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NO. 67776-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

BRYCE HUBER,

Petitioner.

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

Bryce Nathan Huber is restrained pursuant to Judgment and Sentence in King County Superior Court No. 09-1-07310-1 SEA. CP 103-10.[1]

B. ISSUE PRESENTED

Whether Huber has carried his burden to show that his trial counsel, Anthony Savage, was ineffective.

C. STATEMENT OF THE CASE

The facts of this case are set out in detail in the Brief of Respondent, with which this petition is consolidated.

D. ARGUMENT

To prevail in a personal restraint petition, the petitioner must show a constitutional error that resulted in "actual and substantial prejudice" or, if the alleged error is not of constitutional magnitude, a "fundamental defect which inherently results in a complete miscarriage of justice." In re Personal Restraint of Woods, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). "This threshold requirement is necessary to preserve the societal interest in finality, economy, and integrity of the trial process." Id. Huber cannot meet this burden.

[1] This personal restraint petition is consolidated with the appeal under the same cause number.

1. HUBER HAS FAILED TO SHOW THAT HIS TRIAL ATTORNEY, ANTHONY SAVAGE, WAS INEFFECTIVE IN REPRESENTING HUBER AT TRIAL.

Huber alleges a multitude of errors on the part of Anthony Savage, Huber's trial counsel. For support, Huber provides his own declaration, as well as a declaration from James Roe, the attorney who represented Huber's codefendant, Brandon Chaney, at their joint trial. Huber claims that the alleged errors occurred because Savage was too ill to represent him effectively.

Huber's claims of dissatisfaction with counsel, and his allegation that counsel prevented him from testifying, are belied to a great extent by comments that he made in telephone conversations with family and friends leading up to and during his trial. Roe's declaration consists in large part of his own opinions about trial strategy and tactics, and is in part belied by the record.

Anthony Savage cannot provide his own declaration, as his more than 50-year career as a criminal defense attorney came to an end with his death on January 3, 2012. Appendix 2. However, a declaration that Savage provided in a different case provides a general response to some of Huber's claims. Appendix 3.

Even without a declaration from trial counsel to refute these allegations, Huber simply cannot meet his burden to show ineffective assistance of counsel on this record. He cannot show that Savage's performance fell below an objective standard of reasonableness under all of the circumstances, nor can he show a reasonable probability that, absent the alleged errors, the result of his trial would have been different. This petition should be denied and dismissed.

To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

a. Huber And Chaney Were Not In The Same Position Before The Jury.

In support of his claim that his attorney was ineffective, Huber points to the fact that the jury did not reach a unanimous verdict as to his codefendant Chaney. Huber attempts to attribute this different result to his own attorney's alleged failings: "[T]he jury did not convict Chaney, who was in precisely the same position as Huber in terms of the evidence." Motion for Relief from Judgment under CrR 7.8 ("Motion"), at 14.

This conclusion is contrary to the evidence. The prosecution's case against Huber was far stronger than its case against Chaney. Chaney was implicated by only one witness: John Sylve. Sylve, who fired the shot that killed victim Steve Bushaw, testified after pleading guilty to Murder in the Second Degree in exchange for a promise to testify at trial. Predictably, his credibility was aggressively and effectively challenged by the defense at trial.

Unlike Chaney, Huber was additionally implicated by the testimony of four relatively unassailable citizen witnesses to whom he made incriminating admissions both before and after the murder. These young women – Cara Anderson, Jennifer Razmus, Joy Vanderpool and Stephanie Cossalter – provided what Chaney's attorney acknowledged in court was "damning" evidence against Huber. RP 8/22/11 at 6-7. Despite Savage's best efforts to discredit them, the testimony of these young women added to the overwhelming evidence of Huber's guilt.

This testimony was all the more damaging for several reasons. First, all four of these young women protected Huber for some time after the murders. Second, two of them – Razmus and Anderson – endeavored to protect him during their trial testimony. These efforts at deception were belied by their own phone records. However, unlike John Sylve, it could not be argued that they were biased toward the prosecution. Finally,

Vanderpool was a completely independent source of Huber's admissions; she did not even know Anderson.

Because Chaney did not face this additional evidence, the jury's inability to agree on Chaney's guilt is not evidence of Savage's ineffectiveness.

b. Huber Was Not Denied The Assistance Of Counsel.

Because Huber can show neither deficient performance nor prejudice, he instead urges that his case fits within the narrow exception to the Strickland requirement that was articulated in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Cronic is not helpful to Huber. In that case, a young, inexperienced lawyer with a real estate practice was appointed by the court to represent the defendant in a multi-million dollar mail fraud case it had taken the Government four and a half years to investigate; the lawyer was given 25 days to prepare for trial. The Tenth Circuit reversed the defendant's conviction, inferring from these circumstances that his Sixth Amendment right to counsel had been violated, and finding it unnecessary to consider the attorney's actual performance at trial.

The Supreme Court disagreed, and held that the Tenth Circuit's inferential approach was erroneous. The Supreme Court observed:

> The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred.

Cronic, 466 U.S. at 656. The Court acknowledged that some circumstances could be so likely to prejudice an accused that "the cost of litigating their effect in a particular case is unjustified." Id. at 658. These circumstances, the Court said, are:

1) The complete denial of counsel;
2) Where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;
3) Where the likelihood that any counsel could have performed as an effective advocate was so remote that the trial was inherently unfair;
4) Where counsel labors under an actual conflict of interest.

Id. at 660-61. Finding that none of these criteria were met in Cronic, the Supreme Court reversed the Tenth Circuit and remanded the case for a Strickland determination, observing:

> This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel... Respondent can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.

Id. at 666.

Huber argues that "Savage was so ill that he could not function as counsel in this matter." Motion at 5. This contention is a transparent attempt to escape his obligation to demonstrate deficient performance and prejudice as required by Strickland. The Supreme Court refused to infer ineffective assistance of counsel from the circumstances of the attorney's representation in Cronic, and this Court should do the same here.

Huber's extraordinary claim -- that Savage was too sick to be an attorney at all -- is flatly contradicted by a review of Savage's performance in this case, as demonstrated below. But Huber would prefer to ignore the actual evidence that his attorney endeavored mightily, against great odds, to avert his conviction. Instead, he attaches to his Motion two letters written by Savage's physician. The first, written on March 29, 2011, reveals that Savage had developed cancer of the esophagus and would undergo a period of chemotherapy and radiation that would interfere with his ability to speak and that Savage would likely not "be able to conduct litigation at any major trials between now and at least June, 2011." Motion, Exhibit 1. The second letter, written on September 22, 2011, announced that Savage's cancer had advanced to a stage where he would no longer be able to continue his practice of law. Motion, Exhibit 2.

According to Huber, "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." Motion at 6. On January 3, 2012, Savage succumbed to cancer and cannot now defend his performance as Huber's attorney. Appendix 2. But the record in this case provides overwhelming evidence that Savage was fully capable of thinking, speaking, and advocating on Huber's behalf as well as any attorney.

c. Savage Was An Effective Advocate.

Judicial scrutiny of defense counsel's performance is highly deferential, and it employs a strong presumption of reasonableness. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Huber's motion is, of course, not deferential to Savage, but the declaration of his codefendant's attorney, attached to his Motion, takes post-conviction advocacy to a new extreme. According to Mr. Roe, Savage "had 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."[2] Motion, Exhibit 3 at 7.

[2] Huber asserts that Savage "dozed off" during trial. Huber Declaration at 2. The prosecutor noticed no such behavior. Appendix 1 at 7. And it should be noted that nowhere in attorney James Roe's 11-page Declaration, presumably an exhaustive indictment of Savage's performance, does he accuse Savage of sleeping in court. In any event, Savage previously refuted a similar claim with an explanation of his normal practice. Appendix 3 at 1-2.

These are strong allegations indeed. If they were true, one would expect the record of proceedings to be rife with examples of flagrant malpractice. Instead, a careful review of Savage's performance in this case demonstrates unequivocally that he was an effective advocate; indeed it demonstrates that, despite powerful evidence of Huber's guilt, Savage endeavored tirelessly and with great skill to represent him.[3]

On January 3, 2012, after devoting more than 50 years to the defense of criminal defendants, Anthony ("Tony") Savage died. Appendix 2. He cannot defend his performance in this case against Huber's accusations of ineptitude. But in 2011, in response to a previous client's efforts to impugn his trial performance, Savage filed a Declaration that includes an eloquent articulation of his theory of trial practice:

> Based on my experience, I have developed a philosophy of trial that focuses on the "big picture" as the most effective means of combating the prosecution's case and holding the State to its burden of proof beyond a reasonable doubt. I trust the jury to be filled with intelligent people who can spot red herrings or "rabbit trails" of peripheral, unconvincing evidence. Such evidence, if offered by the defense, diminishes the defense case. In addition, objecting to or raising issues that are not compelling may have the effect of the defense impliedly taking on a burden of proof that otherwise would not exist. Evidence or cross-examination that does not bear close

[3] Huber's motion is accompanied by a demand for an order compelling Savage's treating physician to produce Savage's medical records. Motion at 15-16. This Court should deny this motion; it is completely unnecessary, as the Report of Proceedings reveals that Savage's illness in no way compromised his dedication to his client or his performance in court.

