

<p>Colorado Court of Appeals 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: March 8, 2017 10:26 PM FILING ID: 682E5EEB32EE5 CASE NUMBER: 2016CA400</p>
<p>Denver District Court Case No. 2014CR6552</p>	
<p>Defendant-Appellant:</p> <p>Gabriel A. Tresco</p> <p>v.</p> <p>Plaintiff-Appellee:</p> <p>The People of the State of Colorado.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE WITH C.A.R. 28 AND 32

Undersigned counsel certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 3,071 words.

/s/ Katayoun A. Donnelly
By: _____
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court deprived Mr. Tresco of his Sixth Amendment right when it wrongfully denied his request to exercise the constitutional right to choose his counsel?
2. Whether the trial court deprived Mr. Tresco of his Sixth and Fourteenth Amendments and due process rights to effectively confront a witness against him when it allowed an expert to testify at the trial whose summary of opinion had not been disclosed upon Mr. Tresco's request?
3. Whether the trial court deprived Mr. Tresco of his First and Fourteenth Amendment rights to freedom of belief and association when it considered the evidence of his unrelated remote-in-time gang affiliation in sentencing him?

STATEMENT OF THE CASE AND FACTS

Gabriel Tresco proposed to the girl of his dreams at a bar. (R. Tr. [1/22/16], p. 29.) The same night, in the same bar, he observed a man grope her. (*Id.*) He punched that man in the parking lot of the bar. (*Id.*) He was charged with assault in the second degree. (R. CF., p. 10.) The Office of Public Defender (PD) represented Mr. Tresco.

On the day of trial, before the jury selection began, Mr. Tresco approached the court with his complaints to the Office of Attorney Regulation against the PD and DA and asserted his constitutional right to counsel of choice. (*Id.*, pp. 35-6.) The trial court, without any inquiry or explanation, denied Mr. Tresco's request to be represented by an attorney he trusted at a trial that exposed him to a five- to sixteen-year Department of Corrections sentence. (*Id.*, p. 36, ll. 12-24; p. 10, ll. 1-2.)

Later that day, the trial court allowed testimony of the prosecution's expert witness, even though the prosecution had failed to disclose the expert's reports, which the PD had requested. (R. Tr. [12/1/15 pm], pp. 12-22.) The PD objected that this testimony on the dispositive issue of serious bodily injury in a second degree assault case violated Mr. Tresco's constitutional rights under the confrontation clause because, in the absence of timely disclosure of the expert report, the PD was not able to prepare properly for trial, prepare a meaningful cross-examination, or decide whether to hire an expert to confront those opinions. (*Id.*) The trial court overruled the objection and allowed the expert to testify. (*Id.*, p. 122.) The jury found Mr. Tresco guilty of second-degree assault. (R. Tr. [12/2/15], p. 178, ll. 20-2.)

During the sentencing hearing, the prosecution introduced a documentary (*Gangland*) regarding Mr. Tresco's gang affiliations – which occurred many years prior to the incident and were entirely unrelated to the facts of the case presented to the jury. (R. Tr. [1/22/16], p. 3.) The PD objected. (*Id.*, p. 3, l. 7; p. 4, ll. 17-19.) The trial court overruled the objection and took the past gang affiliation into consideration in sentencing Mr. Tresco to eight years in the Department of Corrections. (R. Tr. [1/22/16], pp. 4-5, 37.) This direct appeal follows.

SUMMARY OF THE ARGUMENT

In addressing Mr. Tresco's constitutional rights, the trial court made three mistakes, each of which is a reversible error.

First, every criminal defendant has a fundamental constitutional right to be represented by a counsel (s)he trusts. Wrongful denial of this right is a structural error. The trial court wrongfully deprived Mr. Tresco of this right when, without inquiry or explanation, it denied his request to exercise his right to counsel of choice. This wrongful deprivation must be reversed.

Second, the trial court violated Mr. Tresco's constitutional rights under the Confrontation Clause when it allowed the prosecution's expert to testify about an area not disclosed to Mr. Tresco. In allowing the prosecution to introduce to the jurors a completely new area of expert

testimony, the trial court deprived Mr. Tresco, among other things, of the right to prepare for trial, decide whether he needed an expert to counter the prosecution's expert, reconsider his trial strategy, and effectively cross-examine the expert.

