Supreme Court No. 898243
Court of Appeals No. 67776-4-I consolidated with No. 69299-2-I

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

STATE OF WASHINGTON,
Respondent,
v.

BRYCE NATHAN HUBER,
Petitioner.

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

The Honorable Joan DuBuque, Judge

PETITION FOR REVIEW

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I.
IDENTITY OF PETITIONER

Petitioner Bryce Huber, through attorney Suzanne Lee Elliott, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II.
COURT OF APPEALS DECISION

Huber seeks review of the unpublished opinion filed in *State v. Huber*, No. 67776-4-I consolidated with No. 69299-2-I. *See* Exhibit 1.

III.
ISSUE PRESENTED FOR REVIEW

1. Does the Court of Appeals opinion in this case conflict with this Court's opinion in *State v. Grier*[1] and the United States Supreme Court's opinion in *Strickland v. Washington*[2], when the defendant asked for lesser-included offense instructions, the prosecutor agreed such instructions were merited but defense counsel refused to propose the proper lesser-included offense instructions because he misunderstood the law? RAP 13.4(b)(1).

2. Where Huber filed a declaration in support of his CrR 7.8 motion and stated that his counsel slept during portions of the trial, and that

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[1] *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

[2] *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).

declaration was corroborated by a doctor's letter that indicated that trial counsel's ability to work was impaired by his cancer treatment and the medications he was prescribed, does the Court of Appeals opinion affirming Huber's conviction conflict with *United States v. Cronic*[3], *Burdine v. Johnson*[4], and *Tippins v. Walker*[5]? RAP 13.4(b)(1).

3. Does the Court of Appeals opinion denying Huber an evidentiary hearing regarding his claims of ineffective assistance of counsel, which is based upon a single 30-year-old Wisconsin appellate court decision, conflict with Washington law and post-conviction procedure?

IV.
STATEMENT OF THE CASE

The State charged Bryce Huber and codefendants Brandon Chaney, John Sylve, and Danny O'Neal with premeditated first degree murder with a firearm enhancement, as well as conspiracy to commit first degree murder. The charges stemmed from the February 1, 2009 shooting of Steve Bushaw outside a West Seattle bar. CP 1-24. Sylve and O'Neal eventually pled guilty to lesser charges, and the State dropped the conspiracy charge. CP 63; 4RP 2; 8RP 3-4; 18RP 134-35. Huber and

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[3] *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[4] *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).

[5] *Tippins v. Walker*, 77 F.3d 682 (2nd Cir. 1996).

Chaney were tried before a jury on the first degree murder charge. CP 63; 16RP 10.

Chaney testified, but Huber did not. 25RP 12. The jury found Huber guilty as charged, but deadlocked as to Chaney, and the court declared a mistrial as to him. CP 101; 28RP 2-12.

The court sentenced Huber to the high end of the standard range plus a 60-month firearm enhancement for a total of 380 months. CP 103-10. He timely appealed. CP 112-13.

A. TRIAL TESTIMONY

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 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 p.m. Bushaw and Huber were 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.* at 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

Talarico'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.*

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 they had not hit Bushaw. *Id.* at 81-83. While Chaney and Hampton were upset, Sylve was calm. *Id.* at 87.

Chaney insisted 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 drove him home she noticed that he was "stressed." *Id.* 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.*

Cara Anderson testified that she was from Idaho and had arrived in Seattle two days before the Super Bowl. She met up with her friend Jen Rasmus. 8/2/11 RP at 33-36. On Super Bowl Sunday, she and Jen met up with Huber. 8/2/11 RP 42. Huber drove the two women in Rasmus's car to Talarico'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 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, 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.

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.

B. DISCUSSION OF LESSER OFFENSE INSTRUCTIONS

After the parties rested, they discussed jury instructions. 25RP 182-85; 26RP 43-86. The prosecutor noted that neither Chaney nor Huber had submitted instructions for a lesser offense; the prosecutor asked that both defense counsel confirm that such omission was strategic.

Chaney's counsel, James Roe, confirmed that he and Chaney had discussed the matter and that Chaney did not want lesser degree instructions. 26RP 79.

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. The prosecutor 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/or 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 instructions on those issues.
>
> If Mr. Huber objects and thinks that I'm not doing the proper job for him, I think that the record is complete that he wishes [m]e to do so.

8/23/11 RP at 83-84.

Savage went so far as to call the instructions "facetious," "unmeritorious," and "frivolous." 26RP 79-80, 83. The court did not instruct the jury on lesser offenses. CP 74-99.

