

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

ALAN JUSTIN SMITH,

Appellant

ANSWER TO PETITION FOR REVIEW

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, answers the appellant's pro se petition for review.

II. STATEMENT OF THE CASE

The defendant, Alan Justin Smith, was convicted of one count of first degree murder with a deadly weapon (domestic violence) for the murder of his wife Susann Smith. 1 CP 106, 20. The facts of the case are adequately set out in the Court of Appeals opinion. An unmarked copy of the opinion is attached as Appendix A.

The defendant was assigned counsel for appeal. Before filing appellant's brief and statement of additional grounds for review defendant moved for substitution of counsel. The commissioner of the Court of Appeals denied the motion. The defendant moved to modify that ruling in which he appeared to ask for standby counsel or appointment of an attorney to serve as co-counsel. A panel of judges of the Court of Appeals gave the defendant 21 days to file an unequivocal motion to represent himself. The defendant did not do so. Rather he petitioned for review of the decision denying his motion to modify the commissioner's ruling to this court. The commissioner of this court

denied the petition. App. B – Supreme Court no. 92997-1, Ruling denying review.

Assigned counsel on appeal filed a brief raising three issues: (1) whether the defendant's confession was protected by the clergy-penitent privilege, (2) whether barefoot morphology evidence should have been admitted in the absence of a Frye hearing, and (3) whether the defendant should have been appointed new counsel before sentencing. In a statement of additional grounds for review the defendant raised numerous issues. Appendix A, page 18-21. The Court of Appeals notified the parties that oral argument was set for July 27, 2016. App. C. On July 1, 2016 appointed counsel moved to withdraw at the defendant's request. App. D. On July 6, 2016 The Court of Appeals denied appellate counsel's motion to withdraw. App E. On August 29, 2016 the defendant moved to modify the Clerk's Ruling denying appellate counsel's motion to withdraw. The court denied the motion to modify in the opinion affirming the defendant's conviction. App A, page 21 n. 7.

III. ARGUMENT

A. THE DECISION REGARDING DEFENDANT'S PRO SE MOTIONS REGARDING ASSISTANCE OF COUNSEL DO NOT MERIT REVIEW.

The defendant asks this Court to review the decision of the Court of Appeals relating to his motions regarding representation of counsel. He identifies his August 23, 2016 motion to modify the July 6 ruling denying defense counsel's motion to withdraw and his December 14 motion for hybrid representation. He argues that the decision conflicts with a decision of this court. He also appears to argue that it raises a constitutional question. This Court will accept review of a decision of the Court of Appeals only if the decision conflicts with a decision of this court, or is a significant question under the constitution of the United States or the State of Washington. RAP 13.4(b)(1), (3).

A defendant has a right to counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 393-394, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), State v. Rolax, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985). He also has a right to represent himself on appeal. State v. Rafay, 167 Wn.2d 644, 222 P.3d 86 (2009). A request to represent oneself must be made unequivocally. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Once a defendant has been assigned

counsel on appeal the court may grant a motion for counsel to withdraw only if good cause is shown. Good cause depends on the circumstances and the context in which the motion was made. Even where there is good cause to allow appointed counsel to withdraw, the timing of the motion may justify denying it because it is so late in the proceedings that granting the motion would compromise the execution of an orderly and timely appeals process. Rafay, 167 Wn.2d at 653-654. The defendant has no constitutional right to hybrid representation. State v. Hightower, 36 Wn. App. 536, 540-541, 676 P.2d 1016, review denied, 101 Wn.2d 1013 (1984), McKaskie v. Wiggins, 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

In both his motion to modify the order denying defense counsel's motion to withdraw and his motion for hybrid representation, the defendant argued that his attorney raised issues and took positions that the defendant disagreed with and did not authorize. He argued counsel's positions amounted to ineffective assistance of counsel. Counsel on appeal is not required to raise all possible nonfrivolous issues on appeal urged by the defendant. Evitts, 469 Wn.2d at 394. "Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful

appeal is at the heart of the attorney's role in our legal process." In re Lord, 123 Wn.2d 296, 313-314, 868 P.2d 835, clarified, 123 Wn.2d 737, cert denied, 513 U.S. 849 (1994).

The order denying the motion to modify the ruling denying defense counsel's motion to withdraw is consistent with these authorities. The motion, made after oral argument was not timely. Granting the motion would mean further delay in the appeal process, first to clarify what the defendant wanted, and then possibly to repeat briefing and oral argument. The defendant later clarified that he wanted hybrid representation. He was not entitled to that form of representation.

Counsel had raised three non-frivolous issues; there was no basis on which to conclude the defendant had received ineffective assistance of counsel. The defendant had been afforded the opportunity to file a Statement of Additional Grounds for Review pursuant to RAP 10.10. Rafay, 167 Wn.2d at 654.

The defendant argues that the Court of Appeals decision conflicts with State v. Stump, 185 Wn.2d 454, 464, 374 P.3d 89 (2016). That case dealt with whether RAP 14.2 permitted an award of costs when indigent defense counsel filed an Anders brief. The incomplete quote cited by the defendant was part of this court's

explanation why that rule did not authorize an award of costs to the State in that circumstance.