> scrutiny may easily be attacked and neutralized. It then has no probative value, and the jury's focus swings away from the State's case and onto the failings of the defense's presentation. I rely on my best judgment and strategy in this regard.

Appendix 3 at 2-3.

i. Motions practice.

A review of Savage's pre-trial motions practice reveals no evidence that his performance was deficient. On the contrary, it reveals an attorney who carefully chose the battles important to him – and won most of them.

The prosecutor argued strenuously that evidence that Huber, like Bushaw, sold street-level quantities of marijuana was essential to show the motive for the murder (the victim of the home-invasion robbery that preceded the murder had supplied both Huber and Bushaw with marijuana). RP 7/19/11 at 53; RP 7/21/11 at 20-25. Savage assiduously, and successfully, argued over the course of three consecutive days that the probative value of this evidence was outweighed by its prejudice to Huber. RP 7/19/11 at 51, 61; 7/20/11 at 41-44; 7/21/11 at 15-17, 33-36.[4] Savage made this argument with a unique blend of old-style eloquence and common sense:

[4] The lawyer for Mr. Chaney, Huber's codefendant at trial, has filed a declaration denigrating his colleague's performance. But during argument on this motion, he could say only that he was "actually on the same vein" as Mr. Savage, that "[i]n many ways, I agree with Mr. Savage"; and "I join Mr. Savage." RP 7/20/11 at 29, 30, 35.

> [T]o identify Mr. Huber as a drug dealer would be, in my opinion, a violation of Rule 403, as being extremely prejudicial and not necessary. This is not a drug dealing case, whether or not Mr. Huber was a drug dealer is not relevant to the issues of this case, in my opinion, and should be excluded under Rule 403. Now, the State wants to argue or has argued to the Court that his occupation as a drug dealer is somehow material and relevant. Your Honor, they can establish, and I think the Court can grasp this from the certification of probable cause and the argument you have heard, the prosecution can prove that Mr. Mitchell and Mr. Huber were friends or acquaintances, they can prove that Mr. Huber was upset about the treatment of Mr. Mitchell by the home robbers, they can do all of that without referring to Mr. Huber's so-called occupation as a drug dealer. It's not necessary for them to show that he was a drug dealer in order to get those particular facts before the jury, any more than it would be necessary to show that he was an iron worker, or a fishmonger, or anything of the kind. His occupation or side occupation is just totally irrelevant and extremely prejudicial under Rule 403. And this would include, of course, Mr. Huber's own admissions that he was a drug dealer, which I would ask to be excluded on the same grounds.

RP 7/21/11 at 15-16.

Savage also protested the admissibility of photographs of the victim's bloody clothing, arguing that the relevance of this evidence was outweighed by its prejudice to his client. RP 8/03/11 at 126. Apparently inspired by Savage, Chaney's attorney, Roe, joined in this motion. Roe began his argument like this: "Your Honor, I have the same objection. We then get into the issue of who cut what and how much is involved with the medical and taking the clothes off of him and the ripping and so forth."

RP 8/03/11 at 126. After this, Savage told the court he felt the need to clarify the record of his objection:

> Without telling you how to do your job, which I guess I'm about to, the court's ruling has to depend upon the individual case and the issues in the individual case.
>
> The issues in this case are the roles of our two clients. Now, nobody contends that they did the shooting. The evidence will suggest or is going to suggest that while Mr. Huber was in the general area, he did not have a hand on the gun, and as far as I know, the evidence is going to suggest that the co-defendant was off parked in the car somewhere.
>
> Now, whether Mr. O'Neal and Mr. Sylve took turns in shooting the individual or one did and one didn't, isn't relevant to the issue of whether or not Mr. Huber and the co-defendant are responsible.
>
> The bloody clothing has nothing to do with Mr. Huber or the co-defendant. It might have something to do with Mr. Sylve, if he was on trial, to show where the bullets went, but it's got nothing to do with them. So I suggest that they're totally irrelevant as to my client, and excludable under Rule 403. Thank you.

RP 8/03/11 at 131. Savage renewed this objection on the following day. RP 8/04/11 at 5, 93, 96. Again, Mr. Chaney's attorney deferred to Savage: "Your Honor, I'll pass at the moment, and let Mr. Savage argue it."[5] RP 8/04/11 at 96.

Savage also vigorously contested the admissibility of Sage Mitchell's out-of-court statements about the robbery at his residence. RP 7/20/11 at 15-28. Although the trial court ruled that much of

[5] After Savage's argument, the court noted that Chaney's attorney had "passed" and gave him an opportunity to "add to this discussion." He declined again. RP 8/04/11 at 98.

Mitchell's account of that event was admissible, the court agreed that Huber could not be named as the source of Mitchell's belief that Bushaw was responsible. RP 7/20/11 at 28. Savage also observed that Mitchell could not be considered "unavailable" as a witness until he actually appeared in court and invoked his Fifth Amendment privilege, and insisted that this take place. RP 7/20/11 at 36-37 53, 55. The court agreed. RP 7/21/11 at 10-11.

During pre-trial hearings it was discovered that Huber's sister Jennifer Hairston had contacted two critical prosecution witnesses in this case, Jennifer Razmus and Cara Anderson, at Huber's request, asking for their addresses and apologizing for getting them into such a "mess." The prosecutor immediately endorsed Hairston as a witness. RP 7/27/11 2-6.[6] Recognizing the danger this posed for Huber, particularly on cross-examination, Savage immediately inserted himself as an intermediary between the prosecutor and Hairston, offering to contact the Office of Public Defense to get her an attorney, and, when that failed, offering to find her an attorney himself. RP 7/27/11 at 49; 8/01/11 at 22.

Savage's quick thinking continued throughout the trial. He objected promptly and concisely to any attempts by the prosecution to elicit what he believed was inadmissible hearsay evidence, including

[6] The prosecutor also began listening to Huber's telephone calls from jail. Appendix 1 at 3.

statements by the codefendant, by an individual at Harborview Medical Center, and by Sage Mitchell. RP 8/04/11 at 100, 107, 109.

ii. Jury selection.

There was no indication during jury selection that Savage's mental acuity or his dedication to his client was dimmed by any illness. Savage corrected his co-counsel, and later the prosecutor, on the number of peremptory challenges they could use. RP 7/20/11 at 74; 8/01/11 at 98. Savage alone noticed that the victim was missing from the list of names read to prospective jurors to see whether they knew any of the individuals involved in the case. RP 8/02/11 at 3.

Indeed, Savage was masterful during jury selection, demonstrating a remarkable rapport with potential jurors as he explored some of the most important principles in criminal law. On July 28, 2011, Savage gave what amounted to a clinic on voir dire. Playing the devil's advocate with consummate skill, he challenged the jurors to explain to him why the law should not be changed to limit the presumption of innocence, the right to a jury trial, unanimous verdicts, and proof beyond a reasonable doubt. RP 7/28/11 16-94.

Tellingly, in this particular case, Savage ended his first general voir dire session with questions devoted to a defendant's right to remain

silent during trial, and to the admonition that the jury could draw no incriminating inferences from his silence.

Q: Under our system of law a defendant in a criminal case does not have to testify, and the Court would instruct you that is not to be used against him. Now, let's assume that we have in my country all the protections except in the criminal case the defendant must testify. He has to. Who would be in favor of making the defendant testify in a criminal case? Anyone? Your number?

A: 95.

Q: Would you be in favor of making the defendant testify?

A: No.

Q: Why not? I mean, what happened to that old adage business, well, if he didn't do it, why doesn't he get up and tell the story?

A: Well, the way I think about it is if I was the one on trial I wouldn't want to be forced to do that, so I wouldn't think it would be fair for anybody else in the court to do that.

Q: Well, if you are in trial and you really didn't do it, what's the problem with getting up and saying hey, ladies and gentlemen, I didn't do it?

A: Nothing if you want to do that but if you don't you shouldn't have to.

Q: Well, do you think it's a sign of guilt if the defendant doesn't get up there?

A: No.

....

Q: Well, what about making the defendant testify. Change the rules. What do you think?

A: I can only say if it was me I would be very very uncomfortable because I'm likely to get up there and say the wrong thing on my behalf, and I would be a lot more comfortable being represented. I would not want to say anything.

Q: Can you think of a reason why the defendant who really didn't do it wouldn't get up there and say so?

A: Well, if I was him I might feel like doing that but I would say it wouldn't be very prudent for me to do that because I'm likely to say the wrong thing and incriminate myself.
Q: Would you agree with me that any witness that's on the stand is under pressure?
A: I would agree, yes.
Q: Do you know people who cannot handle that kind of pressure very well?
A: Yeah, you're looking at one.

Q: Is there anybody here who doesn't know a human being who simply cannot express themselves properly? Don't we all know people like that? Again, I'm not making any assurances or promises about Mr. Huber. Is there anybody who would require the defendant to testify in a criminal case?
(No response.)
Q: Is there anybody here who thinks that it's a sign of guilt if you don't?
(No response.)
Mr. SAVAGE: I think that's all, your honor.

RP 7/28/11 at 91-96.

After working with his attorney (and his codefendant, and his codefendant's attorney) on voir dire, Huber was pleased with Savage's performance:

Huber: I feel OK. I heard Tony talk to the jury, cuz we have finished out jury selection. He's real good in front of a jury; I'll say that much and I am glad that I have him. I think if anybody be able to give me a shot, it'll be him.
...
Father: Did you work with Tony on jury selection?