Finally, even though the trial in 2015 and sentencing in 2016 involved no allegations regarding any gang-related activity or Mr. Tresco's involvement with a gang, the prosecution sought the trial court's permission to introduce a video of his 2009 gang-related activities at the hearing. The trial court, over Mr. Tresco's objection, relied on this irrelevant video in sentencing Mr. Tresco to eight years at the Department of Corrections for punching the man who groped the woman who is now his wife. The trial court's decision violated Mr. Tresco's First and Fourteenth Amendment rights and must be reversed.

ARGUMENT

I. The trial court's denial of Mr. Tresco's Sixth Amendment right to choice of counsel was a structural error.

Standard of Review and Preservation

The question of whether the trial court violated Mr. Tresco's Sixth Amendment right to choice of counsel is a question of law that should be reviewed *de novo*. See, e.g., *United States v. O'Neal*, 213 F.3d 644 (9th Cir.

2000) (*de novo* review of Sixth Amendment claim); *United States v. Low*, 401 F. App'x 664, 670 (3d Cir. 2010) (same).

Structural Errors

The United States Supreme Court has

divided constitutional errors into two classes. The first we called “trial error,” because the errors occurred during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt. These include most constitutional errors. The second class of constitutional error we called “structural defects.” These defy analysis by “harmless-error” standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.

United States v. Gonzalez-Lopez, 548 U.S. 140, 148-50, 126 S. Ct.

2557, 2563-64, 165 L. Ed. 2d 409 (2006) (internal citations quotation marks and brackets omitted). Structural errors are not amenable to either a harmless or a plain error analysis because such errors affect “the framework within which the trial proceeds,” and are not errors in the trial process itself. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Because the consequences of a structural error are necessarily unquantifiable and indeterminate, it renders the entire proceeding

fundamentally unfair and warrants automatic reversal. *See Sullivan*, 508 U.S. at 281-82, 113 S.Ct. at 2082-83.

Mr. Tresco preserved this issue by asserting his Sixth Amendment right before the jury selection proceeding started. (R. Tr. [12/1/15 am], pp. 35-6.)

Legal Analysis

A criminal defendant's right to choose his counsel is central to our adversarial judicial system and protected by the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 144; *People v. Maestas*, 199 P.3d 713, 716 (Colo. 2009). The Sixth Amendment commands "that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146, 126 S. Ct. at 2562. This constitutional guarantee "reflects the substantial interest of a defendant in retaining the freedom to select an attorney the defendant trusts and in whom the defendant has confidence." *Anaya v. People*, 764 P.2d 779, 781 (Colo. 1988) (quoting *Rodriguez v. Dist. Court*, 719 P.2d 699, 705 (Colo. 1986)); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624– 625, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who

is willing to represent the defendant even though he is without funds.”). As such, the defendant’s choice of counsel is “entitled to great deference.”

Rodriguez, 719 P.2d at 705.

Before the trial court started the jury selection process, Mr. Tresco brought to the trial court’s attention his complaints to the Office of Attorney Regulation against the PD and the DA and asserted his constitutional right to choice of counsel. (R. Tr. [12/1/15 am], pp. 35-6.) The trial court, however, wrongfully (without any explanation or inquiry regarding either the counsel Mr. Tresco had or the one he wanted to have) denied Mr. Tresco’s request and proceeded to trial, depriving him of this constitutional right to be represented by a counsel he trusted and in whom he had confidence.

