The Honorable Joan DeBuque

FILED
12 AUG 17 PM 1:01

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 09-1-07310-1 SEA

IN THE KING COUNTY SUPERIOR COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. BRYCE HUBER, Defendant.	No. 09-1-07310-1 SEA MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8

I. MOTION

Defendant Bryce Huber, through counsel Suzanne Lee Elliott, moves for an order vacating his conviction and granting a new trial pursuant to CrR 7.8(2), newly discovered evidence, (5) any other reason, in this case, both the denial of counsel and the ineffective assistance of counsel. The motion is supported by the trial record in this case and Exhibits 1-5 which are attached to this filing.

II. FACTS

This Court is aware of the facts of the case. However, a brief review of the testimony is necessary to explain Mr. Huber's complaints regarding the performance of his trial counsel. As the prosecutor stated in closing argument, there was no question in this case that John Sylve and Danny O'Neal shot and killed Steve Bushaw on February 1, 2009. 8/24/11 RP 25-26. And there

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

was no question that Bryce Huber was present when Bushaw was killed. The real question was whether Bryce Huber premeditated the death of Bushaw.

The state's star witness, John Sylve, admitted that he and Danny O'Neal shot Steve Bushaw on a West Seattle street outside a bar. Beyond that one fact, he lied repeatedly to the police and repeatedly on the stand about the facts surrounding his actions. Sylve testified that the plot to kill Bushaw was hatched at O'Neal's apartment between 10:00 and 11:00 p.m. Huber did not even talk to Bushaw until 10:50 p.m. that night. Even at 11:23 Bushaw and Huber are not together. But Sylve stated that they met at a convenience store to finalize plans. Bushaw did not call Huber until 11:30 p.m. Only then did anyone know Bushaw was going to be at the bar.

On January 19, 2009, Sage Mitchell and Brandon Chaney were beaten and robbed in Seattle. 8/23/11 RP 16-18. Sage's friend, Huber was upset about the attack. Stephanie Cossalter said that Huber told her that Bushaw was Mitchell's attacker. She also said that Huber told her that Bushaw "needs to die." 8/17/11 RP 127.

On February 1, 2009, Chaney and Lonshay Hampton went to O'Neal's house to watch the Super Bowl. 8/22/10 RP 25-28. During the party, Mitchell called Chaney and asked him to pick up Sylve at the airport. Hampton and O'Neal rode along. *Id.* at 36. The men went to Chaney's barbershop to wait for Mitchell – who was going to pick up Sylve. *Id.* at 43. When Mitchell arrived, the men decided to go to the Riverside Casino to get a drink. *Id.* at 47.

The men returned to O'Neal's house. *Id.* at 51. According to Chaney, there was no marijuana smoked and no discussion of guns when they returned to O'Neal's apartment. *Id.* 53-55. Eventually, Mitchell left and the others decided to go get food. They didn't know where to go so Chaney called Huber because Huber had been a club promoter. *Id.* at 55. Huber told Chaney he had two girls with him and they were going to Taliarico's. *Id.* Huber told Chaney that a guy named "Steve" was going to come for drinks and Huber was going to question Steve about the robbery. *Id.* at 59. Chaney gave this information to everyone else in the car. *Id.*

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Huber, Chaney and the others drove up to a 7-11 because Chaney had gotten lost. *Id.* at 161. Huber pointed the way to the bar and they drove off and parked nearby. *Id.* at 62. Chaney called his girlfriend while the other men walked towards the bar. *Id.* at 66. While Chaney was still by his car he saw Hampton returning. Hampton told Chaney that someone was shooting. *Id.* at 71. Then Sylve and O'Neal came running back. *Id.* They told Chaney to drive them out of the area. *Id.* Sylve then stated that he "shot the guy." *Id.* When Chaney asked what they meant, they said they shot the guy with Huber. *Id.* at 73.

Chaney said that when the men returned to O'Neal's apartment he was upset and chaos broke out. *Id.* at 75. When Chaney was cursing and talking Sylve told him to shut up. Both men told Chaney that they had not hit Bushaw. *Id.* at 81-83. While Chaney and Hampton were upset, Sylve was calm. *Id.* at 87.

Chaney insisted that there was never any discussion about assaulting Bushaw that evening. The only discussion was about "questioning" him regarding the assault. *Id.* at 95. According to Chaney, Huber and Sylve were not friends. *Id.*

That day, Bushaw received a call from Huber. He told his parents that he was going to meet Huber for a beer at Talarico's in West Seattle. 8/2/11 RP 1-25. Later that evening he was shot to death in the street outside that bar.

Joy Vanderpool testified that around Christmas in 2008, Huber was upset because a friend of his was hurt or killed. 8/11/11 RP 44. She stated that Huber told her the perpetrator had not been caught. *Id.* She picked Huber up on the street in downtown Seattle in the early morning hours of February 2, 2009. 8/11/11 RP 52. As she was driving him home she noticed that he was "stressed." *Id.* Mr. Huber wanted to wait outside his apartment for a while because "there were some guys looking for him." *Id.* at 59-60. She stated that he also told her that he and his friends "had taken care of" the person who had injured his best friend by shooting him. *Id.* at 63. She said that Huber said the man did not die. *Id.*

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Cara Anderson testified that she was from Idaho and had arrived in Seattle two days before the Superbowl. She met up with her friend Jen Rasmus. 8/2/11 RP at 33-36. On Superbowl Sunday, she and Jen met up with Huber. 8/2/11 RP 42. Huber drove the two women in Rasmus's car to Talirico's for the party. Huber made a number of calls on Anderson's phone about meeting up at a bar. A man joined them in the bar and they ordered drinks. 8/2/11 RP 49. More calls were made and then Huber and the other man got up to go outside to smoke. 8/2/11 RP 50. Shortly thereafter, it became clear that there had been a shooting outside the bar. Anderson and Rasmus took a cab home. 8/2/11 RP 55. Huber introduced Anderson to people at the bar. 8/2/11 RP 98. Nothing seemed sinister to her. 8/2/11 RP 75. Huber left her phone when he went outside. Huber could not see the street from where they were sitting and when he got up to go outside he did not appear rushed. 8/2/11 RP 77.

Cossalter testified that Huber told her that he and Bushaw were at Talarico's when a car pulled up. He told Bushaw, "we should leave." As they walked across the street, Bushaw was shot. 8/17/11 RP 129-130.