C. MOTION FOR NEW TRIAL

Huber filed a motion for new trial and argued that Savage was so ill that he could not function as counsel in this matter and asserted that Savage slept through portion of the trial.

Savage appeared for Huber on February 1, 2012. By that time he knew that he had cancer of the esophagus. By March 29, 2011, his doctor, Daniel R. Markowitz, was advising "to whom it may concern" that 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.

Motion for New Trial, Ex. 1. The doctor concluded by stating that Savage would not be able to "conduct litigation" between "now and at least June, 2011."

The Clerk's minutes indicate that on April 19, 2011, Savage spoke with the trial regarding his medical issues. The trial 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 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." Motion for New Trial, Ex. 2. Dr.

Markowitz stated that 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.*

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

Huber also alleged that Savage did not properly investigate the case. He did not interview at least two of the critical witnesses against him.

Huber asked for an evidentiary hearing. But the trial judge entered an order transferring the Motion to the Court of Appeals. That Court consolidated the two proceedings.

On December 23, the Court of Appeals issued an opinion affirming the conviction and denying the personal restraint petition.

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THE COURT OF APPEALS OPINION CONFLICTS WITH THE OPINION IN *STRICTLAND V. WASHINGTON* AND *STATE V. GRIER*

1. Savage did not refuse to propose lesser include offense instructions as a matter of strategy. He failed to do so because he simply was wrong on the law.

While it is true that if the prosecution has not proven its case beyond a reasonable doubt, and if no lesser offense instruction is offered, the jury must, in theory, return a verdict of acquittal, in actuality, it is more common that "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). It is "precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory" that a defendant is entitled to a lesser included offense instruction. *Id.*

The right to a lesser included offense is well established under federal law. "[A] defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble*, 412 U.S. 205 at 208; *see also Sansone v. United States*, 380 U.S. 343, 349, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); *Berra v. United States*, 351 U.S. 131, 134, 76 S.Ct. 685, 100 L.Ed. 1013 (1956); *Stevenson v. United States*, 162 U.S. 313, 315, 16 S.Ct. 839, 40 L.Ed. 980 (1896).

In Washington, the right to present a lesser included offense instruction to the jury is a statutory right. RCW 10.61.006, .010; *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). Under Washington's *Workman* test, a defendant is entitled to an instruction on a lesser included offense if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). First, "each of the elements of the lesser offense must be a necessary element of the offense charged," and second, "the evidence in the case must support an inference that the lesser crime was committed." *Id.* at 447-48.

This 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. *Grier*, 171 Wn.2d at 32. 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.

The Court of Appeals opinion conflicts with *Grier* and *Strickland,* because Savage's decision to forgo proposing lesser included instructions was not the product of a legitimate trial strategy. *State v. Huber*, 2013 WL 6835200 at *4. Instead Savage's stated reasoning was that a lesser

included offense instruction was not permitted under the law. But he was simply wrong on that score. When a lawyer is wrong on the law, he is ineffective.

2. Even if Savage's choice could be deemed "strategic," his strategy was totally unreasonable.

Savage's decision was at odds with his client's stated goal of the litigation. Huber certainly did not endorse an all-or-nothing strategy. Savage candidly admitted that 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.

In this case there was "no conceivable legitimate tactic explaining counsel's performance." *Id.* at 33. There was certainly evidence that Huber knew that participating in a confrontation with Bushaw had substantial risk. Huber knew that Sage Mitchell and Lonshay Hampton were very upset about the robbery. All of the men in his party had been drinking. Thus, Savage was just flat out wrong when he said that lesser included offense instructions were not merited. Huber was entitled to argue that he did not know that Sylve was going to kill Bushaw, but that he ignored the substantial risk that might happen after an evening of drinking and trash-talking with persons who believed Bushaw had robbed them. Huber's position is supported by the evidence introduced at trial by

his co-defendant, Chaney. In addition, Huber's own phone calls support this claim. On August 19, 2011, Huber reiterates to his mother that he wants to testify because there was no "plan" to kill Bushaw.

There is likely no set of circumstances in which a counsel's failure to ask for the lesser included offense instruction would have been reasonable. Huber was at the scene. Bushaw was killed. The only question in this case was who planned the murder and if Huber participated in such a plan.

