Colorado Court of Appeals 2 East 14th Avenue Denver, Colorado 80203 Denver District Court Case No. 2014CR6552	DATE FILED: October 10, 2017 11:14 PM FILING ID: BAED0AA68F95A CASE NUMBER: 2016CA400
Defendant-Appellant: Gabriel A. Tresco v. Plaintiff-Appellee: The People of the State of Colorado.	**▲COURT USE ONLY ▲**
Attorney for Appellant (*through the Office of the Alternate Defense Counsel*): Katayoun A. Donnelly Azizpour Donnelly LLC 2373 Central Park Boulevard, Suite 100 Denver CO 80238 Phone Number: 720-675-8584 E-mail: katy@kdonnellylaw.com Atty. Reg. #: 38439	Case No. 2016CA400
REPLY BRIEF	

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 2,950 words.

/s/ Katayoun A. Donnelly

By: _____

Katayoun A. Donnelly, #38439

TABLE OF CONTENTS

ERRONEOUS DENIAL OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE IS A STRUCTURAL ERROR THAT MUST BE AUTOMATICALLY REVERSED. 5

A criminal defendant does not need to prove prejudice in order to establish a violation of his right to choice of counsel 7

Denial of a right to counsel of choice is a structural error and automatically reversible 8

DENIAL OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM IS A REVERSIBLE ERROR. 10

EMPLOYING EVIDENCE OF UNRELATED PAST GANG INVOLVEMENT IN SENTENCING IS A REVERSIBLE ERROR. 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 16
Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004) 13
Dawson v. Delaware, 503 U.S. 159, 166, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) 14, 15, 16
Hagos v. People, 288 P.3d 116, 120 (Colo. 2012) 13, 14
Lanari v. People, 827 P.2d 495, 499 (Colo. 1992) 11
People v. Brown, 2014 CO 25. ..... 5, 6
People v. Cardenas, 2015 COA 94M 9
People v. Maestas, 224 P.3d 405 (Colo. App. 2009) 15
People v. Ragusa, 220 P.3d 1002 (Colo. App. 2009) 9
Snyder v. Murray City Corp., 159 F.3d 1227(10th Cir. 1998) 16
United States v. Anderson-Bagshaw, 509 Fed. Appx. 396 (6th Cir. 2012) .. 13
United States v. Day, 524 F.3d 1361 (D.C.Cir. 2008) 12
*United States v. Ghilarducci***,** 480 F.3d 542 (7th Cir. 2007) 13
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) ..... passim
United States v. Owens, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) 13

RULES

Colo. R. Crim. P. 16 …… 11

ERRONEOUS DENIAL OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE IS A STRUCTURAL ERROR THAT MUST BE AUTOMATICALLY REVERSED.

Completely dissatisfied with his counsel, all Mr. Tresco wanted was to hire his attorney of choice to represent him at the trial that exposed him to five to sixteen years of imprisonment. (R. Tr. [12/1/15] a.m., p. 36; Tr. [1/22/16], p. 31, ll. 22-5.) The trial court not only understood the nature of Mr. Tresco's request, which asserted his constitutional right to counsel of choice, but also acknowledged the applicability of *People v. Brown*, 2014 CO 25. to Mr. Tresco's request.

> THE DEFENDANT: Actually, there's some relevance because, Your Honor, these are the things that led me to believe --
> THE COURT: It would only be relevant if you're filing or requesting that your counsel be withdrawn on the morning of trial.
> THE DEFENDANT: Then, yes. Let's proceed with that, Your Honor.
> THE COURT: Now we have to go through the elements of ***People v. Brown***.
> You know, the jury is here.
> MS. GREENE: Judge, I'm going to ask that we proceed to jury selection and we do this after jury selection.
> THE COURT: I agree. ***We're going to start. Way too late***.