During trial, Mr. Savage engaged in very little cross-examination of any of the witnesses. For example, he had four questions for the State's primary expert on the cell phone records. In closing argument he repeatedly called his client by the victim's name referring to Huber as Bushaw. 8/24/11 RP 110-112. In addition, Savage questioned the value of closing argument. *Id.* at 110. He stated that the jury was free to review the cell phone records but "that's not where I am coming from." *Id.* at 111. He did concede that Huber was upset that his friend Sage Mitchell had been attacked. *Id.* He also argued that "if you don't believe Mr. Sylve, then you really don't have a case." *Id.* at 114.

The jury convicted Huber as charged but could not reach an agreement as to Chaney. On May 3, 2012, Chaney entered a plea to second degree manslaughter and rendering criminal assistance. He received a sentence of 70 months.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Sylve, the actual shooter, entered a plea to second degree murder with a firearm enhancement. On November 4, 2011, he received a sentence of 180 months in prison.

O'Neal, the other shooter, also entered a plea to second degree murder with a firearm. He received a sentence of 183 months in prison.

III. ARGUMENT

A. Under the circumstances of Mr. Savage's illness, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Under the decision in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), it is unnecessary to show prejudice because Mr. Savage's illness made him effectively unavailable to assist Huber. In *Cronic*, the United States Supreme Court recognized a narrow exception to the *Strickland*[1] requirement that a defendant who asserts ineffective assistance of counsel must demonstrate that the deficiency prejudiced the defense. *Florida v. Nixon*, 543 U.S. 175, 190, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). *Cronic* established that a presumption of prejudice was appropriate in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. The *Cronic* Court identified three situations that would justify this presumption [of prejudice]: (1) when counsel is completely denied; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when surrounding circumstances are such that, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

In this case, Mr. Savage was so ill that he could not function as counsel in this matter. He appeared for Huber on February 1, 2012. By that time he knew that he had cancer of the

[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984).

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

esophagus. By March 29, 2011, his doctor, Daniel R. Markowitz, was advising "to whom it may concern" that Mr. Savage was undergoing "aggressive treatment that combines chemotherapy and external beam radiation therapy." Dr. Markowitz said:

> Combined modality chemotherapy can be associated with toxicities and may impact Mr. Savage's ability to talk, swallow food, and may result in significant pain requiring temporary use of narcotic analgesia. He will also likely require a supplemental nutrition via a percutaneous feeding tube.

Ex. 1. The doctor concluded by stating that Mr. Savage will not be able to "conduct litigation" between "now and at least June, 2011.

The Clerk's minutes indicate that on April 19, 2011, Mr. Savage spoke with this Court regarding his medical issues. This Court then entered an order continuing the trial because of "defense counsel's health."

Trial began on July 18, 2011 and continued until August 24, 2011. Huber was sentenced on September 16, 2012.

On September 22, 2012, Dr. Markowitz wrote that Mr. Savage was diagnosed in February 2011 and "despite aggressive treatment for an 80 year old including chemotherapy and radiation therapy, his disease has continued to rapidly progress." Ex. 2. Dr. Markowitz stated that Mr. Savage was required to close his practice because his "medical circumstances do necessitate that he make this decision now for the good of his clients and his profession." Id.

These two letters, bookending the trial in Huber's case, make it clear that Mr. Savage was so ill that he could not function as counsel in this matter. He was diagnosed at precisely the same time as he filed his notice of appearance. Although his doctor stated that he would be in no shape to conduct litigation between April and June 2011, Mr. Savage had just agreed to master thousands of pages of discovery in this matter, interview witnesses and otherwise prepare for a month-long trial. As discussed below, his illness prevented him from properly investigating and preparing for trial. Moreover, despite Mr. Savage's optimism, the aggressive treatment embarked upon in February 2011 did not work. Just days after completing his work in this trial,

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

he was forced to close his practice on his doctor's orders. Although counsel does not have a complete set of medical records for Mr. Savage (*see* arguments below), the circumstantial evidence is that even by June 2011 Mr. Savage was medically unable to conduct litigation.

Co-counsel James M. Roe's declaration supports this conclusion. Exhibit 3. He notes that during the trial Mr. Savage became exhausted and was clearly affected by his illness.

On this basis alone, this Court must grant Mr. Huber a new trial.

B. Because Mr. Savage's illness caused him to fall asleep during trial, his performance was inherently prejudicial.

Sleeping counsel is tantamount to no counsel at all. *See, e.g., United States v. Thomas,* 194 Fed. App'x 807 (11th Cir.2006); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 535 U.S. 1120, 122 S.Ct. 2347, 153 L.Ed.2d 174 (2002). Cases such as *Burdine*, supra, and *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996), have held that prejudice can be presumed from the fact of a defense attorney's sleeping through critical stages of a defendant's trial because "if counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable." *Tippins*, 77 F.3d at 686. Similarly, the Ninth Circuit has held that when an attorney for a criminal defendant slept through a substantial portion of a trial when evidence against the defendant was being heard, the conduct was inherently prejudicial, and thus no separate showing of prejudice was necessary. *Javor v. United States*, 724 F.2d 831, 833-34 (9th Cir. 1984) (citing *Holloway v. Arkansas*, 435 U.S. 475, 489-91, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (holding that improperly requiring joint representation of co-defendants by counsel with potential conflicts of interest demanded automatic reversal based on prejudice being presumed) and *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983)).

Prejudice is inherent in such circumstances because an unconscious or sleeping attorney is equivalent to no counsel at all due to the inability to consult with the attorney, receive informed guidance during the course of the trial, or permit testing of credibility of witnesses on cross-examination. *Id.* at 834 (citing *Geders v. United States*, 425 U.S. 80, 88, 96 S.Ct. 1330, 47

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

L.Ed.2d 592 (1976) (regarding sequestration of the defendant from his counsel during trial between his direct and cross-examination). The harm is in what the attorney does not do, and such harm is either not readily apparent on the record, or occurs at a time when no record is made. *Javor,* 724 F.2d at 834.

Huber states that at points during the trial Savage was asleep. Exhibit 4. Huber's statement is corroborated by Dr. Markowitz's letters which indicate that Savage was not healthy enough to be conducting litigation. Exhibits 1 and 2. In addition, Dr. Markowitz stated that Mr. Savage's treatment would likely include narcotic painkillers, which make people sleepy.

On this basis alone, this Court should grant Huber a new trial.