Huber: Yeah, we all worked together; me, Tony, and Brandon [Chaney] and his lawyer.

Appendix 1, at 4-5.

iii. Cross-examination.

Huber claims in his motion that Savage "engaged in very little cross-examination of any of the witnesses." Motion at 4. If this is meant to suggest that Savage posed fewer questions than Chaney's attorney did, it is true. If it instead suggests that Savage's cross-examinations were something less than constitutionally effective, it is demonstrably false. Savage's cross-examinations of the prosecution's witnesses were unmistakably the product of considerable preparation and were conducted with exemplary precision and control.

Early in the trial, the prosecution presented the testimony of the only eyewitness to the murder, Clifford Kurzinski. Indeed, the transcript of the co-defendant's attorney's cross-examination of Kurzinski extends for twelve pages and Savage's is reported on one page. But Chaney's attorney's cross-examination suggests that Kurzinski was an unassailable witness. Savage's extremely focused examination managed to expose Kurzinski's only weakness: while Kurzinski claimed to have been standing outside Talarico's for some time before the shooting, he never saw Bushaw and Huber leave and walk across the street to Bushaw's car.

In fact, he apparently never saw Bushaw and Huber together at all. RP 8/03/11 at 46-47.[7]

Huber argues that Savage was unprepared to confront the cell phone site evidence against him. But Savage began his cross-examination of Valentine Luu, a cell phone analyst, by pointing out that an exhibit she had prepared had a number of errors, and asking her to correct them in court. RP 8/10/11 at 132-33. The remainder of Savage's cross-examination demonstrated the limitations of such evidence.

In his motion, Huber asserts that John Sylve was the critical witness against him. He does not – and perhaps cannot – acknowledge the incriminating force of the testimony of Cossalter, Anderson, Vanderpool, and Razmus. They, not his attorney's imagined failings, were the difference between the prosecution's case against him and the case against Chaney. Nevertheless, Sylve was a powerful witness against Huber. Over the course of two days, Savage cross-examined Sylve methodically, ruthlessly, and effectively.

Savage established that Sylve was well-educated and well-read, thus setting up his closing argument that Sylve fabricated his "confession" according to what he knew the detectives wanted to hear. RP 8/08/11 at 117-19.

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[7] Savage deftly incorporated this cross-examination into his closing argument. RP 8/24/11 at 118.

Savage cross-examined Sylve about the reasons for his previous, illegal possession of a firearm, portraying him as a chronically dangerous man. RP 8/08/11 at 126.

Savage highlighted the implausibility of Sylve's testimony that the plan involved a call from Chaney to O'Neal (O'Neal did not have his phone with him at the time of the murder). RP 8/09/11 at 11-16.

Savage made Sylve act out the shooting of Bushaw in front of the jury, underscoring Sylve's matter-of-fact brutality. RP 8/09/11 at 21-25.

Savage exploited Sylve's impossible assertion that O'Neal was firing two handguns simultaneously. RP 8/09/11 at 24.

Savage established Huber's absence when the shots were fired, and impeached Sylve with his inconsistent versions of Huber's whereabouts at the time of the shooting. RP 8/09/11 at 18-20.

Savage established that Sylve was pending sentencing for Bushaw's murder, and that Sylve's "deal" with the prosecution required him to testify truthfully. RP 8/08/11 at 124, 127-29. Setting up the finale of his cross-examination, Savage impeached Sylve time after time with the statement he signed when he pled guilty to the lesser charge of Murder in the Second Degree. RP 8/09/11 at 6-7, 14, 18-19, 23, 27. Savage ended his cross-examination of Sylve on a powerful note: "Do you think you

still have your deal with the prosecutor now?" Sylve responded weakly, "I don't know."[8] RP 8/9/11 at 31.

John Sylve was not the only witness to suffer a scathing cross-examination at the hands of Huber's attorney. Stephanie Cossalter's testimony was also devastating to Huber. Cossalter testified that, before the murder, Huber said that Bushaw "needed to die." RP 8/17/11 at 127. She testified that, on the day after the murder, Huber told her that "[w]e took care of it," and described leading Bushaw to his death. RP 8/17/11 at 129-30. Savage established on cross-examination that Huber's statements to Cossalter before the murder could not have been made in person, as she had testified, because she had moved away from Seattle by the time of the robbery at Mitchell's residence. RP 8/17/11 at 145. And Savage established that the statements that Cossalter attributed to Huber after the murder did not accurately describe the actual shooting itself. RP 8/17/11 at 146. Savage's efforts may not ultimately have been successful, but it is difficult to imagine a more effective approach to this witness.

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[8] At least two individuals present in court during this cross-examination were highly impressed by it. Huber and his friend "Liz" discussed Savage's performance in a recorded telephone conversation later that night:

> Huber: He was pointing out all the inconsistencies!
> Liz: Oh, yeah!...
> Huber: "You think you still have your deal after today?" (Laughing.) I wanted to start laughing out loud but I had to keep my composure.
> Liz: I thought that was, like on point!

Appendix 1 at 6.

Kevin O'Keefe of SPD's CSI Unit collected all of the physical evidence at the scene. Chaney's attorney simply repeated most of O'Keefe's direct testimony during his cross-examination, to little effect. RP 8/04/11 at 58-69. Savage's cross-examination of O'Keefe was intended solely to demonstrate that Sylve's testimony that O'Neal simultaneously fired two semi-automatic weapons at Bushaw could not be true. Id. at 71-72.

Lead Detective Jim Cooper did not escape the reach of Savage's cross-examination either. Savage impeached him with the Certification for Determination of Probable Cause that Cooper himself had authored:

> Q: And do you not say further on in the certification, "When Detective Cooper asked Huber why he had a newspaper clipping of the murder," did he have a clipping of the murder?
> A: No. He had a clipping of the robbery. And I also put, "February 8th, 2009, Bryce Huber was arrested." Actually, it should have been February ---
> Q: Hold on, you don't have a question.
> A: I'm sorry.
> Q: He did not have a clipping of the murder in his wallet?
> A: No, he did not.
> Q: That is inaccurate?
> A: Yes.
> Q: And up above does it not say that, "In searching his wallet you found a newspaper clipping outlining the story of the murder of Steve Bushaw?"
> A: I'm sorry, I thought that's what you asked me already.
> Q: Well, do you see midway through the mid paragraph, "In Huber's wallet officers found ten 100-dollar bills,

a newspaper clipping outlining the story of the murder of Steve Bushaw"?
A: Correct.
Q: That's what it says?
A: Correct.
Q: But that's not correct, is it?
A: Correct. I thought that's what you just asked me.
Q: I'm interested in how in the certificate that inaccuracy appears twice.
A: I had it listed once, and then I referred to it when I was questioning him, yes.
Q: So the inaccuracy appears twice in your certification?
A: Correct.
Q: And you were the one that made up the certification?
A: I wrote the certification, yes.
Q: How is it that in writing the certification you made that mistake on two different occasions?
A: I made a mistake.
MR. SAVAGE: That's all. Thank you.

RP 8/18/11 at 142-43.

iv. The prospect of Huber's testimony.

In his declaration, Huber says that when he told Savage he wished to testify at trial, Savage told him he was "not prepared" to present his testimony. Huber Declaration at 2 (quotes in original). Perhaps Huber means to suggest by this quote that Savage was unprepared for trial. It seems far more likely that, if Savage made this comment at all, it was in an effort to dissuade Huber from making a clearly inadvisable decision.

A claim that an attorney improperly prevented a defendant from testifying is evaluated as a claim of ineffective assistance of counsel under Strickland. State v Robinson, 138 Wn.2d 753, 765-66, 982 P.2d 590

(1999). With respect to the first part of the Strickland test, deficient performance is established if a defendant proves that his attorney actually prevented him from testifying. A 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." Robinson, 138 Wn.2d at 764. The fact that an attorney strongly advises a defendant against testifying does not qualify as infringing on the right to testify:

> We must distinguish between cases in which the attorney actually prevents the defendant from taking the stand, and cases in which counsel "merely advise[s] [the] defendant against testifying as a matter of trial tactics." [Citation omitted]. Furthermore, while the decision to testify should ultimately be made by the client, it is entirely appropriate for the attorney to advise and inform the client in making the decision to take the stand. "Unaccompanied by coercion, legal advice concerning [the] exercise of the right to testify infringes no right, but simply discharges defense counsel's ethical responsibility to the accused." [Citation omitted].

138 Wn.2d at 763-64.

Even if Huber actually told Savage he wanted to testify, and even if Savage actually said, as Huber asserts, that he was "not prepared" to present Huber's testimony, there is no evidence that Savage actually coerced Huber into remaining silent at trial. On the contrary, given the circumstances of this case and the prospect of cross-examination, Savage would only have been discharging his ethical duty to Huber by

discouraging him from testifying. Huber made so many incriminating statements to his friends that it would have been extremely difficult for him to testify under any circumstances. But before the jury was impaneled, a situation arose that made it even more dangerous for Huber to take the witness stand.

