because skin cells supposedly were left there.) If the hammer was wielded by a gloved hand, blood DNA from a small cut would not have been detected on the hammer handle.

Reid claimed she could distinguish between skin cell DNA profile and "fluid cell" DNA profile based on her experience, the size of the area swabbed, and her understanding of "properties of DNA and how the different cells or the body fluids carry DNA." 9RP 70. Counsel did not inquire into the scientific basis for this remarkable ability. Reid did not explain, and she was not asked, how the blood supposedly contaminating the 'handler' DNA sample could produce only Nguyen's profile if the blood on the handle – the presumed source of the skin cell sample contamination – contained enough of Lam's blood to produce a mixed profile.

What emerges from Reid's hammer handle testimony is that she may well have switched the skin cell sample and the blood sample. At minimum, effective counsel would have suggested this for the jury's consideration. Lam's counsel did not.

(v) The Gloves. Reid received a pair of smelly gloves that were saturated with blood. 9RP 47. She swabbed a spot on the interior back of each cuff that was less saturated. 9RP 48. Again, Reid obtained a mixed profile. She concluded that Nguyen and Lam both contributed with a probability of 18,000 to one. 9RP 51. The size of the peaks led Reid to conclude that Nguyen and Lam contributed an equal amount of skin cells to this sample. 9RP 86-87.

Counsel failed to contrast Reid's positive conclusion regarding the putative skin cells on the blood-soaked gloves with her in-court repudiation of the supposed skin cell evidence on the hammer handle, which she said had a good-sized area that appeared unbloodied. Neither did counsel challenge the plausibility of Reid's conclusion. Counsel did not ask Reid to explain, if profiling 9 or 13 DNA positions gives an random match probability of one in 900 quadrillion, how many of these had to be missing to produce a random match probability as uncertain as one in 18,000. 9RP 76.

Reid described the gloves as chenille, feminine-type gloves.[5] 9RP 49. She said a person must handle an item quite a bit to leave enough skin to generate a DNA profile. 9RP 62 ("[W]hen somebody wears an

[5] Reid is not a fashion expert; this was merely her personal opinion. 9RP 125.

item enough, you can get their profile out of it.") So, if the State's theory is correct, either the gloves belonged to Nguyen, or Lam brought them with him. If they were Nguyen's, how could Lam, on a single occasion, deposit as many skin cells on the cuffs as she did during regular wear? If they were Lam's, what were Nguyen's skin cells doing there at all?

Arguably, by contrast with DNA profiles, juries understand bloody gloves. Lam was prejudiced by counsel's failure to develop the exculpatory evidence these gloves provided.

(vi) The Hat. Reid tested Lam's baseball cap. She found a barely-visible speck of blood in the logo area, which she identified as Nguyen's to a certainty of 900 quadrillion to one. 9RP at 61-62. But the interior sweatband yielded yet another mixed profile from two individuals who had worn the hat enough to leave sufficient skin cells for a DNA profile. 9RP 62. Lam was a contributor to a one in 13 quadrillion certainty, but Reid could not identify the second contributor. 9RP 63.

Again, counsel missed an opportunity to impress upon the jury how many times Reid obtained 'mixed' DNA profiles from items from which a mixture simply did not make sense.

(b) Other Evidence. Defense counsel passed up numerous opportunities to challenge the integrity, and thus the relevance, of other crime scene evidence in addition to the DNA.

(i) *The Faucets.* The blood spatter expert looked for blood on the faucets but found none. O'Keefe did find blood on the faucets. Yet counsel did not invite the jury to wonder where the blood O'Keefe found on the faucets came from. This was another missed opportunity to inject an inference that the first responders contaminated the crime scene.

(ii) *Position of the Body.* Likewise, the State suggested fire department personnel rolled the body over before the police arrived. 7RP 120-21. This could not have been to render aid because the body had been dead 36 hours. If the first responders disturbed the body, what other crucial evidence did they disturb? For one thing, the prosecutor suggested bloody footprints outside the apartment also were probably left by the fire department. 5RP 86, 89, 95.

Effectively presented, the evidence of the faucets, moving the body, and generating artifacts such as bloody footprints, could have been exploited to dislodge the jury from passive acceptance of the State's evidence and reminding the jurors of what many of them probably knew from television: that erroneous conclusions of guilt often occur when the crime-scene is compromised by first responders whose first priority is not the preservation of evidence.

(iii) *Bloody Fingerprints.* Latent fingerprint expert, Debra Mitchell, testified about a bloody print found on a windowsill. 6RP 93-94,

110. To identify a print, Mitchell first examines the evidence print to see if there is enough quality detail, then compares it to a known print. 6RP 102-03. There is no standard or minimum number of identification points for declaring a match. Examiners check each other's work, but declaring a match is entirely a matter of the technician's subjective judgment. 6RP 107, 108, 118-19. The police tell the print examiner where they want her to find the suspect's print. 6RP 100.