This wrongful denial of Mr. Tresco’s right to counsel of choice is a structural error – not subject to harmless error analysis or a requirement to show prejudice – and must be reversed. *Gonzalez–Lopez*, 548 U.S. at 150, 126 S.Ct. 2557 (“We have little trouble concluding that **erroneous deprivation of the right to counsel of choice**, ‘with consequences that are necessarily unquantifiable and indeterminate, **unquestionably qualifies as “structural error.”**” (emphasis added) (quoting *Sullivan*, 508 U.S. at 282)); *id.*, 548 U.S. at 146, 126 S. Ct. at 2562 (when the “right was violated because the deprivation of counsel was erroneous. No additional showing of

prejudice is required to make the violation ‘complete.’”); *see also Anaya*, 764 P.2d at 783 (“[T]here is no way to know whether the character of the proceedings would have changed, whether counsel would have made different decisions, or whether the defense strategy would have been different if [counsel of choice] had represented [the defendant]. Under these circumstances, prejudice to the defendant is assumed without the necessity of showing specific prejudice.” (citation and internal quotation marks omitted)); *People v. Cardenas*, 2015 COA 94M, ¶ 19, *as modified on denial of reh’g* (Aug. 13, 2015) (collecting cases) (citing *People v. Ragusa*, 220 P.3d 1002, 1010 (Colo. App. 2009) (“The denial of a defendant’s constitutional right to counsel of his or her choice is structural error.”)); *United States v. Brown*, 785 F.3d 1337, 1350 (9th Cir. 2015) (“The denial of a defendant’s right to counsel of choice is a structural error, requiring that convictions be vacated even without a showing of prejudice.”); *United States v. McKeighan*, 685 F.3d 956, 966 (10th Cir. 2012) (“If a defendant is wrongly denied his counsel of choice, no showing of prejudice is necessary to establish constitutional error. Such a deprivation is structural error and is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received.” (citations and internal quotation marks

omitted)); *Hyatt v. Branker*, 569 F.3d 162, 172 (4th Cir. 2009) (same); *United States v. Bender*, 539 F.3d 449, 454 (7th Cir. 2008) (same); *Benitez v. United States*, 521 F.3d 625, 630 (6th Cir. 2008); *United States v. Sanchez Guerrero*, 546 F.3d 328, 332 (5th Cir. 2008) (same); *United States v. Mosley*, 505 F.3d 804, 811 (8th Cir. 2007) (same)).

II. The trial court deprived Mr. Tresco of his Sixth and Fourteenth Amendments and due process rights to effectively confront the expert witness against him when it allowed an expert whose summary of opinion had not been disclosed upon Mr. Tresco’s request testify at trial.

Standard of Review and Preservation

The Court of Appeals reviews claims of error involving the Confrontation and Due Process Clauses *de novo*. *United States v. Kamahele*, 748 F.3d 984, 997 & n. 4 (10th Cir. 2014) (*de novo* review of Confrontation Clause claims); *People v. Abdu*, 215 P.3d 1265, 1270 (Colo. App. 2009) (*de novo* review of Due Process claims). “Whether the admission of objected-to evidence under Rule[s] . . . [of] Evidence, was proper is a mixed question of law and fact; the factual determinations are reviewed for clear error and the legal issues are reviewed *de novo*.” *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004).

“The complete denial of access to an area properly subject to cross-examination infringes on the Sixth Amendment right of confrontation, and

constitutes reversible error.” *United States v. Rosario Fuentes*, 231 F.3d 700, 704 (10th Cir. 2000); *see also People v. Sisneros*, 44 Colo. App. 65, 66, 606 P.2d 1317, 1318 (1980).

Mr. Tresco preserved this issue when he objected to the introduction of the expert’s testimony. (R. Tr. [12/1/15 pm], p. 120, ll. 22-4.)

Legal Analysis

In all state and federal criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, “to be confronted with the witnesses against him.” U.S. Const. amends. VI, XIV; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004).

The Confrontation Clause gives every accused person the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. “That right is realized by affording defendants *an opportunity for effective cross-examination.*” *United States v. Ghilarducci*, 480 F.3d 542, 548 (7th Cir. 2007) (emphasis added) (citing *Crawford*, 541 U.S. at 61; *United States v. Owens*, 484 U.S. 554, 557, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988)). This in turn requires proper disclosure of anticipated expert testimony that has been requested by defense.

