NO. 101901-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KHALID MOHAMED HAYBE,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Khalid Mohamed Haybe seeks review of the Court of Appeals' unpublished opinion affirming his conviction for first-degree unlawful possession of a firearm. State v. Haybe, Unpublished, No. 83153-4-I, 2023 WL 1102342 (Wash. Ct. App. Jan. 30, 2023). The Court of appeals held that, pursuant to State v. Talbott, 200 Wn.2d 731, 521 P.3d 948 (2022), Haybe waived any challenge to the denial of his for-cause challenge against Juror 16 when he affirmatively accepted the jury, with Juror 16 on it, despite having a peremptory challenge to spare.

Haybe seeks review of two issues he raised for the first time in a motion for reconsideration after the Court of Appeals issued its opinion: whether Haybe established a manifest constitutional error warranting review under RAP 2.5(a) despite counsel's waiver of the juror bias issue, and whether Haybe received ineffective assistance of counsel. The Court of Appeals did not err in failing to address arguments Haybe had not yet made at the time the court issued its opinion. And

because a motion for reconsideration is not a vehicle for raising new claims for the first time, the court properly exercised its discretion in denying the motion for reconsideration.

This Court does not review decisions that the Court of Appeals did not make. The claims on which Haybe seeks review were not addressed by the Court of Appeals because they were untimely raised. This Court should therefore deny the petition for review.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

1. THE TRIAL COURT PROPERLY DENIES HAYBE'S FOR-CAUSE CHALLENGE AGAINST JUROR 16.

The State charged Haybe with one count of unlawful possession of a firearm in the first degree. CP 1. During jury selection, the trial court granted challenges for cause against jurors who stated unequivocally that they could not be fair or who stated that they could try to be fair but clearly believed that they would not succeed, such as Jurors 11 and 13. E.g., RP 342 (Juror 13), 343-46 (Juror 11).

Juror 13, when asked whether they could be fair and impartial, stated "I don't think I could." RP 342. Juror 11, when asked whether they could try to be fair and impartial despite their strong feelings about guns and gun control, stated "You can always try," but added, "I'm trying to be realistic here" and again emphasized that they had "very deeply held beliefs about guns and gun control." RP 344. After Haybe challenged Juror 11 for cause, the trial court sought to clarify

the jurors' true feelings, asking, "Do you believe that because of your personally held beliefs about guns that you would not be able to [fairly evaluate the evidence] simply because the . . . idea of a gun is involved?" Juror 11 responded, "Yes, I do."

When the prosecutor asked whether anyone else had concerns similar to Jurors 11 and 13, Juror 16 was one of the jurors who raised their hands. RP 355. Juror 16 stated that she, too, had "strong feelings about, like, gun laws and really think that no one should -- needs to have a gun. So I think I would find it hard to, like -- like, I just don't think that anyone needs to have a gun. So when there's a law that's broken regarding having a gun, I just -- I think that I . . . yeah. I don't know." RP 355-56. The prosecutor, whose allotted time to speak to the panel was running out, jumped "for time['s] sake" to asking whether, in a case where the charge involved a gun, Juror 16's feelings "would interfere with [her] ability to consider [the defendant] to be presumed innocent throughout the course of the trial." Juror 16 responded, "I think I would be okay. I think

that I would need to really, really, really, really be convinced. Like, which is what a trial is, but I -- yeah." Juror 16 clarified that she meant she "would need to really, really, really, really be convinced" that a defendant was guilty in order to overcome the presumption of innocence. RP 356-57.

During defense counsel's questioning of the panel, Juror 7 expressed a personal belief that no one should get more than one "strike" when it comes to gun crimes. RP 361. Haybe then asked how that belief would play out in a case involving an accusation that someone possessed a gun despite being disqualified. RP 361. Juror 7 responded that the State would still need to prove that the defendant possessed a gun, but believed that someone who had broken the law before was more likely to have broken it again. RP 361-63.