C. Even if Mr. Savage was not otherwise impaired Huber was denied the effective assistance of counsel.

Every criminal defendant in Washington is guaranteed the effective assistance of counsel. "Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings." *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citations omitted).

In Washington, ineffective assistance of counsel claims are evaluated under the two-pronged test set out in *Strickland v. Washington*, supra. *See State v. Thomas*, 109 Wn.2d 222, 224-26, 743 P.2d 816 (1987).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. Both prongs of this test must be satisfied to obtain relief. *Id.*

Deficient performance is established when the defendant demonstrates that defense counsel's representation fell "below an objective standard of reasonableness." *Id.* at 688.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

> [T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant...A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 688-89.

"[T]he court should keep in mind that counsel's function, as elaborated in prevailing work in the particular case." *Id.* at 690, Defense counsel's strategic choices will only be immune from judicial scrutiny if made "after thorough investigation of law and facts[.]" *Id.* at 690-91.

To establish prejudice, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Because the Washington and federal standards for evaluating ineffectiveness claims are identical, federal case law applying *Strickland* to various factual circumstances is persuasive authority. *See Brett*, 142 Wn.2d at 880-82 (relying primarily on Ninth Circuit case law to grant relief).

1. *Trial counsel's performance was deficient because he did not investigate the case adequately before choosing a theory of defense.*

Investigation is a fundamental duty of defense counsel. "Effective representation hinges on adequate investigation and pre-trial preparation. *See United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21, 24-25 (7th Cir. 1976) (as corrected) (mere appearance if in-court effectiveness cannot compensate for inadequate pre-trial preparation). *Crisp v.*

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Duckworth, 743 F.2d 580, 583 (7th Cir. 1984), *cert. denied*, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985). "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case..." ABA Standards for Criminal Justice: Guidelines for the Defense Function, Standard 4-4.1, Duty to Investigate (1991).

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *Brett,* 142 Wn.2d at 873 (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 691)) (emphasis and brackets in original.) *See also Crisp*, 743 F.2d at 583; *United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007).

"A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999), *cert. denied*, 528 U.S. 1198, 120 S.Ct. 1262, 146 L.Ed.2d 118 (2000) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.), *cert. denied*, 528 U.S. 929, 120 S.Ct. 326, 145 L.Ed.2d 254 (1999)) (alterations in original).

Counsel's decisions to curtail investigation must be based on reasonable professional judgment.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91.

In *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), the Washington Supreme Court stressed the importance of conducting an investigation in a criminal case prior to entry of a plea.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

> Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial....The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

The Ninth Circuit recently noted the difference between counsel's duties 1) to investigate relevant defenses, and 2) to select and present a defense:

> On the one hand, counsel must investigate relevant defenses. On the other hand, counsel must reasonably select and present a defense. These are different duties. It is true that evaluation of the two duties overlaps: counsel will be hard pressed to satisfy the duty to select a defense when counsel fails to investigate the best defense. But counsel may fail to investigate a particular defense and still, luckily, present the best one. He may also properly investigate various defenses, but unreasonably select among the alternatives.

Mickey v. Ayers, 606 F.3d 1223, 1236 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 419, 181 L.Ed.2d 274 (2011) (citations omitted). *See also Richards v. Quarterman*, 566 F.3d 553, 571 (5th Cir. 2009) (the lack of any sort of evidence of pre-trial interviews in attorney's trial materials, as well as attorney's often aimless questioning of witnesses at trial was ineffective assistance; *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir.), *reh'g denied*, 89 Fed. Appx. 905 (5th Cir. 2003) (Guided by *Strickland*, we have held that counsel's failure to interview eyewitnesses to a charged crime constitutes constitutionally deficient representation; ABA Criminal Justice Standard 4-4.1(a) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.")).

Courts have granted relief based on these standards in several cases where defendants claimed their attorneys did not present the best defense theory available. In *Rios v. Rocha*, 299

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

F.3d 796 (9th Cir. 2002), the court granted habeas relief where defense counsel presented an unconsciousness defense to a murder charge even though numerous eyewitnesses that counsel failed to interview would have supported a much stronger misidentification defense. In *Jones v. Wood,* 114 F.3d 1002 (9th Cir. 1997), the court affirmed habeas relief based on defense counsel's failure to investigate and present an "other suspect" defense. And the Washington Supreme Court granted a personal restraint petition and reversed a capital murder conviction because defense counsel failed to adequately investigate the defendant's mental and physical impairments and failed to present competent expert testimony regarding those impairments. *Brett*, 142 Wn.2d at 868. *See also State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (counsel ineffective for failing to adequately investigate and present diminished capacity defense).

Other cases have expressly rejected the argument that vigorous cross-examination of witnesses can "cure" counsel's failure to interview witnesses before trial. *Anderson v. Johnson*, supra. Moreover, a witness's character flaws may lead to the strategic decision not to call a witness to testify, but it will not excuse the failure to interview him. *Anderson*, 338 F.3d at 393.

> Without so much as contacting a witness, much less speaking with him, counsel is ill-equipped to assess his credibility or persuasiveness as a witness.

Id.

Here, the record affirmatively demonstrates that Savage did not fulfill his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The declarations of Huber, Suzanne Lee Elliott. Exhibit 5, and James Martin Roe, Exhibit 3, establish that Mr. Savage did not undertake an independent investigation of the evidence against Huber. Counsel's effectiveness, therefore, fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 689.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

2. *Trial counsel was ineffective for failing to propose lesser included offense instructions.*

During the jury instruction conference, Baird pointed out that Savage had not proposed any lesser included offense instructions. At first Savage said:

> All right, your Honor, I think I've got time to submit the lesser included manslaughter in the second degree instruction tomorrow.

8/23/11 RP 78. Baird stated that he would take exception to a manslaughter instruction but:

> I would not except to an instruction on murder in the second degree, and I think the record should be clear that I would not.

Id.

After further discussion with Huber, Savage stated:

> Your Honor, on behalf of Mr. Huber, a suggestion has been made as to murder in the second degree and manslaughter in the first degree. Mr. Huber would like me to murder two and/0r manslaughter in the first degree. My professional judgment is that those – that position – that argument is unmeritorious and frivolous. I certainly don't mean to harm my client, but I don't propose to give lesser included instructions on those issues.
>
> If Mr. Huber objects and thinks that I'm not doing the proper job for him, I that that the record is complete that he wishes me to do so.

8/23/11 RP at 83-84.