Similarly the defendant's citations to United States Supreme Court Authority does not justify review. One case examined whether failure to file a notice of appeal without the defendant's consent was per se deficient performance in an ineffective assistance of counsel claim. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Another case dealt with the procedures for consideration of an Anders brief. Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988). A third case dealt with both the procedures for consideration of an Anders brief, and an ineffective assistance of counsel in failing to file a merits brief. Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). These case have no bearing on the question of whether the court should have granted defense counsel's motion to withdraw shortly before oral argument when he had filed a brief arguing the merits of three non-frivolous issues.

The defendant raises two additional issues; the sufficiency of the evidence and the reliability of the defendant's confession. The decision of the Court of Appeals provides a sufficient explanation why review is not warranted.

IV. CONCLUSION

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

Respectfully submitted on 21st March, 2017.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*
KATHLEEN WEBBER, WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 73219-6-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
ALAN JUSTIN SMITH,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>January 9, 2017</u>

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SPEARMAN, J. — Alan Smith was convicted of first degree murder for killing his wife. He appeals, claiming that the trial court erred by admitting statements that were protected by the clergy-penitent privilege, and testimony regarding barefoot impression comparison analysis. We find no error and affirm.

FACTS

On February 12, 2013, Susann Smith, wife of Alan Smith, did not show up for work. Her employer called the police, who went to her residence and found her lying face down in the bathtub. Her death was caused by multiple head injuries and asphyxia due to drowning.

At the time of her death, Susann had been separated from Smith for over a year and the two were in the midst of acrimonious dissolution proceedings. Smith was frustrated and angry with the way the proceedings were going and

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was very concerned that Susann would take the children away from him and return to her home country of Germany.

Fall 2012, Smith was involved with a woman named Rachel Amrine. He told Amrine that he would like to just get rid of Susann and asked if she knew of a way to make that happen without anyone knowing. In a joking manner, they discussed the possibility of using potassium chloride or a rubber mallet to kill someone. When Smith again mentioned his desire to have Susann disappear, however, Amrine started to wonder if he was being serious.

Smith purchased a rubber mallet and a pair of disposable coveralls in October 2012. Forensic testing and analysis indicated that Susann's injuries were consistent with the type of mallet that Smith purchased, but did not conclusively establish that her wounds were caused by that type of mallet. Fabric impressions found at the scene were also consistent with the impressions that would have been left by the coveralls that Smith purchased.

Susann's body was found in the home she formerly shared with Smith. There were no signs of forced entry and the door was unlocked. Blood was found in the bedroom, the bathroom, and near the front door. There were bloody footwear impressions in the kitchen, the hallway, and leading to the front door. A hand towel found under the body contained Smith's DNA.

Based on surveillance footage and eyewitness accounts, there had been a man riding a bike near Susann's residence early in the morning on February 12, 2013. Smith had purchased a bicycle from Gregg's Green Lake in November

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2012. A few weeks after Susann's death, the bike was found abandoned in a ravine across from Smith's apartment complex.

A global positioning system (GPS) device found in Smith's vehicle, provided data that allowed investigators to track Smith's movements. The Bothell police observed that on February 12, 2013, Smith made some detours from his usual daily route from home to his children's day care and then to his job at Boeing. That morning he stopped at some dumpsters in an Albertsons' parking lot after stopping at the day care center. Around 2:00 p.m., Smith left Boeing and drove in the vicinity of Susann's residence. The road leading to her home was barricaded, however, by police who were investigating her death. Smith then drove to a gas station and later returned to Boeing.

Smith's internet search history for February 2013 revealed searches for flights to Venezuela and Canada, initially for one adult and two children. After he was notified of his wife's death, however, he began to search for tickets for only one adult.

The investigation into Susann's death continued for a number of months. During that time, in June 2013, Smith began dating a woman named Love Thai. Thai and Smith wanted to attend City Church's Belltown campus. They were told that because of their involvement in the homicide investigation they could not attend services at any of the City Church campuses or be part of the church's community groups.

Smith met Wendell Morris, a City Church group leader at a church-sponsored event. Sometime after learning that she and Smith could no longer

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attend services at City Church, Thai contacted Morris's wife. The Morrises decided to meet with Thai and Smith to "minister the Word of God" to them. Verbatim Report of Proceedings (VRP) (4/14/14) at 192-194.

Morris had been an associate minister at Eastside Baptist Church (Eastside Baptist). He left Eastside Baptist in 2010 and joined City Church, intending to "lessen [his] profile" and "shed the title of 'associate minister.'" Id. at 177-78. In his words, he wanted to become merely "a man of God among other men of God." Id. After a year, Morris sought out additional opportunities with City Church and became a small group leader. Morris did not tell Smith that he had previously been an associate minister at Eastside Baptist.

Morris testified that he had agreed to meet Smith at a coffee shop in South Lake Union. When Morris arrived, Thai approached him, told him that Smith was outside in his car, and that he needed some support. Morris went to Smith's car and saw that Smith was upset. Morris told Smith that he had come "to point [him] to the Lord, [and] the Word of God." Id. at 196. Smith began to speak with Morris about some of his recent struggles.

Morris told Smith that he needed to know if Smith was involved in the murder of his wife. Smith looked around and expressed concern about how "safe" the area was. Id. at 201. Morris told Smith that whatever he said would stay between the two of them.

The two decided to take a walk, and then Smith said "[w]hat you asked me about in the car, the answer is yes." VRP (4/04/14) at 203. When asked for clarification, Smith stated, "I did it to her," and became emotional. Id. at 204.