Haybe then asked other jurors whether they could presume a person innocent with respect to whether they possessed a gun if they heard evidence suggesting the person had a disqualifying prior conviction. RP 364. Haybe did not

educate the panel about the prohibition on using prior acts for propensity purposes or ask about their ability to follow an instruction on that point. RP 363-64. Instead, he merely sought to identify other jurors who had feelings similar to Juror 7. RP 366. Juror 16 was one of the 12 potential jurors who raised their hands. RP 366-67.

Haybe framed the jurors' intuition that a person's history was relevant to the likelihood that they were guilty as an indication that, if they heard that the defendant had previously been convicted of a disqualifying offense, they would not properly apply the burden of proof and presumption of innocence with respect to the other elements of the crime. RP 364, 369. When Counsel called on Juror 16 and asked whether she agreed with that, the following exchange occurred:

> JUROR NO. 16: I -- no. I don't know. I feel like -- you know, like, a convicted felon is not supposed to have a gun period. So the idea that that is even at play, like, makes me feel that, yeah, he would be guilty over innocent.
>
> [Defense counsel]: Does that mean that in a trial where the person is being accused of having a

prior conviction that disqualifies them from possessing a firearm, you would not apply the presumption of innocence -- innocence to the other facts that you need to decide in the case?

JUROR NO. 16: I would try really, really, really hard, but I -- I -- I would say, like, it would be in the back of my head that, you know, the other details.

[Defense counsel]: So do you feel that -- now, again, I -- I recall that Juror 16, on your questionnaire, you did raise a -- you did respond to a question that specifically addressed any concern about impartiality where the alleged crime involves firearm possession. And I think you indicate you did have a concern even coming in, and so my question to you is: Now that you have -- have had more of an opportunity to think about it, do you remain concerned? Are you more concerned about your ability to be impartial, or -- or less concerned?

JUROR NO. 16: I would say more concerned.

[Defense counsel]: Okay. And so I guess I'll just put it to you differently. If you were the accused person in this case, and you also knew that a person such as yourself with the same views and predispositions was potentially going to be seated on your jury, would you have a concern about whether you'd be able to receive a fair trial?

JUROR NO. 16: Probably.

RP 369-70. Numerous other potential jurors expressed similar concerns. RP 380-82. The panel had still not been informed that the court would instruct them not to consider a prior

conviction when evaluating whether the State had proved the element of possession. RP 335-82.

The prosecutor had only five minutes to talk to the panel after Haybe concluded his questioning. RP 334-35. Due to that time limit, he indicated that he would need to pose questions to the group as a whole rather than follow up individually with everyone Haybe had spoken to. RP 383. The prosecutor confirmed that all the potential jurors understood the burden of proof and the presumption of innocence, and felt that they could properly apply those concepts. RP 383-84.

The panel was then asked for the first time to consider whether they would be able to follow an instruction from the court to consider a prior conviction for a very limited purpose. RP 384. The prosecutor noted "a lot of nods" in response to that question. RP 384. When the prosecutor specifically asked whether anyone would be unable to follow such an instruction for any reason, there were no affirmative responses. RP 384.

Newly armed with the knowledge that the jury would likely be instructed that they must not consider a prior conviction when evaluating other elements of the crime, the panel generally, and Juror 16 specifically, expressed renewed confidence in their ability to be fair and impartial:

> [Prosecutor]: . . . . There was a lot of questions about people's past experiences, and I think we had touched on this earlier with Juror 11 and Juror Number 13. I think it's safe to say and anyone can raise their hand and please let me know if this is untrue. Guns can provoke very strong feelings in people. Does everyone agree with that statement?
>
> If the Court were to instruct you that you were to -- while still being the person that you are -- fully and fairly consider the evidence in this case as it applies only to this case, does anyone here believe they couldn't follow that instruction? And I don't see anyone raising their hand.
>
> And Juror Number 16, you were asked kind of a few questions about this. I just -- I'll take a jump off start with you here. If -- you mentioned that you have prior experience and you have feelings about this. If the Court were to say you can only look at the evidence in this case and your duty is to be impartial and view it fairly, do you think that you could try to do that? And you nodded your head. Is -- is that you saying yes?
>
> JUROR NO. 16: Yeah.