Our state Supreme Court has held that the decision to offer lesser included offense instructions is a decision that requires input from the defendant and counsel but that ultimately the decision rests with trial counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In this case, however, because Savage failed to properly investigate the case and because his judgment was perhaps clouded by his illness, he improperly overruled Huber and failed to propose lesser included offense instructions that even the State agreed were warranted based upon the evidence produced at trial.

In this case there was "no conceivable legitimate tactic explaining counsel's performance." *Id.* at 33. Based upon the testimony of co-defendant Chaney there was clearly

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

evidence to support the conclusion that no one premeditated the death of Bushaw. And, the jury did not convict Chaney, who was in precisely the same position as Huber in terms of the evidence. Thus, there is a reasonable probability that but for the Savage's error, the jury would not have found that Huber premeditated the murder of Bushaw. There can be no claim that Savage's decision was a "tactic." He stated on the record that he was not providing the instructions because he did not believe the evidence supported a claim of murder in the second degree. But he was simply wrong. Huber *wanted* Savage to propose the lesser included offense instructions. And, even the prosecutor agreed that such an instruction was warranted under the evidence in this case.

3. *Trial counsel was ineffective when he failed to prepare for and present Huber's testimony.*

All defendants enjoy the fundamental right to testify on their own behalf. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Our state Supreme Court has said:

> [I]n order to prove that an attorney actually prevented the defendant from testifying, the defendant must prove that the attorney refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so. In the absence of such demands by the defendant, however, we will presume that the defendant elected not to take the stand upon the advice of counsel. If a defendant is able to prove by a preponderance of the evidence that his attorney actually prevented him from testifying, he will have established that the waiver of his constitutional right to testify was not knowing and voluntary.

State v. Robinson, 138 Wn.2d 753, 764-65, 982 P.2d 590, 597 (1999). The Court also held that this question should be addressed as a claim of ineffective assistance of counsel. *Id.* at 765. A criminal defendant who can present substantial factual evidence that his attorney actually prevented him from testifying is entitled to an evidentiary hearing on the issue of whether the waiver of his right to testify was knowing and voluntary. *Id.* at 770.

In *Robinson* the Court found that the defendant had made a sufficient showing that his attorney actually prevented him from testifying and he was, therefore entitled to an evidentiary

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

hearing. This Court should reach the same conclusion. First, there was no inquiry of Huber regarding his waiver of his right to testify. Second, Huber's statement regarding Savage's rationale rings true under the facts of this case. Savage was not healthy enough to prepare for the trial and that included preparing Huber to testify. Third, absent testifying that he, like Chaney, had no intent to kill Bushaw, the jury was left only with the testimony of Sylve.

As Mr. Roe explains, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Mr. Huber, like Mr. Chaney had to explain to the jury that he never intended to kill Bushaw.

D. Huber is entitled to an evidentiary hearing and discovery of Savage's medical records referenced in Dr. Markowitz's September, 2011 letter to the Presiding Judge.

CrR 7.8(b)(5) authorizes this Court to "relieve a party from a final judgment" if there is "any ... reason justifying relief from the operation of the judgment." Here, the reasons are set out above. Subsection (c)(2) discusses the possibility of transferring the motion to the Court of Appeals.

> The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

Here, Huber has made a substantial showing and this motion is not barred in any other manner. This Court's next step should be to issue an Order to Show Cause directed to the King County Prosecutor.

> If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c)(3).

In addition, this Court should enter an order finding that, prior to any evidentiary or show cause hearing, Dr. Markowitz should present Savage's medical records from February, 2011 to

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

September 22, 2011, to this Court for in camera review and, if appropriate, release to the parties under a protective order. Dr. Markowitz's first letter was authored just after Savage appeared as counsel. His second letter was signed just days after Huber's sentencing and less than one month after this trial concluded. Based upon the observations of Huber and Roe, Savage's inability to represent clients in active litigation became apparent weeks before Dr. Markowitz actually signed the September 22, 2011 letter. Huber is entitled to review the relevant records if they support his motion for new trial. Both letters invite the reader to contact the doctor with "questions or concerns."

By presenting Dr. Markowitz's letter to the presiding judge in support of a motion to withdraw in another (but contemporaneous) King County Superior Court case, Savage waived the doctor/patient privilege. Under Washington law, physician/patient privilege protects only those matters that the patient intends to keep confidential. Here, by submitting the letter from Dr. Markowitz to the presiding judge, albeit in a separate case, and by discussing his condition with others, including Huber, Savage waived the privilege. Moreover, the privilege is undoubtedly waived if the client has an opportunity to assert the privilege but chooses not to do so. *Williams v. Spokane Falls & N. Ry. Co.*, 42 Wash. 597, 600-01, 84 P. 1129, 1130, *reh'g denied*, 44 Wash. 363, 87 P. 491 (1906); 5A Wash. Prac., Evidence Law and Practice § 501.57 (5th ed.). And the privilege was waived by the presence of a third party during treatment. *State v. Anderson*, 44 Wn. App. 644, 651, 723 P.2d 464, 469 (1986). Here, Savage did not assert the privilege when he had the opportunity to do so and he has already permitted third parties to consider his treatment. Thus, this Court should find the privilege waived and perform an in camera review of the records before an evidentiary hearing.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

IV. CONCLUSION

This Court should order the State to show cause why a new trial should not be granted.

DATED this 17th day of August, 2012.

Respectfully submitted:

Suzanne Lee Elliott, WSBA #12634
Attorney for Bryce Huber
Law Office of Suzanne Lee Elliott
705 Second Avenue, Suite 1300
Seattle, WA 98104
Phone (206) 623-0291
Fax (206) 623-2186
Email: Suzanne@suzanneelliottlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served one copy of this pleading by United States Mail, postage prepaid, on the following:

Mr. Jeff Baird
King County Deputy Prosecutor
516 Third Avenue, W554
Seattle, WA 98104

Mr. Bryce Huber #352455
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

8/17/12
Date

Suzanne Lee Elliott

Exhibit 1

EDMONDS:

21605 76th Ave. W., Ste. 200

Edmonds, WA 98026-7507

Tel: 425-775-1677

Fax: 425-778-1635

Richard McGee, M.D., F.A.C.P.

Marc Rosenshein, M.D., F.A.C.P.

Jeffery Ward, M.D.

Daniel Markowitz, M.D.

Eileen Johnston, M.D.

NORTH SEATTLE:

1560 N. 115th St., G-16

Seattle, WA 98133-8402

Tel: 206-365-8252

Fax: 206-365-6136

George Birchfield, M.D.

