Supreme Court No. 95009-0

Court of Appeals No. 339629

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

KEITH W. BEIERS,

Petitioner.

PETITION FOR REVIEW

CARL E. HUEBER, WSBA No. 12453
WINSTON & CASHATT, LAWYERS
601 West Riverside Avenue
1900 Bank of America Financial Center
Spokane, Washington 99201
Telephone: (509) 838-6131
Attorneys for Petitioner

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A. Identity of Petitioner.

Keith W. Beiers asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision.

Review is sought of the Unpublished Opinion filed on February 8, 2018 by Division III of the Washington Court of Appeals. A copy of the decision is attached as Appendix A.

C. Issues Presented for Review.

1. Whether Mr. Beiers' constitutional right against self-incrimination was violated when the State linked his silence with the reason for his arrest, thereby implying that he was silent because he was guilty.

2. Whether Mr. Beiers was denied effective assistance of counsel due to counsel's unwaived conflict of interest between Mr. Beiers and a key trial witness.

3. Whether Mr. Beiers was denied effective assistance of counsel due to his counsel's failure to make an opening statement to the jury in this self-defense case.

D. Statement of the Case.

This case arose from a dispute in a North Spokane neighborhood. Mr. Beiers lived in this neighborhood for 14 years. (RP 459) Mr. Beiers

had a great relationship with his neighbors until 2010. (RP 460) At that time, the neighborhood became polarized. (RP 465)[1]

One of his neighbors was Bret Easley. There was constant traffic in and out of the Easley residence at all hours. (RP 467) Mr. Beiers believed that Mr. Easley was engaged in illegal activities and reported these activities to the Spokane Police Department and the Block Watch program. (RP 79)

Prior to the present incident, Bret Easley had pointed weapons at and threatened Mr. Beiers. (RP 472; Aff. of Beiers ¶9) In fact, Mr. Easley had an AK47 which he had previously pointed at Mr. Beiers. (RP 473) As a result of that incident, Mr. Beiers carried a properly licensed pistol with him in his car. (RP 474)

To minimize his contact with Mr. Easley, Mr. Beiers changed the way he drove home to his house. (RP 475) He would stop at a nearby park and load his weapon. He would put it on the seat as he drove to enter his driveway next to his house. (RP 475)

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[1] The factual support for this section may be found in the Court of Appeals Decision (Appendix A), the Brief of Appellant (Appendix B), and the Personal Restraint Petition (Appendix C).

On the night in question, Mr. Beiers had forgotten to load his weapon at the park. He stopped and parked down the street in front of the house of Nick and Callie O'Connor. (RP 479) He had loaded a round into his weapon when both Mr. and Mrs. O'Connor came running out of their house and started looking through his car window. (RP 479)

Shortly thereafter, Mr. Easley came running down the sidewalk "like he was in a track race." Mr. Easley had a semi-automatic pistol in his hand and was pointing it at Mr. Beiers through the windshield. (RP 483) Mr. Beiers drove off. (RP 484)

Mr. Beiers had earlier met his girlfriend for dinner at a local restaurant. (RP 479) When Mr. Beiers returned to his home, he realized his girlfriend was not there. He decided to leave and go to a friend's house. (RP 485) As he was leaving, Nick O'Connor walked in the street directly in front of his car, stopped him, and put his hands all over the defendant's car. (RP 485-487)

Mr. Beiers started to drive away, and Mr. O'Connor ran beside the car and threw himself on the hood and hung on with both hands. (RP 488) Mr. Beiers drove in a straight line towards the curb at an estimated 4 mph. (RP 488)

Mr. Beiers got out of his car and walked up to Mr. O'Connor and pushed him in the chest. Mr. O'Connor's heels hit the curb and he sat down on his hind end. (RP 490)

Mr. Beiers turned around to walk back to his car. Mr. O'Connor hit him in the back of his head twice and also hit him on the neck. (RP 491) Mr. Beiers opened his car door and Mr. O'Connor slammed his body into him and wouldn't let Mr. Beiers fully open his door. (RP 491) Mr. O'Connor hit Mr. Beiers several more times on the ear and on the head. (RP 492)