RP 386. Juror 16 did not qualify her response or in any way indicate that her response relied on the prosecutor's use of the word "try" in his question.[1] RP 386.

At the end of the prosecutor's time, he circled back one final time to check in with Juror 16. RP 391. Juror 27 had just stated that they were "not a hundred percent sure" that they could be the kind of "impartial" juror they would want if they were on trial. RP 391. When asked if Juror 27 could try to be that kind of juror, Juror 27 responded, "I can certainly try, but it'll be difficult." RP 391. The prosecutor then called on Juror 16 and said, "[S]ame question for you. If you were a defendant, do you think you could try to be the same kind of juror that you'd want if you -- you sat in the Defendant's shoes?" RP 391. Juror 16 responded, "Yeah. I think so." RP 391. Unlike

[1] A more equivocal response to the prosecutor's next question is misattributed to Juror 16 in the verbatim report of proceedings; that question was specifically directed to Juror 9, and neither the juror who answered nor the prosecutor gave any indication that it was answered by anyone other than the intended respondent. RP 386-87.

Juror 27, Juror 16 did not indicate that her affirmative response turned on the word "try" in the question and did not express any doubt that she would succeed in being an impartial juror. RP 391.

At the end of the prosecutor's questioning, Haybe raised eight additional for-cause challenges. RP 394-405. Seven were against potential jurors who, before learning that they might be instructed to consider a prior conviction for only a narrow purpose, had indicated that their evaluation of the evidence might be influenced by knowledge of a prior conviction. RP 366-67, 394-405. When Haybe cited some potential jurors' answers on that topic as a basis to excuse them for cause, the prosecutor pointed out that those answers reflected of the jurors' lack of knowledge about what they would be permitted to consider rather than their inability to follow the court's instructions. RP 400, 404-05.

One of Haybe's challenges for cause was against Juror 16. RP 401. Haybe stated the basis of his challenge as follows:

> This person . . . [i]n response to questioning, raised her hand indicating upfront that she had a concern that her personal experience and attitude that no one -- no one needs to have a gun legally or not, would affect her feelings regarding the presumption of innocence. That raised a concern for me just right off the bat that she did raise her hand expressing a concern about her ability to be impartial.

RP 401. Haybe confirmed he had no other concerns about Juror 16. RP 401. The trial court declined to excuse Juror 16. RP 401.

In a subsequent challenge for cause against Juror 27, defense counsel noted that although Juror 27 indicated a willingness to try to be impartial, her intonation made clear that she had serious concerns about whether she would be successful. RP 403-04. The trial court granted the challenge for cause, agreeing that the record established that, although Juror 27 would try to be a good juror, doing so would be difficult for her. RP 405. At no point did Haybe raise similar concerns about any nonverbal cues by Juror 16 that would

undercut her affirmative responses to the prosecutor's questions about her ability to be an impartial juror.

When the time came to exercise peremptory challenges, neither party used one against Juror 16. RP 481-87. Haybe twice accepted the panel, knowing that Juror 16 was on it, despite having one or more peremptory challenges still available to him. RP 486-87.

After deliberating for less than an hour, the jury found Haybe guilty as charged of unlawful possession of a firearm in the first degree. CP 101-02; RP 776.

2. HAYBE DOES NOT RAISE MANIFEST CONSTITUTIONAL ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS BRIEF OF APPELLANT OR REPLY.