David Dong, M.D.

Jane Golden, M.D.

Douglas Lee, M.D.

www.pscc.cc

March 29, 2011

TO WHOM IT MAY CONCERN:
RE: Mr. Anthony Savage
DOB: 11/18/30

Mr. Savage is an 80 year old practicing attorney who has been followed in oncology clinic for a number of years for a history of melanoma. His skin cancers have been resected and there has been no recent recurrences. However, he was recently diagnosed with a cancer of the esophagus. Although there is no evidence of metastatic disease, the cancer will rapidly become incurable if Mr. Savage does not undergo aggressive treatment which combines both chemotherapy and external beam radiation therapy to the mass in the upper esophagus.

Combined modality chemoradiotherapy can be associated with significant toxicities and may impact Mr. Savage's ability to talk, swallow food, and may result in significant pain requiring temporary use of narcotic analgesia. He will also likely require supplemental nutrition via a percutaneous feeding tube.

Although it is hoped that Mr. Savage will make a full recovery, I have advised him that it is unrealistic to think he will be able to work for any significant length of time over the next few months. He may be able to work for short stretches during a day but I have made it clear to him that it is unrealistic for him to think that he will be able to conduct litigation or any major trials between now and at least June, 2011.

Please don't hesitate to contact my office with any questions or concerns.

Sincerely,

Daniel R. Markowitz, M.D.

DRM/fc

"B"

Exhibit 2

PUGET SOUND CANCER CENTERS

EDMONDS:

21605 76th Ave. W., Ste. 200

Edmonds, WA 98026-7507

Tel: 425-775-1677

Fax: 425-778-1635

Richard McGee, M.D., F.A.C.P.

Marc Rosenstein, M.D., F.A.C.P.

Jeffery Ward, M.D.

Daniel Markowitz, M.D.

Eileen Johnston, M.D.

NORTH SEATTLE:

1560 N. 115th St., G-16

Seattle, WA 98133-8402

Tel: 206-365-8252

Fax: 206-365-6136

George Birchfield, M.D.

David Dong, M.D.

Jane Golden, M.D.

Douglas Lee, M.D.

www.pscc.cc

September 22, 2011

RE: Mr. Anthony Savage
DOB: 11/18/1930

Greetings:

This letter is drafted at the request of Mr. Anthony Savage, an 80-year-old attorney who I have followed in oncology clinic for many years. Mr. Savage respectfully wishes to inform the court that he was diagnosed with a locally advanced cancer of the upper esophagus in February 2011. Despite aggressive treatment for an 80 year old including chemotherapy and radiation therapy, his disease has continued to rapidly progress. Because of the location of the tumor in his upper esophagus, it has impacted his ability to eat, swallow solid foods and talk.

Unfortunately, given the rapid growth of his malignancy, I do not believe it is reasonable for him to continue to try to work as an attorney representing clients in active litigation.

Please extend every courtesy to Mr. Savage as he attempts to close his practice as an attorney and finds suitable representation for his ongoing, active clients. Mr. Savage has had a long and distinguished career as a litigator and I am sure he would like nothing else but to be able to continue to practice the profession he so clearly enjoys. Though I am sure it is extremely hard for him to proceed with closing his practice, his medical circumstances do necessitate that he make this decision now for the good of his clients and his profession.

Please do not hesitate to contact my office with any questions or concerns.

Sincerely,

Daniel R. Markowitz, MD

DM:nk

Exhibit 3

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. BRYCE HUBER, Defendant.	NO.: 09-1-07310-1 SEA DECLARATION OF JAMES MARTIN ROE

I, James Martin Roe, hereby declare, under penalty of perjury, under the Laws of the State of Washington, that the following statement is true and correct to the best of my knowledge:

1. I was retained counsel for Bryce Huber's co-defendant, Brandon Chaney from December 3, 2009 until January 27, 2012.

2. Ms. Suzanne Elliott asked Mr. Chaney's subsequent counsel, Mr. David Gehreke if Mr. Chaney would permit me to discuss my observations about Mr. Savage's performance in this matter with her. On May 10, 2012, Mr. Chaney provided me a written release after conferring with Mr. Gehreke.

3. I was the trial attorney for Brandon Chaney in his case tried with that of Bryce Huber before Judge Joan Dubuque starting July 18, 2011. This case involved the facts contained in SPD Incident 09-039485 and was investigated primarily by Seattle Det. James Cooper. It involved two critical events; a Jan. 19, 2009 home invasion robbery of the home of Sage Mitchell and Brandon Chaney and the Feb. 1, 2009 shooting of Steve

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Bushaw outside Talarico Bar at 4718 California Ave. S in Seattle by John Sylve assisted by Dan O'Neal, Lonshay Hampton, and, unknowingly or unaware until too late, by Bryce Huber and Brandon Chaney.

4. Both Huber and Chaney were charged under 09-C-07310-1 SEA and 09-C-07311-9 SEA, with Conspiracy to Commit Murder formed sometime between January 19, 2009 and February 2, 2009 and Murder in the First Degree. Also charged were Dan O'Neal and John Sylve by separate, but consecutive, cause numbers.

5. Prior to trial both O'Neal and Sylve entered pleas to Murder in the Second Degree and agreed to testify for the State. The cases against Huber and Chaney proceeded to trial.

6. Anthony Savage replaced the public defenders as counsel for Bryce Huber on or around Feb. 1, 2011. By the time Savage filed his appearance, almost all defense interviews of the State's witnesses had been completed.

7. The case had significant amounts of discovery primarily involving phone records, witness statements, expert witnesses, and, ultimately, the versions of events relayed by Dan O'Neal, Lonshay Hampton and John Sylve. Hampton was never charged but was always listed as a government witness and, until the change of pleas for O'Neal and Sylve, was considered the government's primary witness. As it turned out, he never testified at trial. He did, however, provide statements and ultimately a defense interview. He eventually was provided a public defender and asserted his right to remain silent absent a letter of immunity that was never forthcoming.

8. Upon my initial review of the discovery and after speaking extensively to Chaney and repeatedly to the uncharged, and unrepresented, Sage Mitchell (believed by the State to be the ringleader of the conspiracy) and to Lonshay Hampton in an early defense interview, I was aware of major issues in the State's case which suggested that Chaney

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

and Huber were never aware that Sylve would shoot Bushaw and that the decision to shoot or even assault Steve Bushaw was a decision made by John Sylve alone.