During pre-trial hearings in this case, Jennifer Razmus reported to the police that she had received a text message from Huber's sister. She forwarded the text message to the prosecution. The message, in its entirety, read: "Hi, Jen, this is Bryce's sister. I'm very sorry to bother you, but he would like your address and Cara's, as well. He also wanted to know if either of you had a second interview. He says he is sorry for getting us both into this mess. Thanks." Detective Cooper discovered that the message had indeed been sent by Huber's sister, Jesslyn Hairston. The prosecution immediately endorsed Hairston as a witness in the case. RP 7/27/11 at 2-3.

This development prompted the prosecutor to obtain copies of Huber's recorded telephone calls from the King County Jail. A few days later, the prosecution provided a copy of these calls on a CD to Savage. RP 8/01/11 at 103-04.

These statements made by Huber, in the prosecutor's possession and available for use during cross-examination of Huber, provide an

additional, compelling reason why Savage would have advised Huber not to testify. It is easy, if painful, to imagine the cross-examination Huber would have suffered when confronted with statements like these:

> Huber: It's not looking good.
> Belay: No, why?
> Huber: My ex-girlfriend, her statements.
> Belay: She's back in town!?
> Huber: I don't know where she is but if she comes, I dunno, she could cook me.
> Belay: Yeah.
> Huber: I don't know where she is, you know, my lawyer hasn't talked to her, my codefendant's lawyer hasn't talked to her, I don't know if the prosecutor has talked to her but...
> Belay: Ain't she supposed to be in South Africa or South America or something?
> Huber: I don't know, maybe.
> ...
> Huber: If that bitch shows up, it's not gonna be, it's probably gonna be real hard for me to win.
> ...
> Huber: Hopefully she's holed up in different country or something.
> ...
> Huber: The only thing I have going for me is I got a good lawyer.

Appendix 1, at 3.

In a later call, Huber continued in the same vein:

> My ex, Stephanie [Cossalter], I don't know where she is. My lawyer hasn't talked to her, my co-defendant's lawyer hasn't talked to her, but she made all these statements against me. I was thinking they weren't gonna allow some of it cuz it's hearsay, so if she shows up, man, she can make it real difficult for me.
> ...

> Sage [Mitchell] is pleading the Fifth, that's all everybody gotta do, if that bitch, if she comes and just pleads the Fifth.
> ...
> I need a couple of people to take the Fifth!
> ...
> I got to just wait it out and see if my lawyer can do what he does. He's gonna have to shark those motherfuckers ... otherwise I am cooked.
> ...
> I just hope that bitch doesn't come.

Appendix 1, at 4.

Chaney's attorney, James Roe, insists in his declaration that Savage was ineffective because Savage rejected Roe's advice to emphasize the mental anguish that Bushaw's murder had caused Huber:

> I pointed out that Huber was a different man after the shooting than the Huber who drove with two girls to Talarico's. 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 that Savage failed to bring out.

Motion, Exhibit 3 (Roe Declaration) at 7.

It is hardly surprising that Savage declined to follow Roe's advice. Huber was certainly traumatized in the aftermath of the shooting when he admitted to Vanderpool that he and his friends had shot a man – but only because he feared that Bushaw had survived, and might have implicated him. Of course Savage elected not to belabor Huber's later admissions to Cossalter – "We took care of it" is hardly an expression of shock or

befuddlement, much less remorse, or even regret. Huber expressed not shock, but pride, and (showing Cossalter an internet story about the shooting) relief that he was not a suspect. According to Chaney's attorney, when he urged Savage to pursue the theory that Huber was a changed man after the murder, Savage "did comment that his client had spoken too much." Motion, Exhibit 3 (Roe Declaration) at 7. It is likely that Savage was speaking, not just about Huber's comments to his acquaintances before and after the murder, but about Huber's recorded telephone calls made before and after the trial began.

According to Chaney's attorney, "Savage had failed to bring out just how changed Huber was after the shooting and how care-free he was before the shooting." Motion, Exhibit 3 (Roe Declaration) at 9. Savage knew that if, in fact, Bushaw's murder had changed Huber, it was not a change that would engender the jury's sympathy or raise a reasonable doubt about his guilt.

Huber argues that he is entitled to an evidentiary hearing because the trial court did not ask him if he was waiving his right to testify. Motion at 15. But that practice is discouraged in Washington:

> The fact that a criminal defendant, depending on the facts and circumstances of the case, reasonably could choose either to testify or not to testify, necessarily means the determination of whether the defendant will testify is an important part of trial strategy best left to the defendant and

> counsel without the intrusion of the trial court, as that intrusion may have the unintended effect of swaying the defendant one way or the other.

State v. Thomas, 128 Wn.2d 553, 560, 910 P.2d 475 (1996).

Huber cites Robinson, supra, for the proposition that a defendant who can present substantial factual evidence that he was actually prevented from testifying is entitled to a hearing. But in Robinson, the defendant's contention was supported by his own attorney's admission that he disregarded his client's explicit wishes, as well as by eyewitnesses who heard Robinson demanding to testify, guards who heard him complaining that he wanted to testify, and an attorney who said Robinson told her the same. 138 Wn.2d at 757, 760-61. Huber can make no such showing; indeed, his recorded telephone calls suggest that he was at most ambivalent about taking the stand.

In a telephone conversation with his father on August 10, 2011, Huber said: "I don't think I am going to testify. I might, but I don't plan on it now." Appendix 1 at 6.

Huber's mother clearly felt that he would not make a good witness, and told him so. In a telephone call on August 19, 2011, Huber and his mother had the following conversation:

> Huber: I think it's over. I'm thinking about taking the stand.
> Mother: You're thinking about taking the stand? Why?

Huber: 'Cause I think it might give me a better chance. I don't think it looks very good right now.
Mother: Well, they're gonna cross-examine you. They're gonna ask you all those – some of those things that are true.
Huber: I'll say they're true. I'll explain it. Even when I said those things I didn't say anything about a plan.
Mother: Right.
Huber: And when I say I said that you know I'll say I said that and say I didn't plan any of this to happen. It happened.
Mother: You didn't plan any of this to happen?
Huber: Yeah.
Mother: Well, you're going to have to do what Tony tells you to do.
Huber: I know.
Mother: 'Cause he knows what he's doing.
Huber: I don't think he wants me to take the stand. But. But I don't know. I'll talk to him on Monday.

Appendix 1 at 7.

A defendant's unsupported allegation that his attorney prevented him from testifying is insufficient to entitle him to an evidentiary hearing. Thomas, supra. Huber's motion for an evidentiary hearing should be denied.

v. Jury instructions.

In his motion, Huber suggests that Savage inexcusably neglected to ask for a lesser included offense instruction on murder in the second degree, noting that the prosecution seemed to invite such an instruction. "Where the claim of ineffective assistance is based upon counsel's failure

to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012), review denied, 176 Wn.2d 1023 (2013).

Savage did not mince words about his decision not to seek a lesser included offense instruction that would have allowed the jury to convict Huber for an intentional murder but not a premeditated one: "If the State's evidence is correct, I cannot 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." RP 8/23/11 at 79-80.

What Savage meant by this is obvious. Given the evidence against Huber, it would be illogical and counterproductive to claim that Huber intended to cause Bushaw's death, but somehow did so without premeditation. What facts could support this theory? Huber was either guilty or not guilty of premeditated murder, but there was no coherent version of the facts under which Huber could be not guilty of premeditated murder, but guilty of intentional murder.

It was undisputed at trial that Bushaw's murder was premeditated: two men who had lingered in the area for a considerable time approached Bushaw as he crossed a busy street; both men, without provocation, began firing at him. The prosecution's theory was that Huber deliberately arranged to lead Bushaw out of Talarico's into the street where he would be executed. Huber was either guilty or not guilty of premeditated murder, but it would be absurd to claim that he only intended to kill Bushaw, but did not premeditate the murder.[9]

Huber asserts in a declaration that not only did Savage not seek a lesser included instruction on intentional murder, but "he never explained why." Motion, Exhibit 4 (Huber Declaration) at 2. But Huber answers his own question: "Our whole defense was that I never intended for anyone to kill Bushaw." Id.

Savage understood that his decision might invite the attention of Huber's future attorneys. Savage said, "For Mr. Huber's sake, I'm sure that he would like me to submit a lesser included." RP 8/23/11 at 80. But he explained: "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

[9] Even Huber himself acknowledges that he could not have intended the crime without also premeditating it. In his Declaration, he says he needed to testify "to establish...that I never premeditated or intended Steve Bushaw's murder." Motion, Exhibit 4 (Huber Declaration) at 2.

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." RP 8/23/11 at 80.

There is no evidence that indolence or indifference or illness led Savage to decline to seek a lesser included offense instruction in this case. Rather, the decision was driven by sound trial strategy.[10]

vi. Closing argument.

Chaney's lawyer gratuitously characterizes Savage's closing argument as "appalling." He asserts that he "do[es] not understand why Savage never pointed out that his client would never have brought two witnesses to a murder." Motion, Exhibit 3 (Roe Declaration) at 11, ¶ 39. Counsel apparently did not listen very carefully – Savage made exactly the argument that counsel now claims was missing:

> Finally, I would ask you to consider this: Mr. Huber is up to his eyebrows in this murder plot and, therefore, cleverly, he invites two women to come with him, and he takes them to the bar where the plot is to ferment, he leads them to a table from which he is supposedly making the calls, hey, fellows, we're coming out, get ready, he drinks beer with them, and he has Mr. Bushaw come and sit down at the table with them and introduces him so that the ladies could

[10] Indeed, Savage did not neglect the jury instructions. He made a novel and moving effort to persuade the court not to submit the time-honored instruction urging jurors to deliberate toward unanimity. RP 8/23/11 at 55-57. Chaney's lawyer found this argument meritorious enough to join in it. RP 8/23/11 at 67.