Haybe raised a single claim on direct appeal: that the trial court violated his right to a fair and impartial jury by denying of his motion to excuse Juror 16 for cause. Br. of Appellant at 2, 18-30. In its response, the State argued both that (1) the trial court properly exercised its discretion because Juror 16 did not display actual bias and that (2) Haybe was barred from

challenging the trial court's ruling on appeal because he had affirmatively accepted the jury without exhausting his peremptory challenges. Br. of Respondent at 1, 15-38. In reply, Haybe argued that his for-cause challenge was sufficient to preserve the alleged error and that his acceptance of the jury did not waive his claim. Reply of Appellant at 5-20.

At no point did Haybe assert in either brief that his claim involved a "manifest constitutional error" or that RAP 2.5(a) applied in this case. He mentioned RAP 2.5 and manifest constitutional error only once: in his reply brief, when describing the holding of State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015). Reply of Appellant at 7. Haybe never asserted that this Court should apply RAP 2.5 in his case. He also never attempted to raise a claim of ineffective assistance of counsel at any point in his opening brief or his reply.

After briefing was complete, this Court issued its decision in Talbott, holding that a defendant who accepts the jury panel without exhausting his peremptory challenges may

not "appeal on the basis that a seated juror should have been dismissed for cause." 200 Wn.2d at 952. Because Talbott accepted the jury despite having peremptory challenges to spare, this Court held, it was error for the Court of Appeals to reach the merits of Talbott's claim that the trial court erred in denying his challenge for cause against a particular juror. Id.

The Court of Appeals subsequently struck oral argument in this case and issued a short opinion applying Talbott to hold that Haybe's acceptance of the jury panel without exhausting his peremptory challenges barred consideration of his claim. Haybe, slip op. at 1-2.

Haybe filed a timely motion for reconsideration, asserting for the first time that the Court of Appeals should have addressed the merits of his claim as a manifest constitutional error under RAP 2.5(a). Motion for Reconsideration at 3-9. He also asserted for the first time that his trial counsel was constitutionally ineffective in affirmatively accepting the panel rather than using an available peremptory

challenge to remove Juror 16. Mot. for Recons. at 19-23. At the court's request, the State responded to Haybe's motion. The State argued that the Court of Appeals did not err in failing to address these issues in its opinion because Haybe had not raised them, and that Haybe's new claims failed on their merits. Answer to Mot. for Recons. The Court of Appeals denied the motion for reconsideration.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Haybe asserts that review of the Court of Appeals' opinion is warranted under RAP 13.4(b)(3) because this case involves "a significant question of law under the Constitution of the State of Washington or of the United States." Petition for Review at 12. However, the substance of Haybe's petition asks this Court to grant review to address two questions that were not before the Court of Appeals at the time it issued its opinion: whether Haybe's right to an unbiased jury was manifestly violated, and whether he received ineffective assistance of counsel.

Because Haybe did not timely raise these issues below, they do not provide a basis to reverse the Court of Appeals' decision in this case. Moreover, review of the merits of these issues would require only the application of the well-settled law governing manifest constitutional error, juror bias, and ineffective assistance of counsel claims to the facts of this case. As such, they do not involve significant questions of constitutional law that need to be addressed by this Court. The petition for review should be denied.

1. THIS COURT SHOULD NOT REVIEW UNTIMELY RAISED ISSUES THAT WERE NOT CONSIDERED BY THE COURT OF APPEALS.

The purpose of a motion for reconsideration is to bring to a reviewing court's attention "points of law or fact" which the moving party believes "the court has overlooked or misapprehended." RAP 12.4(c). It is not a vehicle for raising new claims for the first time, and an appellate court does not err in failing to consider a basis for relief that the appellant did not timely raise. See, e.g., Cowiche Canyon Conservancy v.

Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding that issue raised in a reply brief is raised "too late to warrant consideration"). The Court of Appeals properly exercised its discretion in denying Haybe's motion for reconsideration without addressing the merits of the claims on which he now seeks review.