The Court of Appeals simply images a strategic choice – that Savage did not want to argue that on the one hand Sylve was lying, and on the other hand, Huber acted without premeditation. But these two positions were not mutually exclusive. Sylve was lying and, while Huber was present, he did not know Sylve had a gun had nothing to do with Sylve's intention to shoot the victim. Both arguments get to the same point – Huber had no idea Sylve planned to shoot, much less kill, the victim.

3. Savage's failure was prejudicial.

The Court of Appeals fails to ask the critical question of the prejudice analysis – which is not whether there was sufficient evidence to convict – but whether it is reasonably likely that the result would have been different if the lesser included instruction had been given to the jury.

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble*, 412 U.S. at 212-13. This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." *Beck*, 447 U.S. at 634.

Because Huber was not the shooter and did not participate in any plan to kill Bushaw, but was nonetheless present, there is a reasonable likelihood that Huber would have been convicted of the lesser included offense of manslaughter rather than premeditated murder had the jury been properly instructed.

B. THE COURT OF APPEALS OPINION CONFLICTS WITH *UNITED STATES V. CRONIC*, *BURDINE V. JOHNSON* AND *TIPPINS V. WALKER*

Huber asserts that Savage was sleeping during trial. The letters from Savage's oncologist support that claim. At best, the countervailing evidence is the prosecutor's self-serving statement that he did not observe Savage sleeping.

Sleeping counsel is tantamount to no counsel at all. *See, e.g., United States v. Cronic*, supra; *Burdine v. Johnson*, supra. Cases such as *Burdine* and *Tippins v. Walker*, supra, 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 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 filed a declaration stating that at points during the trial Savage was asleep. Huber's statement is corroborated by Dr. Markowitz's letters, which indicate that Savage was not healthy enough to be conducting litigation. In addition, Dr. Markowitz stated that Savage's treatment would likely include narcotic painkillers, which make people sleepy.

The Court of Appeals opinion conflicts with this well settled law.

C. THE COURT OF APPEALS OPINION DENYING HUBER AN EVIDENTIARY HEARING REGARDING HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL – BASED UPON A 30-YEAR-OLD WISCONSIN DECISION – IS IN CONFLICT WITH WASHINGTON LAW AND PROCEDURE GOVERNING MOTIONS FOR POST-CONVICTION RELIEF

The Court of Appeals also dismissed and ignored Huber's claims of ineffective assistance of counsel based upon a 30-year-old Wisconsin Court of Appeals case that states:

> A defendant on a post-conviction motion may bring a claim of ineffective counsel. If the counsel in question cannot appear to explain or rebut the defendant's contentions because of death, insanity or unavailability for other

> reasons, then the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness.

State v. Lukasik, 115 Wis.2d 134, 140, 340 N.W.2d 62, 65 (Ct.App. 1983). But this statement is based upon the manner in which Wisconsin deals with post-conviction claims of ineffective assistance of counsel. In Wisconsin it appears that defendants are actually entitled to a full and fair evidentiary hearing on the issue. It appears that in Wisconsin when appellate counsel questions the effectiveness of trial counsel, trial counsel must be notified and should be present at the hearing:

> This court is of the opinion that where a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged. We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.

State v. Machner, 92 Wis.2d 797, 801-04, 285 N.W.2d 905, 907-09 (Ct. App. 1979). It appears that in *Lukasik*, the trial attorney died before the *Machner* hearing and thus, was unavailable to testify in person.

Here, Huber was and is relying on his affidavit, the affidavit of co-counsel, other documents and the letters from Savage's oncologist in an effort to get a full and fair hearing on the issues he has raised. He does not

agree that his allegations are "uncorroborated." But, even if they were, the trial court refused to order a hearing or provide discovery on his claims even though he complied with CrR 7.8. That rule, not the *Lukasik* decision, governs this case.

CrR 7.8(b)(5) authorizes a Washington trial court to "relieve a party from a final judgment" if there is "any ... reason justifying relief from the operation of the judgment." Huber carefully set out his reasons why an evidentiary hearing was necessary. He also asked the trial court to 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 September 22, 2011, to this Court for in camera review and, if appropriate, release the records 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 was 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, *review granted*, 107 Wn.2d 1013 (1986), *review dismissed*, 109 Wn.2d 1015 (1987). 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.

It is simply unfair for the Court of Appeals to affirm Huber's conviction on the basis that he did not present corroborating evidence

while at the same time approving the trial court's failure to provide for a full and fair evidentiary hearing where Huber, co-counsel, and an oncologist could be called to testify.