On June 9, 2015, six months before the trial date, Mr. Tresco filed a motion requesting a summary of anticipated expert testimony and the underlying facts and data supporting the opinions of purported expert witnesses. (R. CF. pp. 26-8.) On December 1, 2015, at trial, the prosecution tried to elicit expert testimony regarding nerve damage and need for surgery as a result of Mr. Tresco punching the man who groped the woman he had proposed to that night. Mr. Tresco objected, asserting his rights under the Confrontation Clause and arguing that the prosecution had not disclosed any information regarding such testimony by their expert. (R. Tr. [12/1/15], pp. 120-22.) The trial court and prosecution acknowledged both Mr. Tresco's specific request for discovery of all expert material and the fact that the prosecution had not provided the information requested regarding the testimony it was trying to elicit from the expert. Nonetheless, the trial court overruled Mr. Tresco's objection and allowed the expert to testify.

In doing so, the trial court violated Mr. Tresco's rights under the Confrontation and Due Process Clauses because, as a result of the prosecution's failure to disclose, Mr. Tresco's attorneys had no opportunity to review and understand the expert's opinion and, therefore, could not effectively cross-examine him or reasonably decide whether they needed to interview the expert, change trial strategy based on what they learned,

present conflicting expert testimony. This was a reversible error. *Rosario Fuentes*, 231 F.3d at 704.

III. The trial court deprived Mr. Tresco of his First and Fourteenth Amendment rights to freedom of belief and association when it considered the evidence of his unrelated and remote-in-time gang affiliation in sentencing him.

Standard of Review and Preservation

Appellate courts review *de novo* a lower court's "findings of constitutional fact" and its "ultimate conclusions" regarding a First Amendment challenge. *See Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 922-23 (10th Cir. 2002). In doing so, they must "make an independent examination of the whole record." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc) (quotation omitted); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 270 (Colo. 1997); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991).

Mr. Tresco preserved this issue by objecting to introduction of the video at sentencing. (R. Tr. [1/22/2016], p. 3, ll. 3-8; p. 4, ll. 17-9.)

Legal Analysis

The prosecution introduced the *Gangland* video at sentencing, as evidence of “the character of the man who stands in front of you,” (R. Tr. [1/22/16], p. 4, ll. 3-4), even though (1) the video was recorded in 2009, seven years earlier, (2) there were no allegations of any gang-related activities in this case, and (3) the prosecution did not introduce any evidence that Mr. Tresco was a member of a gang at the time the alleged crime occurred or that any gang was involved in activities for which he was convicted. In addition, the purpose of the documentary, as a counselor with the National Gang Crime Research Center put it, was “to show the community that this is something you don't want to do.” (R. Tr. [1/22/16], pp. 7-8.)

The Supreme Court of United States drew a clear line in *Dawson v. Delaware*, preventing trial courts from violating criminal defendants’ First and Fourteenth Amendment rights to freedom of association by considering evidence of unrelated gang membership at sentencing. 503 U.S. 159, 166, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

Regarding the reach of the First Amendment, the dissent correctly points out that it prevents the State from criminalizing certain conduct in the first instance. But it goes further than that. It prohibits a State from denying admission to the bar on the grounds of previous membership in the Communist Party, when there is no connection between that membership and the

“good moral character” required by the State to practice law. *Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). It prohibits the State from requiring information from an organization that would impinge on First Amendment associational rights if there is no connection between the information sought and the State's interest. *Bates v. Little Rock*, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). We think that it similarly prevents Delaware here from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.

Id., at 168. The trial court's consideration of evidence of gang membership in violation of the First Amendment is reversible error where, as here, the prosecution fails to tie the evidence to the crime in question and (because there was no proof or even allegation of gang-related activities in the case) the alleged gang membership was not relevant to proving any aggravating circumstances. *See id.* (holding that “[e]ven if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case” and “[b]ecause the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance.”).

As such, the trial court's decision in sentencing Mr. Tresco must be reversed.

CONCLUSION

The trial court's constitutional errors violated Mr. Tresco's fundamental rights and should be reversed along with Mr. Tresco's conviction.

Respectfully submitted on March 8, 2017.

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Certificate of Service

On March 8, 2017, I served this Opening Brief on the party listed below using the Integrated Colorado Courts E-Filing System.

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