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Smith then looked at Morris and stated "I trust what you do with this information."

Id. Morris understood Smith's comment to mean that he had Smith's permission to take his statements to the authorities.

Smith and Morris continued their conversation and Smith indicated that he would like to be baptized. Morris decided that they could go that day to the Citadel church in Des Moines, because it was open late. When they arrived at the Citadel they discovered that the church did not have a baptistery. Morris had mentioned earlier that he could possibly baptize Smith and he agreed to do so at Alki beach in West Seattle.

During the next few days, Morris contacted Smith by phone and text message to try to persuade him to speak with the authorities. When Smith declined to turn himself in, Morris called the police on June 25, 2013.

Smith was charged with first degree murder with a deadly weapon, with the aggravating factor of domestic violence. He moved to suppress evidence of his statements to Morris. At the suppression hearing, the court heard testimony from ministers from Eastside Baptist and City Church.

Pastor Arthur C. Banks, from Eastside Baptist Church, Tacoma, testified that an ordained minister for his church is one who has been examined by several churches within the denomination and has received a recommendation that he or she has met the spiritual qualifications to be ordained. If Eastside Baptist accepts the recommendation, then that person is ordained, and he or she can perform all of the functions of a pastor without supervision.

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Pastor Banks further testified that Morris had become a licensed associate minister with Eastside Baptist. He explained the role of the licensed associate ministers and that they may only perform duties at Eastside Baptist under the supervision of the pastor. For example, a licensed associate minister would not be able to perform a baptism, communion, wedding, or funeral without being supervised by the pastor.

Pastor Banks confirmed that when Morris joined City Church, he became a member of that church and was no longer a member of Eastside Baptist. At that point neither Eastside Baptist nor Pastor Banks had any authority over Morris. The pastor also testified that Eastside Baptist does not have an organized confession but asks its congregation to confess to God; on occasion when Pastor Banks counsels members, he tells them upfront that he reserves the right to notify the authorities if they have done anything harmful or illegal.

Pastor Jason Michalski from City Church testified that its policies require church staff to inform their members that any information they share may be disclosed to other staff members, and that the church reserves the right to report the content of a disclosure to the authorities. He also explained that City Church is "not a church that necessarily you need to go confess your sins to a pastor or a leader or anyone." VRP (4/14/14) at 140. Pastor Michalski also testified that the "City Groups" were small community groups of members that would meet outside of service to discuss particular topics or portions of scripture. Pastor Michalski confirmed that Morris served as a City Group leader, but testified that Morris was never a licensed or ordained minister at City Church.

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The trial court found that Morris was not acting as a member of the clergy for Eastside Baptist when he spoke with Smith and that he did not have any authority from Eastside Baptist to counsel anyone or perform a baptism. The trial court also found that Morris never became a licensed or ordained minister with City Church and that he was not acting as a City Group leader when he spoke with Smith. While it was undisputed that Morris told Smith that their conversation would stay between the two of them, the trial court determined that the communication was not confidential because Morris was acting in his individual capacity. The trial court also found Smith's statement — "I respect what you do with this information" — led Morris to believe that Smith understood that he would go to the civil authorities with the information. Based on these findings, the trial court concluded that Smith had not sustained his burden of showing that his statements were protected by clergy-penitent privilege.

At trial, the State presented photographs of bloody footwear impressions found in the kitchen and bathroom of Susann's residence. Sgt. Shelly Massey, a forensic identification specialist for the Royal Canadian Mounted Police, compared these photographs to inked impressions of Smith's feet (bare and wearing socks). Sgt. Massey testified that based on the impression left at the scene, she was "unable to exclude and in fact ... would include Mr. Smith as a possible source of who could have made this particular impression." *Id.* at 64. Smith moved the court for a Frye¹ hearing to determine the admissibility of Sgt. Massey's testimony, arguing that the use of barefoot morphology evidence is not

¹ Frye v. United States, 93 F. 1013 (D.C. Cir. 1923).

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generally accepted in the scientific community. The trial court denied the motion because Sgt. Massey made a physical comparison of the prints and could not state an opinion more definite than that Smith was a "possible" maker of the footprints." CP at 890.

Smith was found guilty and sentenced to 344 months. Prior to sentencing, Smith moved for new counsel, arguing that he had received deficient representation and that he and his attorney had an irreconcilable conflict. The trial court found that any conflict between Smith and counsel arose from differences of opinion with regard to trial tactics, and that his complaints did not rise to the level of ineffective assistance of counsel. He appeals.

DISCUSSION

Smith contends that the trial court erred when it denied his motion to suppress his "confession" because it was protected by the clergy-penitent privilege. He argues that Morris was acting as a member of the clergy when he heard Smith's confession, because he was a licensed minister at Eastside Baptist.

Our review of findings of fact following a suppression motion is limited to "those facts to which error has been assigned." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. Id. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings of

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fact will be accepted as verities on appeal. Hill, 123 Wn.2d at 647. We review de novo the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) abrogated by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

The clergy-penitent privilege is statutory and has no apparent origin in the common law. State v. Glenn, 115 Wn. App. 540, 546, 62 P.3d 921 (2003). RCW 5.60.060(3) provides:

A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

The privilege is held by the penitent and only the penitent can waive it. RCW 5.60.060(3). For the privilege to attach, statements must be (1) confidential communications, (2) made to a member of the clergy, (3) as a confession. State v. Glenn, 115 Wn. App. 540, 546, 62 P.3d 921 (2003). In this process the trial court must determine several questions of preliminary fact, during which it is not bound by the rules of evidence, except those that pertain to privileges. Id.