A print visualized with chemicals is not liftable, so the expert has to work with a photograph. 6RP 102. Amido black is a chemical. 6RP 100-01. Mitchell received a photograph of an amido black visualization of the evidence print from the window. 6RP 110, 111.

Prints are "very fragile." Merely bumping the surface could disintegrate the print. 6RP 98. The evidence print from Nguyen's apartment was on a chip of paint lifted from the windowsill. 6RP 111. The amido black had eaten away some of the paint, so Mitchell did a second lift of the print from the paint chip onto tape. 6RP 111, 127.

Counsel did not challenge the reliability of Mitchell's identification by contrasting her own testimony that a mere bump can disintegrate fragile prints with fact that this particular fragile print was first scraped off a windowsill in paint and then lifted from the fragile paint scraping. Nor did counsel further question Mitchell's reliability by

pointing out that she found not a single other print in the entire apartment where Lam had visited daily for years. 6RP 112.

Most significantly, the blood print exhibits were mixed up and mislabeled. 5RP 103-04. Detective O'Keefe identified exhibit 61 as 60. 6RP 103. He then said number 60 was a smear from a print on the east window, when it actually was the north window. 5RP 102, 103. Then he said the blood was on the west side of the frame, when he really took it from the east side. O'Keefe then mislabeled these exhibits when he packaged them. 5RP 102-04. (Directional confusion was inevitable, because O'Keefe – presumably following standard police procedure – used north, south, east and west to denote both compass direction and top, bottom, left and right. 6RP 104.) Other autopsy evidence also was mislabeled. 5RP 127-28. Counsel failed to draw the jury's attention to the serious implications of this inept evidence-gathering.

The potential impact of the print mix-up was huge. If the print came from the west side of the north-facing window frame, it was on the left side of the frame. 6RP 102. But Mitchell matched the print to Lam's right thumb, not his left. 6RP 113, 116. Moreover, Mitchell said the print was on the window <u>sill</u>. 6RP 110. O'Keefe twice said it was on the west side of the frame. 5RP 102, 103. Then he said it was on the east side. 5RP 103. Then the west side, then the east side again. He had it

momentarily on the sill (which he called the south side of the north side window). 5RP 104. But he finally settled once and for all on the east side. 5RP 104. Mitchell testified consistently about a print on the sill, not on either side. 6RP 110, 111. By letting this crucial discrepancy pass, counsel missed yet one more opportunity to illustrate that the State's superficially damning circumstantial evidence against Lam was unreliable.

(iv) *Miscellaneous.* There were significant defensive wounds on the victim's hands. Yet, inexplicably, the fingernail clippings were never tested. 8RP 40-41. And investigators did not bother trying to identify the bloody footprint. Counsel made nothing of these omissions. But fingernail clippings and bloody footprints are the sort of evidence that jurors (a) can understand and (b) might regard as dispositive.

Of counsel's failures to capitalize on the weaknesses in the State's evidence, the only one that might be deemed legitimate trial strategy is the decision to forgo an 'if the gloves don't fit, you must acquit' defense. The cumulative errors amounted to constitutionally deficient representation, and they deprived Lam of any chance of acquittal.

(c) Ineffective Closing Argument. Even accepting all the State's evidence at face value, Lam might have had a chance of acquittal if only counsel had offered the jury a plausible scenario to account for the

forensic evidence. Instead, the jury was left with the guilt scenario or nothing.

Several plausible scenarios suggest themselves. Lam had been visiting Nguyen for years. He must have known about the security camera in the lobby. It is inconceivable that he imagined his arrival and departure would not be noted – he left his driver's license at the front desk.

Lam also must have known the back door could be wedged open, which frequently occurred at the time of the murder. 7RP 135-36. If Lam had murder on his mind that morning, he could easily have passed through the lobby, wedged open the back door, immediately exited through the lobby saying Nguyen did not answer her door and must not be home, then reentered and left through the back door, with all day to perpetrate the crime.

Maybe the attacker came in through the wedged-open back door, someone who had visited Nguyen before and knew she lived alone and might have a large amount of cash.

Conceivably Lam, in his distress at finding his friend face-down in a pool of blood, turned her over. The apartment was very warm and smelled bad, so he opened the window, leaving a bloody thumb print. He

was old and in poor health.[6] How natural to just sit there for a while in shock and then to panic and lie out of fear – justifiable as it turned out – that he would be suspected. There was no need to account for Lam's DNA in an apartment he visited daily. Maybe Nguyen was the mystery contributor to the DNA profile in his hatband and left the microscopic speck of blood herself. The State suggested no one else who might have worn Lam's hat.