> get a good look at the victim that Mr. Huber intends to lay out on the street within the next five or 10 minutes?
>
> Now, if that makes sense to you, I guess you'll tell me so. But in the world, if you're going to do this and you're into it are you going to go about creating additional witnesses to yourself – against yourself?

RP 8/24/11 119.

Huber also claims that Savage "questioned the value of closing argument," belittled the importance of the cell phone records, and "repeatedly called his client by the victim's name." Motion, at 4. Chaney's attorney also takes Savage to task for mixing up names. Motion, Exhibit 3 (Roe Declaration) at 11, ¶ 40.

Turning first to the latter issue, Huber implies that making mistakes as to the names is evidence of some kind of mental infirmity. If so, it was an ailment that was not limited to Savage; indeed, it was the prosecuting attorney who first substituted Huber's name for Bushaw's, and it was Savage who immediately caught the mistake. RP 7/20/11 at 6. And when the prosecutor made the same mistake later, it was again Savage who quickly corrected him. RP 8/8/11 at 60.

Ironically, Chaney's attorney, so eager to accuse Savage of this error, was guilty of it himself on multiple occasions. For example, in cross-examining Bushaw's best friend, Jay Sherwood:

> **Roe**: When you spoke to Bryce a couple days earlier –
> **Sherwood**: Steve.
> **Roe**: I'm sorry, Mr. Bushaw. I'll make that mistake many times in this trial.

RP 8/2/11 at 28. And during his closing argument, Mr. Roe slipped up again: "And from that point on it's 15 minutes before Huber comes running back in, shot." [Obviously, counsel was referring to Bushaw, not Huber]. RP 8/24/11 at 95-96.

All three attorneys were guilty of this mistake. It would be a harsh standard indeed if a slip of the tongue rendered a trial attorney constitutionally ineffective.

Huber also implies that Savage belittled the purpose of closing argument. But a review of the context in which the comment was made suggests that Savage was doing what all good trial lawyers do: acknowledging his bias, and inviting the jurors to reason for themselves. RP 8/24/11 at 109-10.

Nor did Savage belittle the importance of the cell phone evidence. He acknowledged the significance of it but underscored that it – like the

travels of Chaney, Sylve, Hampton, and O'Neal before they reached West Seattle -- did not answer any fundamental questions about Huber's guilt:[11]

> You can – and I suspect that you will put in enough hours on these phone call records and cell towers and who called who and what phone was being used and where it was to give you a migraine headache. I'm not trying to discourage that, but that's not where I'm coming from.
>
> You can review, as I suspect you will, the who picked up whom at the airport and the – out to the casino and the barbershop and O'Neal's and all the rest of it. Well, we weren't a part of that and I have no comment on it.

RP 8/24/11 at 111.

Instead, Savage devoted his efforts in closing argument to the most incriminating evidence Huber faced – Huber's angry reaction to the robbery at Mitchell's residence, the testimony of John Sylve, and the testimony of Stephanie Cossalter.

About Huber's statements that Bushaw needed to be "taken care of," Savage said:

> Well, who of you have not done the same thing? You've had a family friend, an acquaintance, a sweetheart,

---

[11] In a telephone call to his father on August 10, 2011, after hours of testimony about telephone records, Huber said:

> Tony told me two things today. He said, in the beginning he said he thinks if it ended today we would win. And then Roe...he was just babbling on and on and on about nothing. About graphs and phones, individual calls, just boring the jury to death after the prosecutor had already bored them. You know, he bored them for another hour and a half. And Tony was like, he was getting real irritated and he told me, he wrote me a note and said, "The jury is bored and confused," and then ten minutes later, he's like "Arrgh!"

Appendix 1, at 6.

> somebody who has suffered an injury at some time, and you're upset about it and you say so. And you voice your opinion on what ought to happen to the dirty, rotten so and so that was responsible. We all have done that. We don't even have to have suffered that personally. You pick up a newspaper, and you see someone where some awful act has been perpetrated, and you voice your opinion as to what ought to happen to the perpetrators.

RP 8/24/11 at 111-12.

In closing argument, Savage attacked Cossalter with the evidence he had developed during his cross-examination of her:

> She said that she left town on January the 1st, '09, and that before she left town Mr. Huber discussed with her in person this assault on Mr. Mitchell. Well, we know that couldn't have happened. The assault didn't happen until January the 19th. He couldn't have been talking about it on January the 1st.

RP 8/24/11 at 112-13.

Savage also attacked Cossalter's testimony by repeating the details of the shooting she claimed to have heard from Huber – details Savage had elicited from her on cross-examination. Because the account Cossalter claimed Huber had given her was inconsistent with the facts of the actual shooting (e.g., Cossalter testified that Huber said he was sitting with Bushaw on the patio at Talarico's, but Talarico's has no patio), Savage argued that Huber had never made the statements at all.

> Now, that was her version of what he said, or purportedly said. Well, who popped him? Well, I don't know. Was it the people at the car? I don't know. Did he describe the people in the car? Well, I don't know.
>
> Is she lying? Is she mistaken? It really, from one point of view, doesn't make any difference. The basic question before you is is she reliable? Is this the kind of evidence or testimony on which you are willing to base a verdict beyond a reasonable doubt, sitting on the patio, talking about events three weeks before they happened, is that a reliable witness on whom you wish to depend?

RP 8/24/11 at 113.

Savage's approach to Sylve's testimony was two-fold. First, he endeavored to persuade the jury that Sylve was the most important witness against Huber:[12]

> Then we get to Mr. Sylve. It seems to me that the fundamental bedrock issue in this case, as far as Mr. Huber is concerned, is do you believe Mr. Sylve beyond a reasonable doubt?
>
> If you don't believe Mr. Sylve, then you really have no case. A verdict of guilty means that each and every single one of the 12 of you who render a verdict believes in your heart and your mind and your conscience that Mr. Sylve is telling the truth, and you don't even have a reasonable doubt about it. That's how strongly you believe in what he has to say.

RP 8/24/11 at 113-14.

After telling the jurors they must believe Sylve beyond a reasonable doubt to convict Huber, Savage proceeded methodically to

[12] In reality, the most important witness against Huber may have been Huber himself: his own statements were perhaps the most incriminating evidence against him. Had Huber testified, he would only have made things worse.

demonstrate why this was impossible. He began by reminding them of the instruction that the testimony of an accomplice could only be considered with "great caution." RP 8/24/11 at 114; WPIC 6.05.

Savage emphasized the "deal" Sylve had with the prosecution, and noted that Sylve – an intelligent and well-educated man, as Savage had established on cross-examination – had access to all of the discovery provided by the prosecution before he made his statement implicating Huber, and that Sylve had an enormous motive to implicate Huber. RP 8/24/11 at 114. Savage further noted that Sylve was not going to receive the benefit of his "deal" until he testified at trial:

> He has got to testify, oh, quote, truthfully. Goodness knows the state of Washington would never admit engaging in using untruthful testimony. He's got to testify truthfully.
>
> But as a result of quote, truthful, close quotes testimony, he saves himself five years and 10 months in prison. Well, let's take a look at this business of truthful testimony. The truthful testimony, when he pleads guilty and Mr. O'Neal pleads guilty, is that they testify in court against Mr. Huber and Mr. Chaney.
>
> Now, is there anybody in the jury box that really thinks that Mr. Sylve would have got his deal if he had come in here before you and said that I swear to God I'm telling the truth and Bryce Huber had nothing to do with it, how do you like his deal then? Do you really think that he would have got a deal if he said that? Well, of course he wouldn't. Part of the deal is that he rope in Mr. Huber and Mr. Chaney, otherwise he has no deal.

RP 8/24/11 at 115.

Savage went on to pillory Sylve by pointing out that he dealt in stolen computers, stole cars, illegally owned a firearm, and, two hours after arriving in Seattle, murdered a man who was a complete stranger to him:

> The next question is wouldn't Mr. Sylve lie under oath in order to help himself? What are you supposed to believe? Here's a guy that was stealing cars, stolen computers, possession of guns, murdering people, but he wouldn't lie under oath? . . . He'd lie to anybody at any time, at any place, about anything, if it was in his best interests. Did he lie? Well, let me hit just the highlights, and you'll have the others in your notes.

RP 8/24/11 at 116.

Savage proceeded to review with the jury the results of his cross-examination of Sylve. RP 8/24/11 at 117-18. He concluded by returning to the argument that, unless the jury believed Sylve beyond a reasonable doubt, they had to acquit Huber:

> Well, when you get back to citing evidence against Mr. Huber, and I'm sure that you will, I would ask you to say, all right, who says so? And the answer is always going to come back to Mr. Sylve. Who says that Mr. Huber and Mr. Bushaw came out of the bar together? Mr. Sylve and nobody else. Who says that Mr. Huber and Mr. Bushaw went to the car and smoked? Mr. Sylve and nobody else. Who says that Mr. Huber and the victim exited the car together? Mr. Sylve. Who said the defendant said, make sure he's dead? Mr. Sylve. Who said that Mr. Huber was ever on California Avenue when the shooting occurred? Anybody say that except Mr. Sylve?