Under RCW 26.44.020(6), "clergy," means "any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution." Such person must be ordained in order to be considered a member of the "clergy." State v. Martin, 137 Wn.2d 774, 783-84, 975 P.2d 1020 (1999).

Smith argues that Morris was a licensed minister with Eastside Baptist Church when they spoke, and therefore Morris qualified as a member of the clergy to whom Smith made his confession. But Smith does not challenge the trial court's finding of fact that "[w]hen Morris joined City Church, he ceased to be a member of Eastside Baptist."² CP at 864. He is therefore not a "licensed minister" for the purposes of the statute. Furthermore, "[s]imply establishing one's status as 'clergy' is not enough" for the privilege to apply; the person "must also be functioning in that capacity State v. Motherwell 114 Wn.2d 353, 358, 788 P.2d 1066 (1990).³ Here, even if Morris had maintained his status as a licensed minister with Eastside, it is clear from the record that he was not acting in that capacity when he and Smith met. Morris had no authority to act on behalf of Eastside without the pastor's supervision.

Smith next argues that he made a "confession" that Morris heard as part of his duties as a minister of City Church. He contends that Morris met with him intending to convince him to confess his sins and stay true to his conversion and faith. He also claims that because City Church had no specific policy on confession, it was likely that Morris's actions were enjoined by City Church

² Smith challenges only one factual finding—that Morris was not an ordained minister with Eastside Baptist. There is no evidence in the record that Morris was ever ordained; he held only a license with Eastside Baptist, which he later gave up when he became a member of City Church. The trial court's finding is not erroneous.

³ Motherwell is often cited as authority in regards to interpreting the clergy-penitent privilege, even though it interpreted the mandatory reporting exemption for clergy. See Jane Doe v. The Corp. of the Pres. of the Church of Jesus Christ of Latter-Day Saints, 122 Wn. App. 556, 563, 90 3d. 1147 (2004); State v. Buss, 76 Wn. App. 780, 785, 887 P.2d 920 (1995), abrogated by Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999); Glenn, 115 Wn. App. at 553 at n.7.

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practice or rules. The determination of what constitutes a "confession" for the purposes of RCW 5.60.060(3) is to be made by the church of the particular clergy member, not the court. Martin, 137 Wn.2d at 787. The record shows that City Church did not have a confession practice, and its policies specified that any information revealed in counseling was not confidential. As a result, Smith has not shown that his statements to Morris were a "confession" to which the clergy-penitent privilege would attach.

Smith next argues that his disclosure was privileged because he believed that his statements were confidential based on Morris's assurances.

Confidentiality is a requirement for establishing the clergy-penitent privilege. Martin, 137 Wn.2d at 789–90. Here, Smith may have intended and/or believed that his statements would be confidential, but neither are sufficient to establish a statutory privilege if none of the other requirements are met.

We conclude that Smith has not shown that his statements are protected by the clergy-penitent privilege. The trial court properly denied his motion to suppress on that ground.

Smith next argues that Sgt. Massey's testimony comparing the foot impressions found at the scene of the homicide, to those taken from Smith should, not have been admitted. He contends that in making the comparisons, Sgt. Massey employed scientific, technical, or specialized knowledge that was not generally accepted in the scientific community. He contends that at the very least, the court should have held a Frye hearing to consider its admissibility. The State argues that a Frye hearing was not necessary because the testimony

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involved a physical comparison rather than a scientific test and the witness's only conclusion was that Smith could not be excluded as a possible source of the impressions.

We review the trial court's decision to admit or deny evidence under the Frye standard de novo. State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Bruckner, 133 Wn.2d 63, 941 P.2d 667 (1997). The trial court's determination of whether expert testimony is admissible under ER 702 is reviewed for an abuse of discretion. Id. at 890.

Washington courts employ the Frye test to determine if evidence based on novel scientific procedures is admissible at trial. Cauthron, 120 Wn.2d at 887. The two-pronged test asks, "(1) whether the scientific theory upon which the evidence is based is generally accepted in the relevant scientific community, and (2) whether the technique used to implement that theory is also generally accepted in the relevant scientific community." State v. Gentry, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995). A third prong that asks whether the generally accepted technique was performed correctly goes to the weight of the evidence, not to its admissibility. Id.

The Frye test is appropriate to those situations in which the scientific evidence has the potential to mislead lay jurors, who may be awed by the apparent infallibility of scientific experts and their techniques. State v. Brewczynski, 173 Wn. App. 541, 558, 294 P.3d 825 (2013). Smith argues that a Frye hearing was necessary here because, in his view, Sgt. Massey employed a scientific process that had not been found to be generally accepted as reliable by

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the scientific community. Br. of Appellant at 28. The State argues that under Brewczynski, the analysis Sgt. Massey offered was a physical comparison, not a scientific test, and a Frye hearing was not required. The State is correct.