It is also inappropriate for the Court of Appeals to assume that there was "no question in the trial judge's mind" about Savage's performance. She made no finding in that regard.

In Washington, the only requirement is that the petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). For allegations "based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). "If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits ... must contain matters to which the affiants may competently testify." *Rice*, 118 Wn.2d at 886. The petitioner must show that the "factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Id.*

Huber's declaration is admissible evidence. It cannot be simply discounted by the Court of Appeals under Washington law. It does not contain speculation, conjecture, or inadmissible hearsay. The trial court and the Court of Appeals should have granted Huber an evidentiary hearing on this issue. Huber again asks this Court to accept review and remand for a proper hearing regarding his claims of ineffective assistance of counsel.

F.
CONCLUSION

For the reasons stated above review should be granted.

DATED this 21st day of January, 2014.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Bryce N. Huber

CERTIFICATE OF SERVICE

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

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1.21.14
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William Brenc

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRYCE NATHAN HUBER, Appellant, and BRANDON DOUGLAS CHANEY, Defendant.	No. 67776-4-I (consolidated with 69299-2-I) DIVISION ONE UNPUBLISHED OPINION FILED: December 23, 2013
In the Matter of the Personal Restraint Petition of Bryce Nathan Huber. STATE OF WASHINGTON, Respondent, v. BRYCE NATHAN HUBER, Petitioner.	

BECKER, J. — A jury found Bryce Huber guilty of first degree murder. Huber claims his attorney, the late Anthony Savage, provided ineffective

assistance by foregoing lesser included offense instructions against Huber's wishes. But the record shows Savage made a strategic decision that was reasonable under the circumstances. Huber also contends that Savage was incapable of providing effective assistance because he was suffering from advanced cancer during trial. But the record shows that Savage, despite his illness, capably represented Huber. There are no factual issues about his representation that require an evidentiary hearing.

On the night of February 1, 2009, John Sylve and Danny O'Neal shot and killed Steve Bushaw outside a West Seattle restaurant and bar. The State charged Bryce Huber along with codefendants Sylve, Brandon Chaney, and O'Neal with premeditated first degree murder and conspiracy. The State's theory was that Huber and the other three men believed Bushaw had attacked a friend of theirs, and they planned and carried out Bushaw's murder to retaliate.

Sylve and O'Neal pleaded guilty to murder in the second degree with a firearm enhancement. The State tried Huber and Chaney together for first degree murder, with a firearm allegation. The cornerstone of the State's case was Sylve's testimony. The jury learned that the State agreed to recommend a sentence of 230 months for Sylve and that Sylve could receive time off for good behavior.

Chaney testified at the trial. Huber, represented by longtime defense attorney Anthony Savage, did not testify. The jury found Huber guilty as charged on August 29, 2011. The jury was unable to reach a verdict as to Chaney, and

the trial court declared a mistrial in his case.

The trial court sentenced Huber to 380 months, the top end of the standard range. At sentencing, the trial court noted Huber's "careful planning" in "setting up the execution of Mr. Bushaw." The court also remarked on Huber's "very callous disregard for the life of Mr. Bushaw."

Huber timely appealed his conviction and sentence. His direct appeal was stayed pending a CrR 7.8 motion for relief from judgment, filed on his behalf by the appellate attorney whom Savage entrusted with the case before he died.

Huber filed the CrR 7.8 motion on August 17, 2012. His motion asked the trial court to vacate his conviction and grant him a new trial due to newly discovered evidence and the alleged denial of counsel and ineffective assistance of counsel. See CrR 7.8(b)(2) ("Newly discovered evidence") and CrR 7.8(b)(5) ("Any other reason justifying relief"). A month later, the trial court transferred the motion here to be treated as a personal restraint petition, citing CrR 7.8(c)(2) and Toliver v. Olsen, 109 Wn.2d 607, 612-13, 746 P.2d 809 (1987).

Huber objected to the transfer. Our commissioner referred Huber's objection to a panel of judges for consideration without oral argument. Huber's attorney, who apparently understood that the objection to the transfer had been denied, moved to consolidate the personal restraint petition with the direct appeal. That motion was granted, and the stay on the direct appeal was lifted.

Transfer of Motion for a New Trial

As a threshold matter, Huber maintains his objection to the trial court's

decision to transfer his motion for a new trial to this court, to be treated as a personal restraint petition. He contends the trial court should have decided the motion because there are factual matters that need to be resolved in an evidentiary hearing.