RP 8/24/11 at 118.

Savage concluded his closing argument by returning to a subject he had raised in voir dire – the jury's duty to hold the prosecution to its burden of proof beyond a reasonable doubt:

> What a verdict of not guilty means is, Mr. Baird, you're a fine guy, you're a good prosecutor, we've listened to the testimony, we've looked at the exhibits, and this mess isn't good enough. It just simply doesn't pass muster. It's not his fault, it's not Mr. Cooper's fault, but what they put in front of you just doesn't get you there. And that's all a verdict of not guilty means, it's not good enough. And that's precisely what Mr. Huber deserves.

RP 8/24/11 at 120.

Considered as a whole, as this Court must do,[13] Savage's performance on Huber's behalf was highly competent. At a minimum, his performance did not fall below an objective standard of reasonableness. Huber's claim should be rejected.

d. Huber Cannot Show Prejudice.

Even if Huber could show any deficiency in Savage's representation, he has nevertheless failed to show a reasonable probability that, but for counsel's errors, the result of the trial would have been different, in light of the overwhelming evidence against him detailed in this response. This petition should be denied and dismissed.

---

[13] McFarland, 127 Wn.2d at 335 ("Competency of counsel is determined based upon the entire record below.").

E. CONCLUSION

The record in this case demonstrates unequivocally that Anthony Savage represented Huber assiduously and with great skill. The jury's verdict of guilt cannot be attributed to Savage's performance; it was the predictable result of the evidence against Huber. Huber has failed to support his claim of ineffective assistance of counsel. This petition should be denied and dismissed.

DATED this 18th day of June, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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APPENDIX 1

COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. BRYCE HUBER, Appellant.	No. 09-1-07310-1 SEA Ct. Appeals No. 67776-4-I DECLARATION OF JEFF BAIRD

I, Jeff Baird, hereby declare as follows:

1. I am a Senior Deputy Prosecuting Attorney for King County. I was assigned to this case approximately one month before it was sent out to trial.
2. It was obvious that the case against defendant Huber was significantly stronger than the case against defendant Chaney. Apart from telephone calling records that showed numerous calls between Huber and Chaney in the hours preceding the murder, the principal evidence against Chaney was the testimony of John Sylve. Sylve, the man who shot victim Steve Bushaw to death, was vulnerable to impeachment for a variety of reasons, not least because he implicated Huber and Chaney only after reaching a plea agreement with a previous prosecutor allowing him to plead guilty to Murder in the Second Degree (with a Firearm Enhancement) in exchange for a promise to testify against them.

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3. In addition to Sylve's testimony and the telephone records, however, Huber was implicated by statements he had made to four of his own friends and associates. Before the murder, Huber had expressed an unequivocal opinion that Bushaw should be killed. Shortly after the shooting, Huber acknowledged that he had been at the scene of the shooting with the victim. An hour or so later, Huber admitted his participation in the crime and expressed concern that Bushaw might have survived. Later, when he learned that Bushaw died from his injuries and he had not been named as a suspect, Huber freely admitted his guilt again, affecting neither remorse nor regret but stating matter-of-factly that "it had been taken care of." The witnesses to whom Huber made these admissions were all the more credible because they failed to disclose their knowledge about his involvement in the crime for months and, even then, implicated Huber reluctantly. (Two of them, Anderson and Razmus, continued their efforts, albeit transparently, to protect him at trial.) These witnesses, unlike Sylve, were immune from any accusations of bias.

4. During pre-trial hearings in this case, Jennifer Razmus, one of Huber's associates who was subpoenaed to testify against him, reported that Huber's sister, acting on his behalf, had contacted her. She sent the investigating detective a voice mail left for her by Huber's sister; it said:

> Hi Jen, this is Bryce's sister. I'm very sorry to bother you, but he would like your address and Cara [Anderson]'s as well. He also wanted to know if either of you had a second interview. He says he is sorry for getting us both into this mess. Thanks.

On July 27, 2011, I brought this matter to the court and the parties' attention and endorsed Huber's sister, Jennifer Hairston, as a witness.

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5. Suspecting that Huber might have been making other efforts to influence the testimony of prospective witnesses, I asked my paralegal Kelly Rosa to obtain recordings of other telephone calls he had made from the King County Jail while awaiting trial. She did so; and provided me with a CD containing numerous calls he made from the jail. On August 1, 2011, while in court, I gave copies of this CD to Anthony Savage, Huber's attorney, and to James Roe, Chaney's lawyer.

6. This CD contained a recording of a telephone call made on July 26, 2011 at 9:13am. A portion of that conversation went as follows:

Huber: It's not looking good.
Belay: No, why?
Huber: My ex-girlfriend, her statements.
Belay: She's back in town!?
Huber: I don't know where she is but if she comes, I dunno, she could cook me.
Belay: Yeah.
Huber: I don't know where she is, you know, my lawyer hasn't talked to her, my codefendant's lawyer hasn't talked to her, I don't know if the prosecutor has talked to her but…
Belay: Ain't she supposed to be in South Africa or South America or something?
Huber: I don't know, maybe.
…..
Huber: If that bitch shows up, it's not gonna be, it's probably gonna be real hard for me to win.
….
Huber: Hopefully she's holed up in different country or something.
….
Huber: The only thing I have going for me is I got a good lawyer.

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7. The CD contained a recording of a telephone call made half an hour later, on July 26, 2011 at 9:43am. During that call, Huber made the following statements:

> My ex, Stephanie [Cossalter], I don't know where she is. My lawyer hasn't talked to her, my co-defendant's lawyer hasn't talked to her, but she made all these statements against me. I was thinking they weren't gonna allow some of it cuz it's hearsay, so if she shows up, man, she can make it real difficult for me.
>
> ....
>
> Sage [Mitchell] is pleading the Fifth, that's all everybody gotta do, if that bitch, if she comes and just pleads the Fifth.
>
> ....
>
> I need a couple of people to take the Fifth!
>
> ....
>
> I got to just wait it out and see if my lawyer can do what he does. He's gonna have to shark those motherfuckers...otherwise I am cooked.
>
> ....
>
> I just hope that bitch doesn't come.

8. I realized that these and other statements on the CD would be very useful during cross-examination of Huber if he took the witness stand.

9. After the trial, I asked Rosa to obtain recordings of any calls Huber had made during his trial. She obtained recordings of dozens of calls. In some of them, Huber continued to bemoan the testimony of his associates. In others, he discussed the performance of his attorney.

10. On July 29, 2011, at 8:56pm, after jury selection had been completed, Huber telephoned his parents. Part of that conversation went as follows:

> Huber: I feel OK. I heard Tony talk to the jury, cuz we have finished out jury selection. He's real good in front of a jury; I'll say that much and I am glad that I have him. I think if anybody be able to give me a shot, it'll be him.

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....

Father: Did you work with Tony on jury selection?

Huber: Yeah, we all worked together; me, Tony, and Brandon [Chaney] and his lawyer.

11. On July 31, 2011, in a call made at 3:20pm, Huber said:

> My lawyer is hella good with a jury. He's good. He should give me a fair run at it. I'd say I have about a 50/50 chance.
>
> ....
>
> Fucking, uh, my sister sent a message to one of the girls that's a witness. Sent it to her as a text and now she's a witness. They're gonna call her.
>
> ....
>
> Either I'll be out soon or I won't be out for a long time.

12. On August 9, 2011, in a call made at 6:36pm after his attorney had cross-examined John Sylve, Huber and a friend had this exchange:

Huber: Today, went good, did you think so?

Liz: I thought so.

Huber: Today went good, today went by good.

....

Liz: Oh my god, ok? So the little short dude – I don't like him. He's cocky…

Huber: The prosecutor?

Liz: Yeah, I don't like that guy!

Huber: I can't stand him!

Liz: Oh my god, he's really annoying. Why is he all over the joint? Can't you just stand in one spot please?

Huber: Man, I can't stand him.

Liz: He's like over here, he's over there, and I'm like, stay in one spot and stop yelling!

Huber: He's effective though.

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Liz: Yeah, he's effective. But yours is on point! As old as he looks – he's on point! He's kinda funny…

Huber: He was pointing out all the inconsistencies!

Liz: Oh, yeah!...

Huber: "You think you still have your deal after today?" (Laughing.) I wanted to start laughing out loud but I had to keep my composure.

Liz: I thought that was, like on point!

13. On August 10, 2011, after a day of testimony about phone records, Huber telephoned his father at 7:15 pm. That conversation included the following remarks by Huber:

> Tony told me two things today. He said, in the beginning he said he thinks if it ended today we would win. And then Roe…he was just babbling on and on and on about nothing. About graphs and phones, individual calls, just boring the jury to death after the prosecutor had already bored them. You know, he bored them for another hour and a half. And Tony was like, he was getting real irritated and he told me, he wrote me a note and said, "The jury is bored and confused," and then ten minutes later, he's like "Arrgh!"

Later in the conversation, Huber said

> I don't think I am going to testify. I might, but I don't plan on it now.