In Brewczynski, the defendant challenged the expert's technique for footwear comparison, arguing that it was not generally accepted in the community of footwear experts. 173 Wn. App. at 555. The expert made an impression of the suspect's boot by shaping clay around the bottom and sides, and then comparing the image with the overlay of a print found at the scene. The expert concluded that Brewczynski's right boot had a similar tread pattern and size and could have made the print. Id. The court rejected Brewczynski's argument that a Frye hearing was necessary because the method used by the expert was a matter of physical comparison rather than a scientific test. "In such cases, the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions." Id. at 556 (quoting State v. Hasan, 205 Conn. 485, 490, 491, 534 A.2d 877 (1987)).

Similarly here, Sgt. Massey did nothing more than make a visual comparison of photographs of the foot impressions at the crime scene and those taken from Smith. The trial court did not err when it denied Smith's request for a Frye hearing.

Smith also argues that barefoot morphology has not garnered general acceptance in the scientific community. He points out that while Washington has not considered the scientific acceptability of barefoot morphology analysis, other

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states have found that such evidence was not sufficiently reliable to pass a Frye test and be admitted at trial. He cites State v. Jones, 514 S.E. 2d 813, (S.C. 2001) ("Jones I"), 681 S.E.2d 580 (S.C. 2009) ("Jones II"), and State v. Berry, 546 S.E.2d 145 (N.C. App. 2001), as instances where the courts rejected barefoot morphology evidence. These cases are not persuasive, however, because they involve different standards for admission and expert opinion testimony that resulted in a conclusive identification. Neither North Carolina nor South Carolina courts use the Frye standard for admissibility. Jones II, 681 S.E.2d at 590; State v. Goode, 461 S.E.2d 631, 645 (N.C. 1995). And in the Jones cases and in Berry, the experts offered testimony based on barefoot impression that positively identified the defendant as the maker of the print. The courts found the method not to be sufficiently reliable to support the admission of such testimony. Jones I, 541 S.E. 2d at 818, Jones II, 681 S.E.2d at 591, and Berry, 546 S.E.2d at 149, 154.

The State argues that this case is the most similar to State v. Kunze, 97 Wn. App. 832, 988 P.2d 977 (1999) which found that the scientific reliability of the method was irrelevant to whether the evidence was admissible. In that case the court considered ear-print identification evidence and found it to be inadmissible, because the majority of testifying experts indicated that it was not generally accepted in the scientific community. The appellate court was explicit, however, that upon retrial, there would be no bar to testimony stating that the defendant could not be excluded as a possible maker of the print left at the scene. Id. at 856. The Kunze court found that this type of comparison — "an

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'eyeballing' of readily discernible similarities and differences — is based on 'visual techniques'... or, ... on personal knowledge that can readily be understood and evaluated by the jury," and "need not be supported by a showing of general acceptance. Id.

Here, Sgt. Massey described how she compared footprints by analyzing:

"the shape of the foot, the location of the tow (sic) pads, the specific space that each towed (sic) pad takes up, the distance of various tow (sic) pads to what we call the met tar sell (sic) ridge, or the front edge, leading edge of the ball of the foot, the width and shape of the ball of the foot, the widths of the arch, the heal (sic), the overall length of the foot, so a combination of these features is what we are looking at."

VRP (1/23/15) at 30. Her conclusion was not that Smith "did make the prints, it's that he could have made them." Id. at 93. Sgt. Massey's process and conclusion is similar to the testimony about ear print evidence that was admitted without a Frye hearing in Kunze. We find no error in the admission of Sgt. Massey's testimony regarding the physical comparison of Smith's prints to the prints found at the scene.⁴

Smith argues that his constitutional right to effective assistance of counsel was violated when the trial court refused to grant his motion for new counsel. We review the denial of a motion to substitute counsel for an abuse of discretion. State v. Lindsey, 177 Wn. App. 233, 248, 311 P.3d 61 (2013), review denied, 180 Wn.2d 1022 (2014). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." State

⁴ Smith does not argue that the trial court abused its discretion when it admitted the evidence under ER 702. Even if it had been error to admit the testimony, it would have been harmless. Based on all of the other evidence against Smith, there is no basis for us to conclude that the outcome of the trial would have been different had the evidence not been admitted.

No. 73219-6-I/16

v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014) (quoting State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)).

A defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A substitution may be justified when the attorney-client relationship is plagued by things that suggest that the attorney cannot provide diligent representation. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724-31, 16 P.3d 1 (2001). However, a defendant must show more than a general loss of trust or confidence. State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007).

To determine whether Smith was entitled to new counsel, we examine three factors: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion for substitution of counsel. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). Here, Smith argues only that the trial court failed to undertake an adequate inquiry into the conflict. A trial court must inquire into "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." Stenson, 142 Wn.2d at 723.

At the hearing, Smith first raised various points and arguments that he felt should have been part of his defense, including DNA analysis and greater emphasis on the timing of events. He further argued that counsel failed to provide more strident advocacy regarding witness credibility, and that his

No. 73219-6-I/17

external circumstances, such as media attention and his children's dependencies, should have been brought to the court's attention.⁵

Contrary to Smith's contention, the trial court considered each of the Stenson factors in detail on the record. First, the court found that many of the reasons for Smith's dissatisfaction, e.g., the points he wanted counsel to emphasize, were either heard by the judge, or irrelevant to his defense. The other points of dissatisfaction were found to be "trial strategy decisions which must rest with the lawyers. . . ." (VRP 2/25/15) at 32. Second, the court reviewed the file and found that Smith had been diligently represented throughout. And finally, the trial court found that substituting counsel prior to sentencing would delay the imposition of a sentence for an undetermined period of time. Based on the trial court's inquiry, we find no abuse of discretion in denying Smith's motion to substitute counsel.