(R. Tr. [12/1/15] a.m., P. 36, ll. 6-21 [emphasis added].) As such, the prosecution's claim that Mr. Tresco did not raise his right to counsel of choice lacks merit.[1]

Further, at the invitation of the prosecutor, the trial court refused to follow the binding authority from the United States and Colorado Supreme Courts, which it had already identified, and denied Mr. Tresco's request without any analysis or explanation, simply stating, despite the fact that this was the first trial setting, that it was "way too late." (*See id.*; *id.*, p. 12, ll. 2-3.)

Pursuant to *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)[2], the trial court's erroneous denial of Mr. Tresco's right to his counsel of choice is a structural error that should be automatically reversed.[3]

---

[1] The prosecution's response brief creates alternative versions of Mr. Tresco's argument and, instead of addressing Mr. Tresco's actual argument, responds to its own versions. These arguments, which attempt to dilute Mr. Tresco's clear choice-of-counsel argument, make distinctions without a difference and do not change the fact that the trial court not merely understood Mr. Tresco's argument but identified the applicable case law governing the issue of counsel of choice, i.e., *Brown*.

[2] *See also Brown*, 2014 CO 25 (citing *Gonzalez-Lopez*).

[3] None of the limitations on the right to choose one's counsel are relevant in this case, since Mr. Tresco was facing a five-to-sixteen-year sentence, this was the first trial setting, and neither the prosecution nor the trial court raised any concern regarding the public's interest in the fairness and efficiency of the judicial system as a potential issue when Mr. Tresco asserted his right.

The prosecution's response brief does not address the holding of the governing authority from the United States Supreme Court, *Gonzalez-Lopez*, which has considered and rejected all the prosecution's arguments.

A criminal defendant does not need to prove prejudice in order to establish a violation of his right to choice of counsel

The prosecution invites the Court to create an additional burden for criminal defendants, namely, proving prejudice, in order to establish the trial court's erroneous denial of Mr. Tresco's right to counsel of choice. The United States Supreme Court has already considered and rejected this argument.

Similar to the prosecution's argument here, in *Gonzalez-Lopez* the government argued that in order to succeed in his choice of counsel claim, the criminal defendant must show that the trial "counsel's performance was deficient and the defendant was prejudiced by it." *Id*. The Supreme Court held "[s]tated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details." *Gonzalez-Lopez*, 548 U.S. 140, 145. It explained that

> the Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a

> fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland, supra,* at 684–685, 104 S.Ct. 2052. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."

Gonzalez-Lopez, 548 U.S. 140, 146.

Therefore, where, as here,

> the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. *Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants,* regardless of the quality of the representation he received. *To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed*.

Gonzalez-Lopez, 548 U.S. 140, 148 (emphasis added).

Denial of a right to counsel of choice is a structural error and automatically reversible

The prosecution also invites the Court to apply a harmless error standard in determining whether the trial court's violation of Mr. Tresco's right to hire his counsel of choice is reversible.

Again, the United States Supreme Court has already considered and rejected this argument in *Gonzalez-Lopez*. "*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.'" *Gonzalez-Lopez*, 548 U.S. 140, 150 (internal quotation marks and citation omitted) (emphasis added). The Supreme Court reasoned:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds,"*Fulminante, supra,* at 310, 111 S.Ct. 1246—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.

Id.; *see also People v. Cardenas*, 2015 COA 94M, ¶ 19, *as modified on denial of reh'g* (Aug. 13, 2015) (collecting cases for the same proposition, 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.")).

Therefore, the trial court's erroneous denial of Mr. Tresco's right to his counsel of choice should be automatically reversed.[4]

DENIAL OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM IS A REVERSIBLE ERROR.

Pursuant to Colorado Rule of Criminal Procedure 16,

> **Part I. Disclosure to the Defense**
> **(a) Prosecutor's Obligations.**
> (1) The prosecuting attorney ***shall*** make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplicates upon request, and concerning the pending case:
> …
> (III) ***Any reports or statements of experts made in connection with the particular case***, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
> …
> **(d) Discretionary Disclosures.**
> …
> (3) Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons. ***The intent of this section is to allow the defense sufficient meaningful information to***

[44] The trial judge has since retired.

conduct effective cross-examination under CRE 705.