9. It was clear that everyone thought Steve Bushaw would be asked some questions about the home invasion robbery as it was Bushaw with the assistance of Huber, who had sold marijuana to Mitchell.

10. I also knew that by the time of the shooting, Chaney, O'Neal, Sylve and Hampton had been drinking heavily and smoking marijuana with Hampton, by every account, the most impaired. I learned later that Huber had some alcohol but nothing near that consumed by the others following Superbowl XLIII.

11. I learned very early that Sage Mitchel had been thoroughly frightened by the home-invasion robbery; had been significantly hurt, and cooperated fully with Seattle Detective Magan in the investigation of his home-invasion assault/robbery even advising Det. Magan of his involvement in selling marijuana and why he believed Steve Bushaw might have some knowledge. This fact was entirely inconsistent with that State's general theory that Mitchell was the head of conspiracy seeking revenge against the suspected perpetrators.

12. I knew from Mitchell that Hampton, over the course of the evening, complained to Sylve that no one had done anything about Mitchell's beating and words to the effect that friends should take care of friends. I also learned that it appeared as if the others were ignoring Hampton who suffers from a reputation as a blowhard and big talker.

13. Based upon what I knew, the initial defense interview with Hampton was astonishing. Hampton never implicated Chaney any more than he implicated himself and, of course, Hampton was not charged. Hampton had managed to lie to the police and to defense counsel and to the prosecutor about his involvement but he was treated as a trusted eyewitness; he was, in fact, quite intoxicated most of the time. Upon hearing Hampton's

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

version I was committed to trying this case as soon as possible since the prosecution had a questionable case against Chaney. Because Chaney was in the same position as Huber as an accomplice, I was surprised that the public defenders for Huber repeatedly continued the case.

14. The defenses soon became antagonistic. Chaney and Huber were in one position while O'Neal and Sylve and Hampton were in quite another position. Why Hampton was not charged still eludes me as he was with Sylve and O'Neal when Sylve made the decision to assault Bushaw with the gun.

15. Sylve claimed, up to the time of trial, that he was not present at the time of the shooting but was at Sea-Tac airport. This was nonsense and I told his attorney multiple times that it would not work because Chaney would be testifying and he would testify that Sylve, O'Neal and Hampton left the car together. As to what they did, Chaney could only testify as to what they said later.

16. I advised all the defense attorneys for the co-defendants that any attorney could interview Brandon Chaney before trial. Only one attorney took advantage of the offer to interview my client – Walter Peale counsel for O'Neal. After Anthony Savage became the attorney for Huber I renewed the offer and he expressed little interest and - even during the trial - declined any invitation to talk to Chaney.

17. During the trial I re-interviewed O'Neal, and spoke to other witnesses. I also contacted Hampton's attorney to get more information but by then Hampton was not talking.

18. Huber told Chaney he would be testifying,[1] except his attorney (Savage) did not want him to testify. Chaney and I wanted Huber to testify because Huber was the other half of Chaney's case. We wanted him to show that while there was a desire to meet up with

---

[1] There was a separation order for both defendants in the County Jail, but crowding, leaving both in the holding tank, at times, living in adjoining pods or cells, passing in the hallways, all provided amble opportunity for Chaney and Huber to talk.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Bushaw, no one was actually talking of killing him or even assaulting him other than Hampton's rants which no one was paying much attention. Although Chaney later could see how meeting up with Bushaw might have resulted in some sort of fight; still, when the plans to get together at Talarico's were made, there was no talk of doing anything physically harmful to Bushaw, but just to talk as Bushaw lived near Talarico's and could show up and maybe give everyone some idea of who had beaten up Sage Mitchell.

19. In preparation for the trial I ran all the phone records for all the principle actors for the relevant time period. It was pretty clear that Chaney and Steve Bushaw were not close at all. While Huber would talk to Mitchell, Hampton, Bushaw, Stephanie Cossalter, Cara Anderson, and others the evidence showed he only called Chaney on Feb. 1, 2009 at 22:04 hours, 22:09 hours and 23:16 hours. Chaney called Huber at 22:50 hours and 22:59 hours which fit in with what Chaney had told me, and later told the jury, about the case. The last call was to locate each other at the 7-11 to confirm where Talarico's Pizza was, the first one was from Chaney asking if Huber knew where folks were still partying after the Superbowl. A couple of calls were simply saying they were on their way and one call was likely a misdial as there was nothing corresponding on the other phone.

20. What was clear is that it was only AFTER Chaney had talked to Huber that there was any contact by Huber with Bushaw and things moved quickly. So quickly that I became convinced that Sylve's testimony was utter nonsense as to the elaborate planning for a "drive by" shooting with guns positioned on both sides of a vehicle. I read the phone records to show that nothing was set up in the manner that Sylve would later describe. Sylve false testimony was that everyone was at O'Neal's apartment planning the killing with an "Ocean's Eleven" precision, planning and caution. The phone records and Chaney's testimony belie that.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

21. Huber's testimony would have only confirmed what really happened. The phone records support and I believed Huber's testimony would have confirmed, that going to Talarico's after the Superbowl was a last minute plan. Bushaw was invited by Huber simply because he lived close to Talarico's and to determine if he had any knowledge of the robbery. Bushaw was an afterthought. Since the Superbowl this crowd had been celebrating and wanted to keep celebrating. Certainly this was a chance for Huber to talk to Bushaw and for Bushaw to talk to Huber and others who had an interest. It may well be that there was a suggestion to lean on Bushaw or even confront him - but killing him or hurting him was never planned or discussed although Hampton thought something should be done and, as we find out later, Sylve just wanted to shoot him (see Sylva's trial testimony).

22. The records show that Mitchel was calling Sylve and was not present at any planning- contrary to Sylve's testimony. Mitchell was made part of the mix to satisfy the government position. Sylve told the investigators and the prosecutors what he thought they wanted to hear, but nothing resembling the truth.