⁵ Smith compares his case to the conflict between client and counsel found in United States v. Williams, 594 F.2d 1258, 1259 (9th Cir. 1979) and Frazer v. United States, 18 F.3d 778, 785 (9th Cir. 1994), by way of Stenson, 142 Wn. 2d at 724. In Williams, the Ninth Circuit held that the District Court erred when it denied the defendant's request, after a strong showing of irreconcilable conflict, where even "the response of counsel tended to confirm that the course of the client-attorney relationship had been stormy one with quarrels, bad language, threats, and counter-threats." 594 F.2d at 1260. In Frazer, the defendant's attorney called him a "stupid nigger son of a bitch and said he hopes I get life. And if I continue to insist on going to trial I will find him to be very ineffective." 18 F.3d at 780. There is nothing in the record that suggests that the issues between Smith and his lawyers even approached this level of conflict.

Statement of Additional Grounds

In his pro se statements of additional grounds, Smith lists over thirty additional errors.⁶ Several of his claimed errors have either been addressed by counsel or are not proper matters for a statement of additional grounds under RAP 10.10(a). These include the admission of forensic evidence, the denial of his motion for alternate counsel, and the admission of his confession. Smith also asks the court to reweigh the evidence and make alternate findings regarding witness credibility. These are issues for the trier of fact that cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Smith's other additional grounds for error include ineffective assistance of counsel, sufficiency of the evidence, prosecutorial misconduct, probable cause for search and arrest warrants and admissibility of evidence.

Smith argues that he was deprived of his right to a defense because he was subject to coercion by counsel and law enforcement. He argues that his statements and his consent to search were made under threats that he would not be able to see his children. We are unable to review these claims because they rely on facts or evidence not in the record. While they may be properly raised in a personal restraint petition, we will not consider them here. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

⁶ Smith also submits an amendment to his statement of additional grounds (SAG) where he explains why he filed a SAG. In this Amendment he claims that the trial court erred by failing to hold a voluntariness hearing with regard to the confession and that both trial and appellate counsel were ineffective for failing to raise the issue. The record contains nothing, however, that suggests the confession was not voluntary, nor does Smith provide any basis for a finding of involuntariness.

No. 73219-6-I/19

A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient representation, the defendant must show that counsel's representation "[fell] below an objective standard of reasonableness." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Courts presume that counsel provided effective representation and require the defendant to prove that no legitimate strategic or tactical reasons exist. Id. "Prejudice" for this purpose is the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Smith fails to articulate any respect in which he was prejudiced by the acts or omissions about which he complains. His challenge fails on this basis alone. We need not consider both prongs of Strickland (deficient performance and prejudice) if a petitioner fails one prong of the test. 466 U.S. at 697.

Smith next argues that his conviction is not supported by sufficient evidence, presumably excluding his confession. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. State v. Drum, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). We draw all reasonable inferences from the evidence in the State's favor and interpret the evidence most strongly against the defendant. State v. Joy, 121

No. 73219-6-1/20

Wn.2d 333, 339, 851 P.2d 654 (1993). We assume “the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 820 P.2d 1068 (1992). Here, there is ample evidence in the record upon which a reasonable trier of fact could find each element of first degree murder beyond a reasonable doubt.

Smith raises other additional grounds related to the trial court's admission of evidence. We review the trial court's admission of evidence for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). “A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.” State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). Smith has not shown that any of the challenged decisions to admit evidence were unreasonable or untenable.

Smith challenges the trial court's denial of his motion to suppress arguing that there was no probable cause for arrest and that the police improperly obtained evidence without a warrant. He fails to identify, however, any finding of fact to which he assigns error regarding probable cause for either his arrest or any of the search warrants. Nor does he explain the insufficiency of evidence at the suppression hearing that would make the findings erroneous.

Finally, Smith raises issues of prosecutorial misconduct, arguing that the State's questioning elicited improper opinion testimony about Smith's silence and his guilt. Prosecutorial misconduct is grounds for reversal if the conduct is both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551

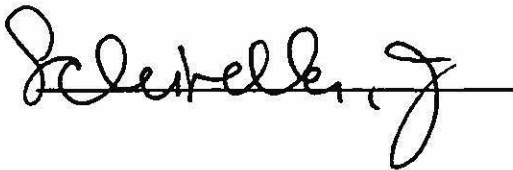
No. 73219-6-1/21

(2011). We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the argument, the issues the evidence addressed in argument, and the jury instructions. Id. A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Id. Here, Smith does not identify the challenged conduct with sufficient specificity to enable us to evaluate it. We conclude that none of Smith's additional grounds for appeal have merit.⁷

Affirmed.

A handwritten signature in cursive script, reading "Specina, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Schelley, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Applegate, J.", written over a horizontal line.

⁷ Smith moved to modify the denial of his attorney's motion to withdraw as counsel on this appeal. The motion is denied.