The rules provide for transfer. Under CrR 7.8(c)(2), the trial court "shall transfer" the motion 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 the defendant has made a substantial showing he is entitled to relief or resolution of the motion will require a factual hearing. The court's decision was appropriate here because, contrary to Huber's argument discussed below, the record does not disclose material factual issues that require resolution through an evidentiary hearing.

Ineffective Assistance of Counsel

The facts material to Huber's claim of ineffective assistance are found in the trial record. Huber's friend, Sage Mitchell, was the victim of a home invasion robbery in January 2009. According to testimony at trial, Mitchell sold quarter-pounds of marijuana from his home. Two masked and armed men entered his home demanding money. As they searched, the men received instructions via telephone from a third person, who told them where to look for money. They beat Mitchell severely enough to send him to the hospital.

Huber's former roommate, Stephanie Cossalter, testified that Huber told her he thought "Steve" (Bushaw), Huber's coworker on the docks, had set up the

robbery. Huber had introduced Bushaw to Mitchell, reportedly for a drug deal, and Huber believed the men who robbed and beat Mitchell knew Mitchell had drugs and drug money. Cossalter testified that Huber said he could not let Bushaw get away with the attack and that Bushaw had to die as a result.

The night of the murder was February 1, 2009, Super Bowl Sunday. John Sylve met up with Mitchell, Chaney, and O'Neal, three acquaintances from his high school years in Yakima, and Lonshay Hampton, a man Sylve did not know. Sylve testified that the five men were at O'Neal's apartment when the conversation turned to the break-in at Mitchell's home. Hampton reportedly said he couldn't believe "they" would be allowed to get away with it. While no names were mentioned, Mitchell said he knew a guy (Huber) who thought he knew the person who was responsible for orchestrating the robbery and beating. Sylve testified that all the men agreed they should retaliate.

According to Sylve, Chaney made some phone calls to confirm they could get the man they were after (Bushaw) to the location where they intended to shoot him. Chaney reported that Mitchell's contact would call them to let them know when he could get Bushaw there. The group, minus Mitchell, left the apartment and drove to where they planned to shoot Bushaw. Sylve convinced Mitchell that he should not take part in the retaliation because police would immediately suspect him.

Cell phone records for that night showed conversations between Chaney and Huber, and between Huber and Bushaw. Huber was using a cell phone

belonging to a friend (Cara Anderson) to make calls.

Huber and two female friends, Anderson and Jennifer Razmus, drove to West Seattle in Razmus' car. In West Seattle, they met up with Mitchell's acquaintances outside a convenience store.

Sylve gave the following account of what happened next. Chaney and Huber discussed their plan. Huber asked whether they were really going to go through with it, and when Chaney said they were, Huber nixed Chaney's plan for a drive-by shooting. Huber explained that he was going to bring Bushaw outside Talarico's—the West Seattle restaurant and bar where he and Bushaw were meeting—and he did not want to be shot himself. Chaney assured Huber he would take care of things if Huber brought Bushaw outside. Huber and Chaney then got in their respective cars and drove to the restaurant.

Huber, along with Cara Anderson and Jennifer Razmus, met Bushaw at Talarico's. Anderson testified that after about 5 or 10 minutes, Huber and Bushaw went outside to smoke a cigarette.

Sylve said Huber and Bushaw remained in Bushaw's car for 15 minutes. When Bushaw got out of the car and began to cross the street, Sylve asked him for a light. As Bushaw hesitated, Sylve and O'Neal shot him at close range. Bushaw ran toward the restaurant and collapsed by the doorway. Bushaw later died at Harborview Medical Center.

Sylve testified that he and O'Neal ran back to the car where Chaney and Hampton were waiting. They immediately drove off. Huber eventually arrived

back at his Northgate condominium with Joy Vanderpool, another friend, in her car. The two women he left at Talarico's took a cab back to Razmus' condominium, where they spent the night. Huber dropped off Razmus' car there later that night.

Vanderpool testified that Huber told her that night that he and some others had "taken care of" a friend—shot him—but the person didn't die. The next day Huber left Seattle for the Tri-Cities to see Cossalter, his former roommate. Cossalter testified that Huber, upon arrival, told her "We took care of it." Huber told her he had met up with "Steve" for a beer and that as soon as he saw the car pull up, he told Steve they should go. The two left the restaurant, and "they popped him."