23. I discussed the case with Anthony Savage when he got on board. I discussed the evidentiary value of phone records with Savage. I told him I thought Sylve's story was based upon Sylve's reading of the discovery and was designed to curry favor with the prosecution (which it did) and gain a reduced sentence (which it also did). I told Savage that Huber was important to Chaney's defense and that both defendants ought to testify. Savage paid no attention. My law office is across the street from Savage's law office and I went to his office on approximately ten different occasions prior to the trial to discuss how the testimony of Chaney and Huber would be in their best interests. Savage was out sick most of the time and though polite, acted as if he had his own rabbit to pull from the hat. He would simply nod. There was no parsing of the facts between co-counsels before the trial. Savage never cared to discuss why the killing had taken place. I had the

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

impression that he had a plan and understood and was waiting for the prosecution's move. Savage did comment that his client had spoken too much. To that I pointed out that Huber was a different man after the shooting than the Huber who drove with two girls to Talaricos. It was clear to me that Huber acted and spoke like a person suffering from a traumatic experience, in shock, befuddled. The witnesses he spoke to would say that Huber was a changed man after the shooting; a fact Savage failed to bring out.

24. I provided Savage with a phone chronology, some notes and my impressions. He nodded and thanked me. I never saw that chronology again and when shown Savage's trial file, the extensive phone chronology with notes was not present.

25. The trial was frustrating. Tony Savage had a certain way in Court due to his reputation and experience. He carried himself as a man who knew the ropes and knew how to play them. He was clearly a polished courtroom attorney; he had, however, no real mastery of the facts, no theory of the case, no theory of what he needed to bring out in cross examination; he was often absent- minded. His failure to aggressively cross examine Cara Anderson or Stephanie Razmus was a sore point with me and my client. There was so much that could have been brought out. I did not want to act like an attorney for Huber and thereby have my client joined to Huber if Huber's own attorney was not going to confront the witnesses against Huber. Brandon Chaney and I discussed it and he wanted me to ask some questions I was fearful that would tie Chaney to Huber and I could see early on that Huber's trial was only pro forma and Huber would be in trouble; for that reason I never came to the rescue of Huber or extended my examinations. It was a very delicate position.

26. I told Savage that I had interviewed the women; that the women did not even remember the stop at the 7-11, likely because it was so quick and not the drawn out" how to kill" planning session painted by Sylve; that Huber was happy-go-lucky going to Talarico's

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

and not the serious killer conjured by Sylve; that the meeting between Huber and Bushaw was normal; that Huber was not acting strange before the shooting.

27. It was clear that some type of meeting or talk was intended but only a threat - nothing more. It was clear talking to Chaney that the meeting up with Bushaw was something Huber had thrown together at the last minute. Chaney had not paid much attention. Huber's testimony was important to this fact but Savage elected not to call him to testify.

28. The only person who expressed any thought to confront Bushaw was Hampton. Sylve did confirm that, but I had heard about it from Sage Mitchell. Chaney recalls Hampton talking but that he was drunk and Chaney didn't pay him much attention. When Sylve showed up he saw, for the first time, that Mitchell had been badly beaten. He naturally inquired. Hampton, probably due his drinking and a disposition to boast and talk, made mention that someone should confront Bushaw. No one paid much attention. When Hampton, Sylve and O'Neal walked through the passageway they were surprised to see Huber. Neither Sylve nor O'Neal knew Huber other than a brief meeting at the 7-11. It was Hampton who was surprised as well, who then pointed out his friend Huber with another man, Steve Bushaw. The decision to actually shoot Bushaw was made by Sylve alone on a whim.

29. O'Neal was behind Sylve and was caught off-guard. He did not see Sylve's shot and thought Bushaw was shooting and so crouched down believing he was under fire and started shooting back. In the meantime, Hampton, sensing for the first time, that something was not right, was already going back to Chaney.

30. I knew O'Neal always carried a gun and it was no surprised that he had one. Sylve, however, had not talked about the gun except to Mitchell. He has one story why he had the gun, but most likely it was one of those things he was cleaning out as he was moving

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

and probably thought he could get some money or favor from Mitchell if he gave it to him. That is speculation however.

31. Huber, I would have argued, was as surprised as anyone what transpired. He was with two women; he had the keys to the car; he had obviously made no plans. What unfolded before him was a total surprise. Certainly nothing like what he had discussed with Chaney. Huber could have explained what actually happened on California Ave but Savage would not call him and then Savage was stuck in how he would argue the case to the jury.

32. Savage had failed to bring out just how changed Huber was after the shooting and how care-free he was before the shooting. Huber's show of bravado to the women could be explained as Huber trying to save some face. It was clear when I first reviewed the case that Huber was trying to act as he thought he should and not revealing the fact that what had happened was a shock. Chaney could not understand why Huber wasn't telling his public defenders what happened. Chaney thought that Huber was mentally "not all there" and we thought there would be a mental issue. By the time of trial it was clear to me that Huber was a much humbler person and would more likely have admitted his naiveté and that fact that what happened was all a surprise. I suspect Huber wanted so much to be on the inside of whatever world he occupies, that he often acts or sounds like he knows what is going on, when, truthfully, he hasn't a clue.

33. Only Sylve testified for the State. Hampton's version did not comport at all with Sylve's nor did O'Neal's and the State had already repudiated O'Neal. Chaney could only say what he did in or near the car but what he knew of what happened on California Street was told to him by Hampton, Sylve and O'Neal. Huber and Chaney never spoke after the shooting.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

34. At the trial I could not call Hampton as he finally got a lawyer and she asserted his 5th Amendment privilege when I spoke to her about Hampton testifying; O'Neal was not called by me because O'Neal was always a bit confused and it was apparent that he was inebriated. O'Neal talked about a bag with a gun found at the Barbershop, but Chaney thought that was all wrong. Hampton supposedly held that gun, but never spoke of it; the gun was not used in the shootings and if actually around, had no bearing on the case.

35. At the beginning of trial, Savage seemed to be in adequate health. We all knew that he had been sick. He told me that his treatment was "working out" and that he had a "good doctor." Notably, however, he never told he was "cured" or in remission. In the spring he told me that the doctor had confidence in some new treatments for his cancer.

36. As trial progress, it was clear that Savage was getting weaker and weaker. He complained to me about the length of the trial and he had gastrointestinal problems that manifested them to me. He did not take many notes. He didn't seem to care much about the evidence. There really wasn't much fight in Savage. I think he was nice enough, but his mind was elsewhere, and he really didn't care about Huber.

