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I. STATEMENT OF THE CASE

At trial, the defense theory of the case was that insufficient evidence proved that defendant was even at the scene of the residential burglary, let alone that he committed the offense. RP of 021811 at 11-20. The defendant argued at trial that the evidence was insufficient to even place him at the scene of the crime. The trial court found that the evidence produced did not support instructing the jury on the lesser-included offenses of first and second degree criminal trespass for the charged offense of residential burglary. RP 11-20. The trial court reviewed the proffered instructions at a conference with counsel. The trial court cited to *State v. Brown*, 50 Wn. App. 873, 751 P.2d 331 (1988), decision in reviewing the body of evidence to determine whether it supported the giving of lesser-included instructions. RP 11-20.

On appeal, petitioner assigned error to the trial court's denial of the lesser-included instruction of criminal trespass. The Court of Appeals, citing the analysis and holding in *State v. Brown, supra*, found no error by the trial court and affirmed the residential burglary conviction.

Petitioner contends that a conflict of interest exists in this case based upon his appellate counsel's claim that counsel provided ineffective assistance of counsel on appeal because counsel "over looked" a case in the direct appeal. Petitioner and appellate counsel contend that the ineffective

assistance of counsel was demonstrated by the Court of Appeals, *sua sponte*, citation to the decision in *State v. Brown, supra*.

Petitioner contends that this claimed conflict entitles him to the appointment of new counsel to continue his appeal of the holding of the Court of Appeals. Petitioner contends that the appellate counsel's confessed ineffective representation is sufficient to justify the appointment of new appellate counsel.

II. ARGUMENT

To establish ineffective assistance of appellate counsel, petitioner must establish that (1) counsel's performance was deficient, and (2) the deficient performance actually prejudiced the defendant. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). The failure to prove either element ends the inquiry. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Here, petitioner contends that the confession of appellate counsel that counsel "over looked" the decision in *State v. Brown*, is sufficient to prove ineffective assistance of counsel to thereby entitle him to new appellate counsel. The record reflects that the case appellate counsel did not argue on appeal, was presented and argued to the trial court. RP of 021811 at 11-20. The trial court factored the holding in the *Brown* decision into its consideration of the body of evidence with regard to how to instruct

the jury on the law to be applied. RP 11-20. Since the case was already part of the record, appellate counsel's failure to raise and use the case had, at best, little bearing on the resolution of the issue on appeal. The Court of Appeals was well within the scope of its duties to review the record to determine whether the trial court had committed an error that called into question the viability of the verdict rendered by the jury.

Petitioner contends that this Court should appoint him new appellate counsel to facilitate his claim of ineffective assistance of counsel that is set forth in his petition for review already filed. This is the exact same claim of ineffective assistance of counsel that petitioner's currently assigned counsel proffered to the Court of Appeals in petitioner's motion for reconsideration. Petitioner's petition for review of the decision by the Court of Appeals proffers the very same basis as did his motion for reconsideration to the Court of Appeals. The argument of the ineffective assistance of appellate counsel is the same. Petitioner's current assigned appellate counsel has already perfected the issue before this Court and is very capable of presenting the issue at oral argument if the petition is granted.

Ultimately, the petitioner's motion for the appointment of new appellate counsel to argue the issue of ineffective assistance of existing appellate counsel is premature since this Court has not granted the petition for review. Nevertheless, petitioner's present appellate counsel has already

presented the argument in writing. The only function left is to review the petition to determine whether it has satisfied his burden of proof vis-à-vis the claimed ineffective assistance of counsel.

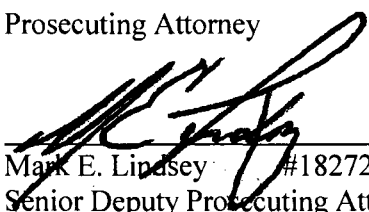
Here, defendant presented a defense of general denial whereby he contended that the State failed to prove that he was even at the scene of the burglary. Instructing the jury on lesser-included offenses of first and second degree criminal trespass was completely inconsistent with the proffered defense and would have confused the jury at the very least. The petitioner has not established that either his trial or appellate counsel provided ineffective assistance by deficient performances that prejudiced the results of his trial.

III. CONCLUSION

The State respectfully requests that the Court deny petitioner's motion for the appointment of new appellate counsel.

Dated this 23rd day of October, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
GARY D. MCCABE,)
)
)
 Petitioner,)
)

NO. 89125-7

CERTIFICATE OF SERVICE

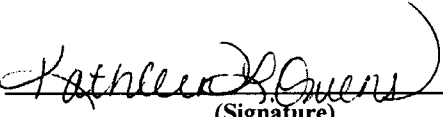
I certify under penalty of perjury under the laws of the State of Washington, that on October 23, 2013, I e-mailed a copy of the Answer to Motion for Independent Counsel, pursuant to the parties' agreement, to:

Eric Broman
sloanej@nwattorney.net

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

10/23/2013
(Date)

Spokane, WA
(Place)


(Signature)

OFFICE RECEPTIONIST, CLERK

To: Owens, Kathleen
Cc: 'sloanej@nwattorney.net'
Subject: RE: McCabe #89125-7

Rec'd 10-23-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Owens, Kathleen [mailto:KOWens@spokanecounty.org]
Sent: Wednesday, October 23, 2013 3:20 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'sloanej@nwattorney.net'
Subject: McCabe #89125-7

Attached please find the State's Answer to Motion for Independent Counsel regarding Gary D. McCabe #89125-7.

Kathleen Owens, Legal Assistant
for Mark E. Lindsey
Sr. Deputy Prosecutor
for Spokane County