14. On August 17, 2011, after Stephanie Cossalter testified, Huber telephoned a friend at 8:45. That conversation included the following exchange:

Liz: How was your day?

Huber: It was terrible

Liz: Why?

Huber: They found her. She showed up and testified today.

Liz: No way.

Huber: Yeah. I feel like it's over. My lawyer, he said that he feels like I dodged a big bullet because it could have been a lot worse. But she tried to cook me, man.

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Liz: She did?

....

Huber: It was hard for me.

Huber: My lawyer thinks I gotta shot but I don't feel very good right now.

Huber: It was hard for me because she was saying things that I said, you know.

....

Huber: Today was hella rough.

15. On August 19, 2011, during a telephone call began at 3:38pm, Huber and his mother had the following conversation:

Huber: I think it's over. I'm thinking about taking the stand.

Mother: You're thinking about taking the stand? Why?

Huber: 'Cause I think it might give me a better chance. I don't think it looks very good right now.

Mother: Well, they're gonna cross-examine you. They're gonna ask you all those – some of those things that are true.

Huber: I'll say they're true. I'll explain it. Even when I said those things I didn't say anything about a plan.

Mother: Right.

Huber: And when I say I said that you know I'll say I said that and say I didn't plan any of this to happen. It happened.

Mother: You didn't plan any of this to happen?

Huber: Yeah.

Mother: Well, you're going to have to do what Tony tells you to do.

Huber: I know.

Mother: 'Cause he knows what he's doing.

Huber: I don't think he wants me to take the stand. But. But I don't know. I'll talk to him on Monday.

16. I did not observe Tony Savage sleeping during the trial in this case.

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17. I have been working as a deputy prosecuting attorney for King County for thirty years and have been prosecuting homicides for most of that time. I have had a number of cases with Mr. Savage. Three of them (including State v. Huber) were murder cases. I quickly developed a deep respect for Mr. Savage's skill as a trial attorney. I was particularly impressed by his talent for cross-examination, his ability to focus on the issues of real importance in a case, his rapport with a jury, and his dignity and integrity. I believe he did a commendable job of representing Mr. Huber. I learned in early December of 2011 that Mr. Savage was closing his practice of law. On December 7, 2011, I sent Mr. Savage a brief email which read, in its entirety, as follows:

> Tony,
>
> Most of what I've learned about trial practice I have learned from defense attorneys – and from my own mistakes when trying cases against them. Over the years, I've learned more from you than anyone. Thank you.
>
> Jeff

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 17th day of June, 2013, at Seattle, Washington.

Jeff Baird, WSBA #11731
Deputy Prosecuting Attorney for King County

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APPENDIX 2

The Seattle Times
Winner of Nine Pulitzer Prizes

Local News

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Criminal defense attorney Tony Savage dead at 81

Well-known and much-respected criminal defense attorney Tony Savage died Tuesday at 81. Among his clients were Gary L. Ridgway, the Green River killer, and David Lewis Rice, murderer of four members of the Goldmark family in 1985.

By Jennifer Sullivan

Seattle Times staff reporter

Anthony "Tony" Savage may have lacked the schmooze of a big-city lawyer and the slick, headline-catching demeanor, but for 56 years the bearded bear of a man strode into courtrooms up and down the West Coast hell bent on giving everything he possibly could to defend mass murderers, rapists and dope smugglers.

In addition to his trial work, where prosecutors considered him a skilled opponent, Mr. Savage was a mentor to defense lawyers across the region. From the day he passed the bar exam in 1955 until recent weeks, when his terminal cancer left him weary and unable to speak, he dedicated his life to practicing law.

Mr. Savage died Tuesday (Jan. 3); he was 81.

Anthony Savage Jr. was a gigantic presence both in person — he was 6-foot-6 — and inside the courtroom, where he sat with his many infamous clients, among them Green River killer Gary L. Ridgway; David Lewis Rice, who murdered four members of the Goldmark family in 1985; and Charles Campbell, a convicted rapist who escaped from prison and killed both the woman who had testified against him and her 8-year-old daughter. Campbell was executed in 1994.

Mr. Savage vehemently opposed the death penalty and spent a large part of his career fighting it.

"He was just a 100 percent all-around guy. He never said an unkind word about anybody," said Senior U.S. District Court Judge Carolyn Dimmick. In the course of friendship of more than 50 years, Dimmick said, the only skeptical thing she ever heard Mr. Savage say about anyone was about Charles Campbell.

"He said, 'That was the only man who I looked in those eyes, and I didn't feel a thing for,' " she recalled. "He felt sympathy for every other defendant he had."

Bellevue attorney Stephen Hayne said that when he was assigned to handle the defense of Henry Grisby, a man accused of murdering three adults and two children in 1978, he rushed to Mr. Savage for help. Grisby and co-defendant Raymond Frazier had faced the death penalty, but were instead sentenced to life in prison.

"I was a young public defender and in no way qualified to try a death-penalty case. I was in a panic, and I had nowhere to turn, so I showed up in Tony's office and poured my heart out," Hayne recalled. After about a half-hour, Mr. Savage agreed to help try the case. "I don't think Clarence Darrow or F. Lee Bailey could carry Tony's briefcase. Those guys didn't have near the career or credentials of Tony Savage," he said.

In father's footsteps

Mr. Savage proudly followed his father, former U.S. Attorney Anthony Savage Sr., into the world of law. Savage Sr. would sometimes quietly stand in the back of courtrooms and watch his son, then a deputy King County prosecutor.

The Savage family hailed from North Seattle. Anthony Jr. was an Eagle Scout and graduate of Roosevelt High School. He went on to attend Wesleyan University in Connecticut and was a member of the football team, said retired King County District Court Judge Joel Rindal. Mr. Savage then went to law school at the University of Washington.

After getting his law degree from the UW, Mr. Savage worked at a downtown law firm handling civil cases. He joined the King County Prosecutor's Office in 1956, just a few months after Rindal. Within two years, Rindal was the chief criminal deputy prosecutor and Savage his right -hand man.

Though he was very good, Rindal said, prosecutorial work was tough for Mr. Savage because he had to push for the death penalty in several cases.

Judge Dimmick, who also was a deputy prosecutor at the time, said Mr. Savage was never bombastic.

"We used to call him the big Boy Scout because he was so low-key in prosecuting people," she said.

Jim Kempton, a longtime friend, said Mr. Savage was always popular with women because he behaved like a gentleman. He was also a fantastic dancer "who was light on his feet," Kempton said.

"Tony had a great sense of humor," Kempton said. "Nothing went over his head. He saw the light side of everything, he just had a lot of fun."

Private practice

After about six years in the Prosecutor's Office, Mr. Savage went into private practice with Judge Dimmick's husband, at the firm Dimmick, Samson and Savage. Mr. Savage handled mostly criminal defense work.

A few years later, he moved to the firm Kempton shared with attorney Dave Gossard. He was there for more than 20 years, Kempton said.

"He was unable to ask anyone for money; all of his clients were broke. I used to say that if a defendant didn't have the $25 filing fee for the Public Defender's Office, they sent them to Tony Savage," Kempton recalled.

It was as a defense lawyer that Mr. Savage's courtroom skills won renown. He had a gift for catching a liar on the witness stand and was known for keeping juries on the edge of their seats.

"He would, on cross-examination, build a fence around a witness and leave them no room for escape. Tony was just extraordinarily skillful at fencing people in," said Hayne. "He would get up and ask a question and get closer and closer and closer to the witness. The guy was an amazing trial lawyer, he would turn the prosecution's case on its head."

Court of Appeals Judge Anne Ellington said that when she was a young King County Superior Court judge in the 1980s, Mr. Savage paid her a compliment in the press, and she immediately called his office and, as a joke, asked him to marry her. He accepted, and their joke continued; the two often called each other's offices asking for their fiancé.

"Lawyers have some room for melodrama in cases, and they tend to take advantage of that. But that was never Tony's way," Judge Ellington said. "If Tony rose from behind the counsel table, he had something to say. If he approached the bench, he lumbered up, which was especially the case in recent years."

Mr. Savage's slow movements won him a nickname among judges: "the wounded buffalo," Ellington said.

Judge Dimmick said that when Mr. Savage tried a case in her courtroom, jurors were out for several hours deliberating. One panel later told her that they had no question about the defendant's guilt, but they wanted to stay in the deliberation room because they didn't want to disappoint Mr. Savage.

King County Superior Court Judge William Downing said that Mr. Savage was always "the paragon of integrity"; he exhibited outstanding legal skills and was simply a delight to be around."

"I have been in the court system 35 years and there's nobody for whom I have the admiration and affection that I have for Tony," said Downing, who prosecuted the Goldmark case. "Tony had a unique gift for being able to figure out the vulnerability of a prosecutor's case. I think he must have had a photographic memory. He never gave the impression that he worked hard."

The courtroom consumed every aspect of Mr. Savage's life, until he married his now-deceased wife, Barbara, in the 1980s. The couple lived in Edmonds.

Jail stint

Mr. Savage spent some time on the other side of the jail-cell door when he was sentenced to a month for not paying his taxes. Judge Dimmick said she and other friends tried to get him to pay his taxes, and he promised to get around to it eventually.

"Tony was a great procrastinator, as most lawyers are," Kempton said.