Brandon Chaney, Huber's codefendant for whom the jury could not reach a verdict, provided a different story from Sylve's as to what happened on the night of the murder. Chaney said there was no discussion about shooting or assaulting anyone. Chaney testified that he called Huber because he did not know where to go out in Seattle on a Sunday night and that Huber suggested the restaurant in West Seattle, where Huber wanted to question "Steve" about the home invasion robbery. Chaney insisted that he didn't know of any plan to shoot Bushaw.

Direct Appeal

In his direct appeal, Huber asserts he wanted the jury to be instructed on the lesser offenses of second degree murder (intentional murder without

premeditation) and first degree manslaughter. He contends Savage was ineffective (1) for acting against Huber's wishes and (2) for acting upon a misunderstanding of the facts and the law.

To prevail on a claim of ineffective assistance, Huber must show that (1) his attorney's representation was deficient and (2) Huber was prejudiced, meaning there is a reasonable probability that the result of the trial would have been different absent the challenged conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An ineffective assistance claim is reviewed de novo because it presents mixed questions of law and fact. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Our Supreme Court examined the nature of the decision to forgo lesser included offense instructions in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), abrogating State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004). "Part tactic, part objective, the decision to request or forgo lesser included offense instructions does not fall squarely within the defendant's sphere." Grier, 171 Wn.2d at 30. The court observed that the second edition of the ABA *Standards for Criminal Justice* stated, "'The defendant should be the one to decide whether to seek submission to the jury of lesser included offenses,'" but that language was not included in the third edition. Grier, 171 Wn.2d at 30. Under a "Strategy and Tactics" subheading of the commentary, the third edition notes, "'[i]t is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury.'"

Grier, 171 Wn.2d at 31 (alteration in original), quoting ABA, *Standards for Criminal Justice: Prosecution Function and Defense Function* std. 4-5.2 cmt. (3d ed. 1993). The court concluded, "Washington's RPCs, as well as standards promulgated by the ABA, indicate that the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel." Grier, 171 Wn.2d at 32.

Huber claims that if the defendant disagrees with defense counsel's decision and insists on a lesser included instruction, as Huber claims he did in his discussions with Savage, defense counsel is obliged to defer to his client's wishes. This is not the law. As stated in Grier, the decision ultimately rests with defense counsel.

Grier also defeats Huber's claim that Savage misunderstood the facts and the law. The decision to forgo an otherwise permissible instruction on a lesser included offense is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. Grier, 171 Wn.2d at 43; State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

In Grier, the court held defense counsel was not ineffective for failing to request a manslaughter instruction for the murder defendant even though her case met the two-pronged test established in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under Workman, a defendant is entitled to a lesser included instruction if (1) each of the elements of the lesser crime is a

necessary element of the greater crime (the "legal prong") and (2) the evidence supports an inference that the defendant committed the lesser crime ("the factual prong"). Workman, 90 Wn.2d at 447-48. "The salient question" was not whether Grier was entitled to such instructions, but rather whether defense counsel was ineffective for pursuing "an all or nothing approach" to secure an acquittal. Grier, 171 Wn.2d at 42. The court concluded, "Grier and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal. . . .That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an effective assistance analysis." Grier, 171 Wn.2d at 43 (citation omitted). Nor could Grier establish prejudice under the second prong of Strickland. "Assuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial." Grier, 171 Wn.2d at 43-44.

Huber contends Savage had a mistaken belief that a lesser included instruction could not have been given because the State had presented evidence of premeditation. The record contradicts this claim. During a discussion of the jury instructions, the prosecutor pointed out that "neither defendant has submitted any lesser included instructions." The prosecutor asked, "I wonder if given recent case law it makes sense to have, in open court, . . . the defendants or their attorneys acknowledge that this is a strategic decision." Savage was aware that

a lesser included instruction could have been given despite the evidence of premeditation, but he believed the all-or-nothing approach was the better strategy:

> PROSECUTOR: I'm sorry, your Honor, but I think that -- I anticipated that someone later might claim that somehow they'd been deprived of the opportunity to seek a lesser included instruction.
>
> THE COURT: With these two counsel I don't -- never mind. My experience has been that these counsel are completely diligent, and they have made their decision as to how they would like to proceed. But if that's going to happen, please submit it to me.
>
> CHANEY'S ATTORNEY: I will, if it does happen. On the record, I've talked to my client about the issue that Mr. Baird's brought up, and it has been a --
>
> MR. SAVAGE: If I could.
>
> CHANEY'S ATTORNEY: No, I don't want to -- I don't want to say anything that screws up your case, but I'm not -- we're not submitting any, and that's a decision made after attorney and client referring. Is that correct?
>
> DEFENDANT CHANEY: Yes.
>
> MR. SAVAGE: Your Honor, I was probably being a little facetious. If the State's evidence is correct, I can't think of anything being more premeditated than planning to shoot this fellow in Renton and driving to West Seattle to do it.
>
> Now, I don't think that defense counsel should burden the court with facetious and unmeritorious arguments.
>
> THE COURT: That's sufficient for me, Mr. Savage, it really is. And it's just that all of us are struggling with what our appellate courts are deciding that are now a responsibility of judges sua sponte, as well as counsel, and I think that's where we're all trying to figure out where the case law would go.
>
> And I was not facetious when I said, with the two defense counsel in front of me, I know that they thoroughly go through what the instructions are and what they propose, and I was not going to make you undergo such a confirmation in front of me. I feel very awkward. There comes a point at which I cannot push beyond your consultation and representations of your client.
>
> MR. SAVAGE: For Mr. Huber's sake, I'm sure that he would like me to submit a lesser included.
>
> THE COURT: But you're thinking of the Workman case.[1]

[1] State v. Workman, 90 Wn.2d 443.

> MR. SAVAGE: I'm thinking that it is unmeritorious and I'm obligated not to do that, and if some sharp shooter on appeal, if we get there, wants to take me to task, why that's been done before too. So I just -- there's not a lesser included, in my opinion, in this case.

As in Grier, Savage's decision to forego lesser included instructions was a legitimate trial strategy that cannot be second guessed based on hindsight. "'Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy.'" State v. Breitung, 173 Wn.2d 393, 399-400, 267 P.3d 1012 (2011), quoting Hassan, 151 Wn. App. at 220.

Savage's strategy for Huber's defense was to focus on destroying Sylve's credibility. Savage grilled Sylve on the deal he made with the State, the inconsistencies between his previous statements (including his plea) and his testimony at trial, and whether he still thought he had the deal after his admission that he lied to police. He pressed Sylve: "Which is true, what you told the detectives or what you told the jury?" Sylve replied, "What I told the jury." Savage kept on: "You mean you lied to the detective in putting this deal together?" Sylvie responded, "Not lied, but was mistaken." Savage said, "Mistaken. I see." In closing argument, Savage told the jury, "the fundamental bedrock issue in this case, as far as Mr. Huber is concerned, is do you believe Mr. Sylve beyond a reasonable doubt?"

The evidence of premeditation against Huber was very strong, making his case similar to State v. Mullins, 158 Wn. App. 360, 372, 241 P.3d 456 (2010),

review denied, 171 Wn.2d 1006 (2011). In Mullins, the defendant was convicted of first degree murder, and we held that counsel was not ineffective for not requesting a jury instruction of second degree murder. If the defendant "had tried to argue that he was guilty at most of second degree murder, it would have weakened his claim of innocence." Mullins, 158 Wn. App. at 372. The same is true in Huber's case. Savage did not want to argue on the one hand that Sylve was lying about Huber's involvement in the planning and execution of the murder, and on the other hand that if Huber was involved, he committed some lesser crime because he acted without premeditation. Under the circumstances, Savage's strategy was reasonable.

We conclude Savage's refusal to request a lesser included instruction did not constitute ineffective assistance of counsel.

Personal Restraint Petition

In his personal restraint petition, Huber alleges Savage was ineffective in three additional ways: (1) for sleeping through portions of the trial, (2) for refusing to prepare and call Huber as a witness, and (3) for failing to prepare and investigate the case properly. Huber claims these alleged errors occurred because Savage was ill with cancer during the trial. He requests that his petition be sent back to the trial court for an evidentiary hearing on these allegations, which he contends are supported by his own declaration, two letters from Savage's oncologist, and a declaration from James Roe, the attorney who represented codefendant Chaney in the joint trial.

It is undisputed that Savage was suffering from esophageal cancer, the condition that led to his death more than four months after the trial ended. But the record is insufficient to create a factual issue about how Savage's illness affected his performance.

When a defendant's postconviction motion includes a claim of ineffective counsel, and the counsel in question cannot appear to explain or rebut the claim, "then the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness." State v. Lukasik, 115 Wis.2d 134, 340 N.W.2d 62, 65 (1983). Huber's self-serving declaration claims that Savage was dozing off during trial. Nowhere in Roe's declaration does he accuse Savage of sleeping in court. The prosecutor noticed no such behavior. The oncologist's letters do not address Savage's condition *during* the trial.