This Court reviews decisions made by the Court of Appeals; it does not review the merits of issues the Court of Appeals did not reach. E.g., State v. Slert, 181 Wn.2d 598, 609, 334 P.3d 1088 (2014) (remanding for Court of Appeals to consider issue it did not originally reach); cf. RAP 13.1 (addressing review "of decisions of the Court of Appeals"). Moreover, an issue raised for the first time in a motion for reconsideration of a Court of Appeals opinion will not be reviewed by this Court. 1515--1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp., 146 Wn.2d 194, 203 n.4, 43 P.3d 1233, 1238 (2002); see also State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or

briefed in the Court of Appeals will not be considered by this court.").

Because the Court of Appeals properly did not address the merits of the untimely raised claims on which Haybe now seeks review, this Court should deny the petition for review. This Court should also deny review because Haybe's untimely raised claims fail on their merits, as discussed below.

2. RAP 2.5(a) DOES NOT ENTITLE HAYBE TO REVIEW OF HIS CLAIM OF JUROR BIAS.

Haybe asserts that this Court should reach the merits of his challenge to the seating of Juror 16 under the "manifest constitutional error" exception in RAP 2.5(a) because this Court did not address in Talbott whether RAP 2.5(a) entitles a defendant to review of a failed challenge for cause even where the defendant affirmatively accepted the panel without exhausting all peremptory challenges. This argument fails for numerous reasons.

First, a reviewing court does not consider claims under RAP 2.5(a) where the appellant has not argued that RAP 2.5(a)

applies. E.g., State v. Palmer, 24 Wn. App. 2d 1, 23, 518 P.3d 252 (2022); State v. Wiley, 79 Wn. App. 117, 121 n.1, 900 P.2d 1116 (1995); RAP 10.3(a)(5). Aside from a single reference to RAP 2.5 his description of the holding of Irby, Haybe never mentioned RAP 2.5 or manifest constitutional error in his Brief of Appellant or Reply, and he certainly never asked the Court of Appeals to apply RAP 2.5 in his case. The Court of Appeals therefore did not err in failing to apply RAP 2.5(a) to reach the merits of Haybe's claim.

Second, RAP 2.5(a) by its plain language governs only consideration of claims raised for the first time on appeal. RAP 2.5(a) (addressing review of "any claim of error which was not raised in the trial court"). Haybe's challenge to juror 16 was *not* raised for the first time on review, and thus RAP 2.5(a) is inapplicable.

Third, the rule reaffirmed in Talbott—that a defendant may not appeal the seating of a juror he affirmatively and voluntarily accepted—is essentially a manifestation of the

invited error doctrine. Both are rooted in the idea that the appellate courts will not review an asserted error to which the defendant agreed or contributed below. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) ("Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. This court will deem an error waived if the party asserting such error materially contributed thereto."); State v. Talbott, 521 P.3d at 949, 952 ("[A] party who accepts the jury panel without exhausting their peremptory challenges cannot appeal based on the jury's composition. . . . [W]e have consistently held that if a defendant does not exercise all peremptory challenges[,] it is presumed that [they are] satisfied with the jury." (final alteration in original; internal quotation marks omitted)).

The invited error doctrine applies even to manifest constitutional errors that would otherwise be reviewable for the first time on appeal under RAP 2.5(a). State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999); State v. Henderson, 114

Wn.2d 867, 871, 792 P.2d 514 (1990). Courts apply the doctrine strictly, despite the sometimes harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding invited error doctrine prohibited review of legally erroneous jury instruction because defendant proposed it, even though it was standard WPIC at the time).