THE SUPREME COURT

STATE OF WASHINGTON

SUSAN L. CARLSON
SUPREME COURT ACTING CLERK



TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929
(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

May 18, 2016

LETTER SENT BY E-MAIL

Alan Justin Smith (sent by U. S. mail only)
#381201
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Mary Kathleen Webber
Snohomish County Prosecutors Office
MSC 504
3000 Rockefeller Avenue
Everett, WA 98201-4061

Thomas Michael Kummerow
Washington Appellate Project
1511 3rd Avenue Suite 701
Seattle, WA 98101-3647

Hon. Richard Johnson, Clerk
Division I, Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101

Re: Supreme Court No. 92997-1 - State of Washington v. Alan Justin Smith
Court of Appeals No. 73219-6-I

Clerk, Counsel and Mr. Smith

Enclosed is a copy of the RULING DENYING REVIEW, signed by the Supreme Court Commissioner on May 18, 2016, in the above entitled cause.

The State is requested to take the necessary action to arrange for the entry of --- by the trial court within not more than sixty days from the date of this letter; and thereafter file a copy of the --- in this court within 10 days of entry by the trial court.

Sincerely,

A handwritten signature in black ink that reads "Susan L. Carlson".

Susan L. Carlson
Supreme Court Acting Clerk

SLC:bw
Enclosure as stated

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ALAN JUSTIN SMITH,
Petitioner.

NO. 92997-1
RULING DENYING REVIEW

FILED E
MAY 18 2016
WASHINGTON STATE
SUPREME COURT
h/h

Alan Smith was convicted in a Snohomish County Superior Court bench trial of the premeditated murder of his wife. Mr. Smith appealed to Division One of the Court of Appeals, where he is represented by appointed counsel. In addition to the briefing provided by counsel, Mr. Smith was permitted under RAP 10.10 to file a pro se statement of additional grounds for review. Prior to the filing of the appellant's brief and the statement of additional grounds for review, Mr. Smith filed a motion for substitute appellate counsel, arguing that he had a conflict and/or a breakdown of communication with counsel appointed to represent him. Mr. Smith indicated dissatisfaction with counsel's selection of issues to raise on appeal. Commissioner Neel denied the motion, observing that Mr. Smith would have the opportunity to file a statement of additional grounds for review under RAP 10.10. Further, to the extent Mr. Smith sought to raise issues based on evidence outside the existing trial record, Commissioner Neel observed that his available remedy is to file a personal restraint

735/60

petition. *See* Title 16 RAP. In his motion to modify the commissioner's ruling, Mr. Smith appeared to request appointment of standby counsel or appointment of counsel with whom he would serve as co-counsel. A panel of judges of the Court of Appeals denied Mr. Smith's motion to modify the commissioner's ruling, stated that a criminal defendant does not have a right to hybrid representation on appeal, and provided Mr. Smith 21 days in which to file an unequivocal motion seeking to represent himself on appeal. Mr. Smith did not file such a motion. Mr. Smith now seeks this court's review of the order denying the motion to modify the commissioner's ruling.¹

In seeking this court's review, Mr. Smith argues that he was not equivocal and has clearly asserted his rights. The Court of Appeals acknowledged the right of self-representation on appeal that was recognized in *State v. Rafay*, 167 Wn.2d 644, 652, 222 P.3d 86 (2009). Consistent with that right, the court afforded Mr. Smith ample opportunity to submit a motion with an unequivocal request to represent himself. *See State v. Stenson*, 132 Wn.2d 668, 740, 940 P.2d 1239 (1997) (a request to proceed pro se must be unequivocal). Mr. Smith did not submit such a motion. Additionally, although Mr. Smith argues that he clearly asserted his right to self-representation, his motion for discretionary review describes the asserted right as allowing him substitute counsel with whom he can serve as co-counsel. There is no constitutional right to "hybrid representation" through which a defendant may serve as co-counsel with his attorney. *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987); *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). The Court of Appeals correctly determined Mr. Smith did not submit an unequivocal request to represent himself.

¹ The acting clerk of this court referred to me the question of whether the amended motion for discretionary review filed on April 22, 2016, would be considered. It has been considered in ruling on the motion for discretionary review.

As to the request for appointment of substitute counsel, a general loss of confidence or trust alone is not sufficient to substitute new counsel. *Stenson*, 132 Wn.2d at 734. Rather, attorney-client conflicts justify the grant of a substitution motion only when counsel and the defendant are so at odds as to prevent presentation of an adequate defense. *Id.* Mr. Smith cannot show that the claimed breakdown of communication will result in an inadequate presentation of his case on appeal, particularly given that Mr. Smith has been afforded the opportunity to present his legal theories in his statement of additional grounds for review. Mr. Smith's suggestion that the appellate court should review the merits of the various legal arguments in a motion to substitute counsel would result in undue interference with appellate counsel's range of decisions regarding representation on appeal unless it is clear that counsel is not qualified to represent defendant. *Cf. State v. Cross*, 156 Wn.2d 580, 609, 132 P.3d 80 (2006) (courts leave conflict on trial strategy for counsel and client to work out absent actual ineffective assistance of counsel). To the extent review of the statement of additional grounds for review reveals issues that may require additional briefing, the Court of Appeals may in its discretion call for such briefing. *See* RAP 10.10(f). And Commissioner Neel correctly ruled that to the extent the arguments Mr. Smith seeks to put forward rest on matters that are outside the record, they cannot be considered on direct appeal and must be presented in a personal restraint petition. *State v. Kinzle*, 181 Wn. App. 774, 786, 326 P.3d 870, *review denied*, 181 Wn.2d 1019 (2014).