Colo. R. Crim. P. 16 (emphasis added). "By permitting the prosecution and defense to obtain relevant information prior to trial, the rules also *promote fairness in the criminal process by reducing the risk of trial by ambush*." *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (emphasis added).

The prosecution does not and cannot dispute that the expert report and statements it had disclosed in this case did not include any material that would suggest that its expert had made any findings regarding nerve damage and planned to testify about it at trial. (Resp. Br., *passim*; R. Tr. [12/1/15] p.m., pp. 120-22.)

Mr. Tresco's Confrontation Clause argument (which the prosecution seems to mistake as an evidentiary argument) addresses not whether the prosecution disclosed written summary of the expert's opinion and its basis but whether a party can ambush the other on the day of trial by presenting expert testimony regarding a new area that has not been disclosed. Mr. Tresco's constitutional challenge is to allowing the expert to testify about matters outside the scope of his disclosed report (not the prosecution's failure to disclose the factual and scientific basis of what had been disclosed).

Further, instead of addressing the governing case law, the prosecution ignores the United States Supreme Court precedent and argues that Mr. Tresco must establish prejudice to prove violation of his rights under the Confrontation Clause.

Once again, *Gonzalez-Lopez* has specifically addressed and rejected this argument.

> What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)) with regard to the Sixth Amendment's right of confrontation—a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right." *Maryland v. Craig,* 497 U.S. 836, 862, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (SCALIA, J., dissenting). Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated.
> See *Roberts, supra,* at 65–66, 100 S.Ct. 2531. We rejected that argument (and our prior cases that had accepted it) in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.,* at 61, 124 S.Ct. 1354.
> . . .
> No additional showing of prejudice is required to make the violation "complete."

Gonzalez-Lopez, 548 U.S. 140, 145–46.

Mr. Tresco requested that the trail court exclude any testimony regarding nerve damage, which was the only reasonable remedy available to

him in the midst of the trial. *See, e.g., United States v. Day,* 524 F.3d 1361, 1372 (D.C.Cir. 2008) (upholding the district court's exclusion of the expert witness as a sanction for the defendant violating Rule 16 by providing an insufficient and tardy report that made it virtually impossible for the Government to engage in meaningful cross-examination and had "the effect of putting the government in a box that was prejudicial and unfair and which had an impact [on] the integrity of the adversary process." (internal quotations and citations omitted)); *United States v. Anderson-Bagshaw*, 509 Fed. Appx. 396, 410 (6th Cir. 2012) (similar).

By allowing the expert to testify about an area not disclosed to the defense, the trial court prevented Mr. Tresco from confronting this witness through meaningful cross-examination and deprived him of the opportunity to decide, for example, whether he needed to interview the expert, change trial strategy, or present rebuttal expert testimony. *See, e.g., United States v. Ghilarducci***,** 480 F.3d 542, 548 (7th Cir. 2007) ("[the confrontation] right is realized by affording defendants an opportunity for effective crossexamination." **(**emphasis added) (citing *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004) ; *United States v. Owens*, 484 U.S. 554, 557, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988))).

The trial court's denial of Mr. Tresco's request to limit the expert's testimony to the areas that had been disclosed violated his rights under the Fourteenth Amendment and Confrontation Clauses of the Constitutions of the United States and Colorado and must be reversed.

EMPLOYING EVIDENCE OF UNRELATED PAST GANG INVOLVEMENT IN SENTENCING IS A REVERSIBLE ERROR.