As Mr. Savage grew older and as his friends retired, he remained as dedicated as ever to work. Even ill, he could be found in his office every day until last week.

Colleagues and friends tried to host parties for him and even surprise him with Champagne in his office, but he refused. When a group of King County Superior Court judges, defense lawyers and the Prosecutor's Office tried to coax Savage into court to give him an award honoring his legal career, he refused. The Prosecutor's Office set up a video camera in a conference room, asking people who knew him to say a few nice words for a video to be delivered to him.

Toward the end, he hunkered down at home and told friends they could see him one by one. Though he couldn't talk he remained as funny as ever, writing out statements on pieces of paper complaining about "too much undeserved hoopla and praise."

"I have always thought that I had a pretty good grip over who I was and what I was doing," Mr. Savage wrote in a recent note shared by Hayne. "If everybody wanted to get together, have a few drinks and tell stories about when I went to jail, got my ass kicked by the WSBA (the state Bar Association), etc. That would be enough."

Mr. Savage was preceded in death by his wife. He is survived by a sister, Margaret Savage, of Shaw Island, and a sister-in-law, Margaret Vance Savage, of Edmonds. He is also survived by granddaughter, Adelle Chisholm, of Little Falls, Minn; grandson Quentin Starin, of Crystal, Minn;. and a great-grandson.

At his request, no services are planned.

APPENDIX 3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 85459-9
vs.	)	King County Superior Court No. 07-1-04039-7 SEA
SIONE LUI, Appellant.	)	DECLARATION OF ANTHONY SAVAGE

I, ANTHONY SAVAGE, hereby declare as follows:

1) I have been an attorney for more than 50 years. My practice is limited to criminal defense. I have tried hundreds of cases to verdict. I have handled numerous high profile Murder and Aggravated Murder cases and defendants, including Gary Ridgway ("Green River Killer"), David Rice, and Charles Campbell, among others.

2) 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. I was attentive throughout this trial.

3) I twisted my knee after court on Wednesday, April 16, 2008. It felt fine when I got home but by the following morning it had stiffened, making it difficult to walk. I appeared for court the morning of Thursday, April 17, 2008, using a walker for assistance. The trial judge recessed court until Monday, April 21, 2008, to allow me to recuperate. (Trial would not have been in session on Friday anyway, given King County's trial schedule.) I immediately went to a doctor, who gave me a knee brace, and recovered sufficiently over the weekend to appear in court Monday with no problems that would have affected my ability to represent Mr. Lui. I did not receive or take any narcotic medication and felt perfectly comfortable and functional for the remainder of the trial. There was no mental impediment, and the injury did not affect my ability to represent Mr. Lui in any way.

4) Based on my experience, I have developed a philosophy of trial that focuses on the "big picture" as the most effective means of combating the prosecution's case and holding the State to its

burden of proof beyond a reasonable doubt. I trust the jury to be filled with intelligent people who can spot red herrings or "rabbit trails" of peripheral, unconvincing evidence. Such evidence, if offered by the defense, diminishes the defense case. In addition, objecting to or raising issues that are not compelling may have the effect of the defense impliedly taking on a burden of proof that otherwise would not exist. Evidence or cross-examination that does not bear close scrutiny may be easily attacked and neutralized. It then has no probative value, and the jury's focus swings away from the State's case and onto the failings of the defense's presentation. I rely on my best judgment and strategy in this regard.

It has always been my general philosophy that it is preferable to explain circumstances rather than to directly confront them. By directly confronting a contention of the prosecution (other than that of guilt itself, of course) you set up a contest for the jury to weigh. If the jury weighs the contest against the defendant it dilutes the defense. If a reasonable explanation of the State's contention can be made (i.e., the dog was following Lui's scent which he laid down during the process of distributing posters) you avoid making the jury decide what the dog was following as would have been the

case if you had completely denied the possibility that the dog was tracing Lui's path from the car itself to the house.

5) As part of my trial preparation in this case, a dog expert in California was consulted regarding the bloodhound evidence. The expert said a bloodhound cannot track a scent trail as old as the one in this case. I considered this to be an example of testimony that could damage the defense case by being easily discredited. The dog in this case clearly tracked something, because it traveled from the location of the victim's car to the defendant and victim's house. The handler and dog had no way of knowing where the defendant and victim lived. Even if the dog in fact tracked the victim's scent, rather than the defendant's, that argument would have inherently contradicted any defense expert testimony that the trail was too old to follow. Rather than rely on expert testimony that was easily attackable, it was better strategically to argue, as I did, that the scent trail was easily explained away by the defendant's efforts to distribute posters, and would have been made later than the State contended.

6) It was my belief that evidence regarding Det. Denny Gulla's background was not admissible. The finding that he made a

false statement was remote, more than 20 years before the trial, and subsequent misconduct findings had nothing to do with honesty. All were unrelated to this case. I do not pursue an argument simply for the sake of the argument when I believe it is not legally tenable. Even if admitted, this evidence could have diminished the defense case simply by it being offered by the defense, as it was clearly peripheral and unrelated. In this instance I told the prosecution that any attempt by the State to portray Gulla as particularly experienced or capable would result in my argument that the door was opened to his entire history. As a result, I believe, the State kept his testimony tightly constrained to avoid an open door.

7) I did not argue about admissibility of "another suspect" evidence because it was not legally colorable under current case law. The victim's ex-husband, James Negron, was a church pastor. He had been alibi'd by three people, and there was nothing to suggest they lied. There also was nothing to suggest a motive he might have to kill the mother of his son. Their child custody arrangements were in place, they rarely saw each other, and there was no evidence of a fight or disagreement. DNA on the victim's

shoelaces could have been from Negron or his son and could have been deposited at any time by either one of them. Nothing beyond that tied him to the crime or crime scene. A proffer of him as another suspect would not have been allowed and, for the reasons discussed above, even if admitted could have diminished the defense case.

8) Prior to calling Sam Taumoefolau to testify, I showed him a map that had already been admitted into evidence of the area where the victim's body was found. Taumoefolau indicated that the map would be sufficient for him to explain where he and the defendant walked while putting up missing person posters. The map I showed Taumoefolau covered the area of the dog track. The primary reason for calling Taumoefolau to testify was to establish that he and the defendant did, in fact, walk all over the area, including the area tracked by the dog, thereby undercutting the significance of the State's dog track evidence. Taumoefolau testified consistently with that expectation.

9) Before calling Amber Mathwig to the stand, I spoke with her in the hallway outside the courtroom. Prior to this discussion, I had been provided with the summary of an interview

of her conducted by my investigator, Denise Scaffidi, and I believe I had spoken with Mathwig by telephone on at least two occasions. In speaking with Mathwig outside the courtroom, I learned that some of the information in the defense investigator notes was inaccurate, or that Mathwig was backing off what she had said. I cannot now recall exactly what she stated, but I do recall that she would not have testified that she did not see the victim's car in the gym parking lot on Monday, February 5. She could not say if the car was there all week or not. Consequently, I did not ask her any questions about how long the car had been in the lot as her testimony on this topic would have proven useless to counter the prior testimony of the gym owner. I never did believe that the location of the car on a particular morning was a "smoking gun." If Mr. Lui was responsible for the murder, he could have hidden the car over the weekend and driven to the location at some later time. In other words, the location of the car on Saturday, Tuesday, Thursday, etc., doesn't really convict or acquit him of the offense.

10) The DNA testing and results provided by the State indicated the presence of the defendant's semen in the victim's vagina and underwear. Partial profiles of the victim's husband

and/or son were also detected on the victim's shoes. The presence of unidentified male profiles in any of these samples allowed me to argue that we don't know who else had been in contact with the victim (thus leaving behind his unidentified DNA profile) and, therefore, a reasonable doubt existed as to who killed her. Had I taken additional steps to have the unidentified DNA results further analyzed, there was a high probability that none of them would have matched each other, thereby weakening the argument that the unidentified male profiles belonged to the real killer. If the blood on the stick shift and the unidentified male profiles on the steering wheel, vaginal swabs, and the shoe laces did not match one another, then any argument that another person committed this crime would be severely weakened.

11) I knew that the defendant had broken a bone in his arm several months before the murder. I also knew that the State had witnesses who would testify that, since breaking his arm, he had helped move furniture and was able to change a tire the night the victim was last known to be alive. Given this evidence, along with my knowledge of the defendant's athletic prowess (he was an avid rugby player and fitness buff), and his general strength and

size, the argument that he would not have had the strength required to strangle the victim as a result of this injury seemed tenuous, at best, and another example of evidence that could hurt rather than help by diminishing the defense case. Moreover, the medical examiner testified that he could not rule out that the victim was killed by ligature strangulation, which requires far less strength and dexterity than manual strangulation.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 30th day of March, 2011, at Seattle, Washington.

ANTHONY SAVAGE, WSBA # 2208
Defendant's trial counsel

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Suzanne Lee Elliott**, the attorney for the petitioner, at **Hoge Building, 705 Second Avenue, Suite 1300, Seattle, WA 98104**, containing a copy of the **STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION** in **IN RE PERSONAL RESTRAINT PETITION OF BRYCE HUBER**, Cause No. **67776-4-I**, in the Court of Appeals for the State of Washington, Division I.

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

Name  Date 06-19-13

Done in Seattle, Washington