The rule that a defendant may not appeal the seating of a juror he affirmatively accepted despite having peremptories to spare has repeatedly been articulated in similarly stark terms, without any suggestion that there is an exception to the rule for manifest constitutional errors. Talbott, 521 P.3d at 952 ("Cases in the Clark line hold that if a party 'accepted the jury as ultimately empaneled and did not exercise all of [their] peremptory challenges,' then *they do not have the right to appeal 'based on the jury's composition*.'" (quoting State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001) (emphasis added)). Indeed, such an exception would swallow the rule, as *every* appeal based on a meritorious allegation of juror bias

would qualify. Both the logic and history of the Talbott rule indicate that it bars consideration of even errors that would normally be reviewable for the first time on appeal under RAP 2.5(a).

No Washington appellate decision offers a principled basis to conclude that RAP 2.5(a) entitles Haybe to consideration of the merits of his juror bias claim. State v. Irby, on which Haybe relies in his petition, presented a very different set of facts in which the pro se defendant chose to be entirely absent for jury selection. 187 Wn. App. at 189; Petition at 14-15. Because Irby was not present when his jury was chosen, he never affirmatively accepted the juror he later challenged on appeal. The principles underlying the Talbott rule and the invited error doctrine have no application in such a scenario. Irby therefore provides no basis to conclude that the Talbott rule does not apply in this case, where Haybe *did* affirmatively accept the juror he had challenged for cause and later challenged again on appeal.

The other cases on which Haybe relies are similarly unpersuasive. State v. Guevara Diaz has no bearing on this case, because Guevara Diaz exhausted his peremptory challenges. 11 Wn. App. 2d 843, 853, 456 P.3d 869 (2020). The Talbott rule thus did not apply in his case. And because Guevara Diaz's juror bias claim was truly raised for the first time on appeal, RAP 2.5(a) could be properly applied.

In State v. Ramsey, Division Two of this Court applied Guevara Diaz's RAP 2.5 holding to a defendant who had *not* exhausted his peremptories and who *had* raised the issue in the trial court, without any analysis of why Guevara Diaz would apply in such different circumstances. State v. Ramsey, No. 54638-8-II, 21 Wn. App. 2d 1034, 2022 WL 842605, at *7-8 (Mar. 22, 2022) (unpublished), review denied, 199 Wn.2d 1028 (2022). Although this Court in Talbott declined to address the validity of Ramsey—because Talbott conceded that manifest constitutional error was not at issue in his case—the fact

remains that Ramsey is wrongly decided and provides no basis to grant review in this case.

Finally, as explained in the Brief of Respondent, the record does not establish that Juror 16 was actually biased. Br. of Respondent at 27-38. Haybe therefore fails to establish a manifest violation of his right to an unbiased jury.

3. HAYBE FAILS TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Haybe asserted for the first time in his motion for reconsideration that the Court of Appeals should have reversed his conviction because his trial counsel was constitutionally ineffective in choosing not to use an available peremptory challenge to remove Juror 16 from the panel. The Court of Appeals properly denied the motion for reconsideration. First, the claim was untimely raised, and would have been untimely even if it had been raised in Haybe's reply rather than his motion for reconsideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue

raised and argued for the first time in a reply brief is too late to warrant consideration.").

Second, Haybe's claim fails on its merits. In order to prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001). To establish that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Grier, 171 Wn.2d 17, 35, 246 P.3d 1260 (2011). Performance is not deficient if it represents a legitimate trial strategy or tactic. Id. at 33.

In order to show that he was prejudiced by deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229.

Haybe's claim of ineffective assistance is based solely on his assertion that the seating of Juror 16 violated his right to a fair trial. But as explained in the Brief of Respondent, the record does not establish that Juror 16 was actually biased. Haybe therefore cannot show that his counsel's decision to leave Juror 16 on the jury was an unreasonable tactical choice, and cannot establish a reasonable probability that the verdict would have been different had Juror 16 not deliberated. The Court of Appeals properly declined to reconsider its opinion in this case, and review by this Court is not warranted.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

This document contains 4,968 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of May, 2023.

Respectfully submitted,

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Appellate Court Case Title:	State of Washington v. Khalid Mohamed Haybe

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