The scientific aspects of the evidence seem to have overwhelmed counsel's ability to subject the State's witnesses to any sort of effective confrontation. Going easy on the State's witnesses cannot be characterized as a plausible trial strategy, because the defense did not put on a case. Therefore, challenging the State's evidence was the entire defense. Counsel's performance was constitutionally deficient, and Lam was prejudiced.

2. LAM'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED.

A person accused of crime has a constitutional right to a public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). This means that all jury voir dire must be conducted in public. In re Personal Restraint of Orange, 152

[6] We know this from pretrial motions. 1RP 106,109. The jury had Lam in front of them.

Wn.2d 795, 100 P.3d 291 (2005); Bone-Club, 128 Wn.2d at 259. An accused may waive this fundamental trial right to have jurors examined in public only by an affirmative act that is knowing, intelligent, voluntary, and on the record. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994).

Without a waiver, the court may not close any part of any juror voir dire without considering on the record the following criteria: the existence of a compelling interest in privacy; the opportunity for objections; the weight of the alleged privacy interest versus the right of the defendant and the public to a public trial; and whether closing the proceedings is the least restrictive means available. Orange, 152 Wn.2d at 801-02, 804-07; Bone-Club, 128 Wn.2d at 256-59. Failure to address the so-called Bone-Club factors on the record is an error of constitutional magnitude that can be raised for the first time on appeal. Bone-Club, 128 Wn.2d at 257; State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). Review is de novo. State v. Jones, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

This error is not subject to harmless error analysis. Bone-Club, 128 Wn.2d at 261-62; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Prejudice is presumed. Bone-Club, 128 Wn.2d at 261-62; Orange, 152 Wn.2d at 812. The only appropriate

remedy is to reverse and remand for a new trial. Brightman, 155 Wn.2d at 518; State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

Here, the court more than once indicated its willingness to voir dire jurors in private. For example, the court instructed the potential jurors to let the court know if any part of the voir dire made them uncomfortable, "and we'll try to take up in a more private venue." 3RP 34. Later, the judge told the jury: "Again, I want to remind you that nobody here is going to intentionally ask a question to embarrass you or make you uncomfortable. So, if for whatever reason we wander into an area like that and you'd rather take it up in a more private venue, just say so. We will pass over the question and take it up later on. We may still need the answer but we may be able to accommodate you in a more private setting." 3RP 75-76.

The record includes the following trial minute: "Jury absent. Juror #10 is questioned outside the presence of the jury. Court holds in chamber conference with the court reporter, Juror #10 and respective counsel. Court continued until Monday, March 19, 2007 at 9:00 a.m." Supp CP __ (sub no. 77A, Clerk's Minutes, 3/12/07). On March 19, 2007, the court filed an Order on Criminal Motion, "Sealing Transcript of In-Chambers Conference of 4/07." Supp CP __ (sub no. 78, Order on Criminal Motion, 3/19/07). The Order says that the court, having "conducted an in-

chambers conference with counsel for plaintiff and defendant and one of the jurors, IT IS HEREBY ORDERED that "the transcript of the in-chambers conference is hereby sealed."

Interviewing a juror in chambers without a public trial waiver and without addressing the Bone-Club factors, and then sealing the record violated Lam's right to a public trial. The error requires reversal of his conviction. Bone-Club, 128 Wn.2d at 259.

D. CONCLUSION

Defense counsel clearly was not up to the task of cross examining the DNA expert. Few defense lawyers are.[7] This record is replete with problems with the State's expert testimony such that effective counsel could have made a strong case for reasonable doubt. Lam was denied effective assistance of counsel by his lawyers' repeated failures to educate the jury about the implications of inept investigation on the integrity of the evidence. These failures constituted deficient representation that was particularly prejudicial given the inherently circumstantial nature of the State's case.[8]

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[7] Richard A. Nakashima, DNA Evidence in Criminal Trials: A Defense Attorney's Primer, 74 Neb. L. Rev. 444, 445 (1995).

[8] This Court has recognized the "inherently slippery" nature of statistical evidence, which is circumstantial by definition. Oda v. State, 111 Wn. App. 79, 96, 44 P.3d 8 (2002).

In addition to receiving ineffective assistance of counsel, Lam was denied a public trial. For these reasons, Lam asks this Court to reverse his conviction.

DATED this 30th day of January, 2008.

Respectfully submitted,

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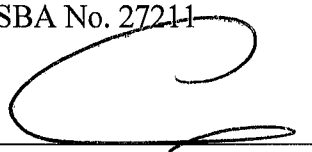

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