The trial judge was in an excellent position to observe counsel during this lengthy trial. Before trial began in July 2011, the trial court had ordered a continuance to accommodate Savage's treatment, so the court was apprised of his illness. Yet there is no indication in the record of any question in the judge's mind about whether Savage was falling asleep during the proceedings or was too weak or distracted to be effective. The judge was well aware of the rule that permitted an evidentiary hearing to be held on Huber's motion for relief for judgment if there was any factual basis for it. Under CrR 7.8 (c)(2), the trial court "shall" transfer such a motion to the Court of Appeals for consideration as a personal restraint petition *unless* the court determines the defendant has made a

substantial showing that he is entitled to relief, or resolution of the motion will require a factual hearing. The fact that the trial court chose to transfer Huber's motion to this court rather than hold a hearing suggests that the court, having observed the trial, was not concerned that Savage's illness impaired his performance.

A review of the trial record shows that Savage was not only alert and prepared, but often masterful. He ably argued motions in limine (to the benefit of not just Huber, but Roe's client, Chaney); he was "real good in front of a jury" (Huber's own assessment of voir dire, as relayed in one of his phone calls from jail); on cross-examination, Savage showed Sylve up as a liar (to Huber's delight, as shown in the recorded calls); and in closing argument, Savage showed how Sylve's untrustworthiness created reasonable doubt.

In a motion to strike, Huber asks this court to strike appendices 2 and 3 to the State's response to his personal restraint petition. Appendix 2 is a Seattle Times obituary detailing Savage's respected career. The State claims it submitted the newspaper article simply as the most efficient means of establishing Savage's date of death in January 2012. We accept the submission for that purpose and disregard the remainder.

Appendix 3 is a sworn declaration Savage provided in March 2011 in a completely separate case in which he represented the defendant, Sione Lui. In the declaration, Savage explains his longtime practice of closing his eyes to concentrate:

I never "fell asleep" during the trial of this case. Given the layout of

> the courtroom, if I were asleep it would have been in full view of the judge, lower bench, and prosecutors, none of whom raised a concern, which would have been apparent in the transcript of the trial. For the entirety of my career, I have at times closed my eyes during legal arguments. This blocks out visual distractions and allows me to listen and focus on the argument being made.

The State wants us to consider the declaration as a general response to Huber's claims because Savage is not alive to provide his own declaration.

Evidence rules do not apply to habeas corpus proceedings pursuant to ER 1101(c) (3). In re Pers. Restraint of Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Therefore, the hearsay rule does not necessarily bar us from considering Savage's declaration from the other case. Nevertheless, we grant Huber's motion to strike the declaration because it is related to a case tried years before Huber's trial began. Even without it, however, there is no need for an evidentiary hearing to determine the merits of the claim that Savage fell asleep.

As to Huber's contention that Savage advised him against testifying because Savage was "not prepared" to present his testimony, Huber offers no evidence that Savage improperly coerced him into remaining silent. Without such evidence, Huber is not entitled to an evidentiary hearing on this claim. See State v. Thomas, 128 Wn.2d 553, 561, 910 P.2d 475 (1996) (noting that a defendant must produce more than a bare, unsubstantiated, self-serving statement that his lawyer, in violation of professional standards, forbade him to take the stand).

Huber supports his claim that Savage was falling down on the job with an affidavit from James Roe, the attorney who represented Chaney, the

codefendant who did testify. But Chaney's decision to testify and the jury's inability to reach a verdict in Chaney's case do not weigh one way or the other with respect to Savage's performance because the evidence against Huber was stronger than the evidence against Chaney. Unlike Chaney, Huber was implicated not only by Sylve's testimony but by the testimony of the four women to whom Huber made incriminating statements before and after the murder. Given those numerous incriminating statements and Huber's recorded phone calls from jail, Savage likely kept Huber off the stand to avoid exposing him to a damaging cross-examination. This decision was consistent with Savage's overarching, and reasonable, strategy of creating reasonable doubt by calling Sylve's credibility into question.

In summary, the trial court properly concluded that Huber was not entitled to an evidentiary hearing. The existing record suffices to demonstrate that defense counsel effectively assisted his client.

We affirm the conviction and deny the personal restraint petition.

Becker, J.

WE CONCUR:

Leach, C.J.

Jan, J.