It is difficult to understand how after *Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012), holding that appellate courts "review all other errors, constitutional and nonconstitutional, that were not preserved by objection for plain error," the prosecution could still argue that a criminal defendant's constitutional argument (even if not raised below) "should not be reviewed." (Res. Br., at 34.)[5]

[5] The prosecution makes a similar argument regarding another constitutional issue: counsel of choice. Without citing to any authority, it argues that the Court should not consider Mr. Tresco's constitutional argument because Mr. Tresco, who was not represented by counsel when he asserted his right, had a duty to re-raise his request to exercise his constitutional right, even though the trial court had already denied his request. Like the prosecution, the undersigned counsel has not been able to locate any authority that would put such an impossible burden on a criminal defendant in such circumstances, perhaps because both the United States and Colorado Supreme Courts, in *Gonzalez-Lopez* and *Hagos*, have held that there is no requirement of preservation for structural errors such as denial of the right to counsel of choice. *See United States v. Gonzalez*, 110 F.3d 936, 946 (2d Cir. 1997).

But, even if this was not a structural error, the prosecution's argument would still have no merit because *Hagos* expressly prevents the prosecution from making the exact argument it is making, i.e., that the Court should not

It is also hard to understand how the prosecution's position on criminal defendants' First Amendment rights would not render the holding of the United States Supreme Court in *Dawson v. Delaware*, 503 U.S. 159, 166, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) meaningless, considering that the prosecution can always argue that past gang membership, even if it has no bearing on the case at hand, is relevant to show the defendant's character and future danger.

Dawson expressly rejects this argument and puts the burden on the prosecution to establish a nexus between the actual evidence of defendant's gang activities, introduced during the trial, and any future danger to society that might result from such activity. *Dawson*, 503 U.S. at 164. Seeking punishment for Mr. Tresco for coming forward and speaking of his gang involvement in a previous life in order to educate youth cannot be a "legitimate purpose," *see id*., or an "appropriate consideration." *People v. Maestas*, 224 P.3d 405, 409-10 (Colo. App. 2009). This is particularly true where, as here, not a scintilla of evidence suggests that Mr. Tresco was

---

consider a criminal defendant's constitutional arguments if they are not preserved. *Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012).

involved with any gang during the time-period relevant to this case.[6] *See* *Dawson*, at 168 (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.").

---

[6] The prosecution and the judge repeatedly pointed out that there was no evidence of groping. The trial counsel's mistake of identity theory of defense – instead of heat of passion – explains why.

> Mr. Tresco did not punch, did not assault
> Louis Covillo in December of last year.
> Now, there's no denying that Mr. Covillo was
> injured. You saw pictures of that, video of it, and
> you heard Dr. Fallon testify about the injuries that
> Mr. Covillo had. That's not up for debate. But
> Mr. Tresco did not cause those injuries.

(R. Tr [12/2/15], p. 159, ll. 9-15.) Furthermore, the prosecution has already pointed out some of the serious problems in the trial counsel's representation of Mr. Tresco and the record shows additional issues, one of which being that by the morning of trial the counsel had not yet located the main witness in the case whose presence could completely change the defense strategy. (*See, e.g.,* R. Tr. [12/1/15] a.m., pp. 11-12.)

Under these circumstances[7] there was no legitimate purpose for introducing and considering Mr. Tresco's remote-in-time involvement with gang activities because they had "no bearing on the issue being tried." *Dawson*, 503 U.S. 159, 168.

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 October 10, 2017.

AZIZPOUR DONNELLY, LLC

/s/ Katayoun A. Donnelly
Katayoun A. Donnelly

Attorney for Defendant/Appellant
(through ADC)

[7] The Court 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); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Certificate of Service

On October 10, 2017, I served this Reply Brief on the counsel of record using the Integrated Colorado Courts E-Filing System.

/s/ *Katayoun A. Donnelly*
Katayoun A Donnelly

In accordance with C.A.R. 30(f) and C.R.C.P. 121 § 1-26(9), a printed copy of this document with original signatures is maintained by the filing party and will be made available for inspection by other parties or the Court upon request.