37. As a trial attorney you can account for certain actions as trial strategy but as trial went on I realized Savage had no trial strategy at all. What really struck me was his strained and labored cross-examination of Detective Cooper on a marginal point in the affidavit of probable cause. It was much ado about nothing. With this I suspected that Savage did not understand the State's case at all; and really had no grasp of this. He was treating this as an old fashioned "they didn't have enough evidence beyond a reasonable doubt" defense case. That was all wrong; there was lots of evidence and certainly there was a murder, but who and why were disputed. I had told this in so many words to Savage long before the trial started, but though he was pleasant and nodded, it was clear that he had no trial strategy at all.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

38. When it came time to instruct the jury, I submitted a complete packet of jury instructions tailored to this case. I gave my client a copy of all the instructions and we discussed the fact that the evidence would support the giving of lesser included offense instructions. My client made the decision to forego any instructions on lesser included offenses because he was not guilty of any intentional homicide.

39. In my view, it was a huge mistake for Savage not to propose the lesser included offense instructions for Huber because, unlike me, he had done nothing to attack the State's case for intentional murder and place the statements of three witness (who the State used to try and suggest that the murder was planned) in context. I do not understand why Savage never pointed out that his client would never have brought two witnesses to a murder. It is also true that at this point he appeared to be exhausted. By that time his clothes were hanging off him.

40. Savage's closing argument was appalling. He called his client by the victim's name more than once. The jury afterwards asked if that was bad.

41. His illness, compounded by the natural effects of aging, impaired his ability to act as competent counsel in a case of this length and complexity. Decisions were made, not for any legal strategy, but...well, to get to the bathroom or get a cup of tea or to leave early or get some rest.

42. These facts are based upon my personal observations. I have a release from my former client Brandon Chaney to discuss these matters and will testify at any evidentiary hearing.

Signed in Seattle, Washington on August 14, 2012

Date

James Martin Roe

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Exhibit 4

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. BRYCE HUBER, Defendant.	NO.: 09-1-07310-1 SEA DECLARATION OF BRYCE HUBER

I, Bryce Huber, hereby swear under penalty of perjury the following:

1. I am the defendant in this matter.

2. Originally, I was represented by the Public Defender Association.

3. But, while I was in jail, I heard about Mr. Tony Savage, so my dad called him.

4. Mr. Savage came to meet me at the jail. He assured me that he would take the case to trial and fight for me.

5. In the spring of 2011, Mr. Savage told me that he was ill and needed treatment. He told me that if I wanted to discharge him he would return a portion of the retainer. I asked Mr. Savage if he thought he would be fine to try my case after his treatment. He said he felt confident that he would be fully recovered. I said: "I need you to tell me if you can't continue." He never again talked to me about his health. I had no idea that he was so seriously ill until we began the trial proceedings. Then it became clear to me that he was too ill to properly represent me.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

6. The case was continued and Mr. Savage completed treatment. We never talked about his health again. He never told me that his treatment was not successful, that he was ill or that he was dying. I never saw the letters from Dr. Markowitz signed on March 29, 2011 and September 22, 2012 until Ms. Elliott provided them to me on August 6, 2012.

7. As far as I know, the only witnesses Mr. Savage interviewed were Mr. O'Neal and Mr. Sylve. I pressured him constantly about interviewing others – in particular Ms. Cossalter.

8. As trial progressed, I got more and more worried about Mr. Savage. During trial, he said he was tired. Then, I noticed that he was dozing off. I noticed this because I would write my questions to him on a piece of paper and slide it over to him. When he started dozing, I would have to tap him on his shoulder to rouse him so that he would review the notes.

9. I became ever more worried when I realized that Mr. Savage was engaging in only cursory cross-examination of most of the witnesses.

10. I told Mr. Savage that I needed to testify in order to establish that Mr. Sylve was a liar and that I never premeditated or intended Steve Bushaw's murder. When I told Mr. Savage to call me to the stand, he said he was "not prepared" to present my testimony.

11. As the record reflects, I told Mr. Savage to ask for lesser included offense instructions. Tony told me was not going to do so, but he never explained why. I wanted him to do so because at trial, I never denied being at the scene. Our whole defense was that I never intended for anyone to kill Bushaw. Moreover, I was not the one who shot him. I knew and the jury knew that the actual killer had been allowed to enter a plea to second degree murder.

12. In closing I was shocked and really, really upset Mr. Savage called me Mr. Bushaw. At that point, I realized how extensively his illness had affected his ability to competently represent me.

13. I was also dismayed when the prosecutor essentially admitted that I should not be convicted for murder in the first degree. But because Mr. Savage had not given any lesser

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

included offense instructions, the most he could do was suggest to the jury that they could find me not guilty of the firearms enhancements.

Signed this 7th day of August, 2012 in Clallam Bay, WA.

Bryce Huber

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

Exhibit 5

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. BRYCE HUBER, Defendant.	NO.: 09-1-07310-1 SEA DECLARATION OF SUZANNE LEE ELLIOTT

I, Suzanne Lee Elliott, hereby declare as follows:

1. I am counsel for Bryce Huber.

2. I was retained to investigate any basis for bringing a motion for new trial.

3. Originally, Mr. Huber was represented by the Office of the Public Defender, including Mr. Schwabe, Mr. Carey Huffman and Mr. Paul Vernon.

4. During the time that the Office of the Public Defender was representing Mr. Huber, the parties interviewed Sage Mitchell, Danny O'Neal Mr. Eric Bell, Holly Famularo, Lonshay Hampton, Marie Bardwell, Jennifer Rasmuz, Joy Vanderpool, and Shannon Warden. We also interviewed police witnesses Luu, Duty, Dunn, Anderson, Woo, Stephenson, O'Keefe and Southworth. The bulk of these interviews took place in January 2011.

5. Mr. Savage was not present for any of those interviews.

6. In mid-October, 2011, I obtained Mr. Savage's files for this case.

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291

7. Those filed did not contain any notes or records of the investigation conducted by the Office of Public Defense.

8. Mr. Savage did not enter an appearance in this case until February 11, 2011.

9. On April 11, 2011, the trial was continued because of "defense counsel's health." During that month Mr. Savage was undergoing radiation treatment. On April 27, 2011, he wrote Mr. Huber the attached letter.

10. Trial eventually commenced in July 2011.

11. On August 2, 2012, I learned of Dr. Markowitz's letter filed on October 4, 2011 in *State v. Afeworki*, #10-1-09267-2 SEA on July 31, 2012.

12. After learning of the Afeworki matter, I had several converstations with Mr. Afeworki's sister, Selamwit. On August 6, 2012 she sent me a copy of the March 29, 2011 letter also authored by Dr. Markowitz.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

8/8/12
Date

Suzanne Lee Elliott

LAW OFFICE OF
SUZANNE LEE ELLIOTT
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-0291