In sum, the Court of Appeals did not commit either obvious or probable error in denying the motion, and its decision does not constitute a departure from accepted practice calling for exercise of this court's revisory jurisdiction. RAP 13.5(b) (criteria for acceptance of review).

The motion for discretionary review is denied.



COMMISSIONER

May 18, 2016

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

June 6, 2016

Thomas Michael Kummerow
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
tom@washapp.org

Mary Kathleen Webber
Snohomish County Prosecutors Office
MSC 504
3000 Rockefeller Ave
Everett, WA 98201-4061
kwebber@co.snohomish.wa.us

Washington Appellate Project
1511 Third Avenue
Suite 701
Seattle, WA 98101
wapofficemail@washapp.org

CASE #: 73219-6-1
State of Washington, Res/Cross-App. v. Alan Justin Smith, App/Cross-Res.

**** Read this Notice Carefully ****
**** This is the only notice counsel will receive. ****

Counsel:

The Court of Appeals is committed to the timely and expeditious processing of cases on appeal. In order to facilitate that objective, and to ensure adequate advance notice to all parties, Division I has instituted changes in the oral argument calendaring process. Oral argument in this case has been scheduled for July 27, 2016 at 9:30 am before Judges Spearman, Schindler and Appelwick at the Court of Appeals. Pursuant to RAP 11.4(a), the court has scheduled 10 minutes per side for oral argument.

Because of the significant advance notice regarding the calendaring of this matter, continuances will ordinarily not be granted. Continuances will be granted only on a showing of good cause.

If counsel desires either additional time for oral argument, or a continuance, **a written motion must be filed by June 17, 2016. Failure to file a written motion for continuances by the date identified will result in the case being heard on the scheduled date.**

Counsel has sole responsibility for determining whether the proper record to review the appeal has been filed with this court. Counsel's failure to ensure the filing of a proper record necessary for review may result in the imposition of sanctions pursuant to RAP 18.9.

APPENDIX C

No. 73219-6-1-1/2

Counsel should acknowledge receipt of this letter. Please date and sign the attached copy of this letter and return it to the undersigned within five days of receipt.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

jh

Name: _____

Bar #: _____

Sign: _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,)	No. 73219-6-I
Respondent,)	
)	MOTION TO
v.)	WITHDRAW AS
)	ATTORNEY FOR
ALAN SMITH,)	MR. SMITH
Appellant.)	(RAP 18.3(a)(1))

I. IDENTITY OF MOVING PARTY

COMES NOW the appellant, by and through the undersigned attorney of record, and upon all the files, records and proceedings herein, moves this Court for the relief designated below.

II. STATEMENT OF RELIEF SOUGHT

So that the ends of justice might be served, appellant moves the court for the entry of an order allowing counsel to withdraw.

III. GROUND FOR RELIEF SOUGHT

As grounds for and in support of this motion petitioner avers the following:

1. Alan Smith was convicted of a single count of first degree murder. Counsel was appointed and the Brief of Appellant has been filed. Argument is scheduled for July 27, 2016.

2. Early in the appeal process, Mr. Smith sought to discharge counsel and have new counsel appointed in his stead. Mr. Smith unsuccessfully litigated his motion to the Supreme Court.

3. Mr. Smith has now indicated that he believes I am engaging in unprofessional conduct and has demanded that I immediately withdraw. As a result, due to Mr. Smith's continued dissatisfaction with appointed counsel and claims of unethical conduct, counsel hereby moves to withdraw under RAP 18.3(a)(1). Counsel believes there is good cause for his withdrawal as it now appears there is a conflict of interest and irreconcilable differences between counsel and Mr. Smith resulting in a complete breakdown of communication. RAP 18.3(a)(1); *State v. Stenson*, 132 Wn.2d 668, 733-34, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

4. As a consequence, counsel hereby requests this Court issue an order allowing him to withdraw and new counsel appointed.

IV. CONCLUSION

Counsel requests this Court find good cause, grant the motion to withdraw, and appoint new counsel.

DATED this 1st day of July 2016.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

tom@washapp.org

Washington Appellate Project-91052

Attorneys for Appellant

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 73219-6-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Kathleen Webber
[kwebber@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney

appellant

Attorney for other party



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 1, 2016

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

July 6, 2016

Thomas Michael Kummerow
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
tom@washapp.org

Mary Kathleen Webber
Snohomish County Prosecutors Office
MSC 504
3000 Rockefeller Ave
Everett, WA 98201-4061
kwebber@co.snohomish.wa.us

Washington Appellate Project
1511 Third Avenue
Suite 701
Seattle, WA 98101
wapofficemail@washapp.org

Alan J. Smith
#381201
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

CASE #: 73219-6-I
State of Washington, Res/Cross-App. v. Alan Justin Smith, App/Cross-Res.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on July 6, 2016, regarding appellant's motion to withdraw as attorney for Mr. Smith (RAP 18.3(a)(1)):

At the direction of the panel, the motion is denied.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

khn

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

ALAN JUSTIN SMITH,

Petitioner.

No. 94213-7

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21st day of March, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Thomas Michael Kummerow, Washington Appellate Project; wapofficemail@washapp.org; tom@washapp.org

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

Dated this 21st day of March, 2017, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office