Mr. Beiers was finally able to open his car door and fall into his car. He was completely in his car with his arm lying across the console. His feet were still on the ground. (RP 495) Mr. Beiers grabbed his weapon, took the safety off, and fired a warning shot into the blacktop. (RP 496)

Mr. Beiers testified that he did not intend to shoot Mr. O'Connor nor did he ever point his gun toward Mr. Easley or the O'Connors. (RP 498-500)

Mr. Beiers testified that he was dazed and disoriented from being hit in the head. (RP 494) He started walking to his house. He realized that his car door was still open and his car was still running. He turned around to get his car when the police arrived. (RP 499)

The police arrived and spoke with Mr. Beiers. He told them, "I didn't do anything wrong. I was defending myself" (RP 138) and "they were kicking the shit out of me, and I was in fear for my life." (RP 123)

The jury found Mr. Beiers guilty of one count of First Degree Assault against Mr. O'Connor while armed with a firearm and one count of Second Degree Assault against Mrs. O'Connor. (CP 50-51) Mr. Beiers was found not guilty of one count of Second Degree Assault against Mr. Easley. (CP 52) Mr. Beiers was sentenced to serve a total of 207 months in custody. (RP 607) A timely Notice of Appeal was filed.

E. Argument Why Review Should be Accepted.

1. The State violated Mr. Beiers' right to remain silent when the prosecutor attempted to impeach him with his pre-arrest silence while implying to the jury that he would not have been arrested if he spoke up – that is, the reason he was silent was because he was guilty.

At the close of the CrR 3.5 hearing, the trial court ruled that there were two groups of statements. The first group was pre-Miranda warning statements. The court ruled that the questions about Mr. Beiers' injuries and a gun being fired were investigatory type of statements to ascertain what was occurring. (RP 33) The trial court ruled that the pre-Miranda statements were admissible as they were just part of an investigation and not pointed towards any kind of guilt seeking questions. (RP 33) However, the trial court cautioned: "But for trial [the prosecutor] will

caution the officer not to say anything about his exercising his rights." (RP 33)

The trial court also ruled that Mr. Beiers' statement that, "I didn't do anything, I was defending myself" was not in response to a question or part of interrogation. The trial court ruled that these statements were admissible for Miranda purposes. The court also cautioned, "So I will let all of those in. And if the state chooses to ask the questions, they may not. And then, again, Ms. Ervin will caution the officer not to talk about the rights being invoked, and we should be okay, sounds like." (RP 34)

At trial, the following colloquy was exchanged:

> Q: And so, Officer Dollard, do you feel that you had-do you feel that you had an adequate amount of time to talk to the defendant on scene that night in terms of being able to gather information?
>
> A. Not necessarily. I mean, again, part of what I was still doing from-the time-all the way up to the point where he was placed in the back seat of a patrol car was just trying to secure the scene, trying to secure the scene to make sure that everybody was safe and that any injuries were being tended to. And then also the preservation of evidence.
>
> Usually the investigation part will come-I mean-much after that. Once a scene has been secured, then we'll investigate. And I'm trying to do multiple things at the same time and not, you know, just talk to Mr. Beiers.
>
> Eventually I did try to talk to Mr. Beiers, but-

Q. Okay. But you got a statement from him; I mean, he did tell you that he had been injured by somebody else and that he felt that he was the nonaggressor; correct?

A. That is correct.

(RP 124)

The State carried on its theme when another witness, Nicholas O'Connor, testified. Mr. O'Connor was asked:

Q. All right. And you talked to the police; correct?
A. Yes.
Q. And gave them a full statement?
A. Yes.

(RP 369)

Mr. Beiers testified at trial. (RP 455) He recounted his version of the events that night during direct examination. (RP 477, 500) The start of cross-examination began with the State asking, or rather telling, Mr. Beiers: "You never told them that, did you?" to which Mr. Beiers answered, "I never told them that." (RP 501)

However, the prosecutor did not end that line of questioning with Mr. Beiers. Instead, she stated, "So rather than tell the police just how dangerous that had been and how close to came you [sic] losing your life, you let them arrest you; correct?" (RP 501) At this point, Mr. Beiers had already been impeached with his silence, so the only purpose was to link his silence with the arrest and make him look guilty. To make matters

worse, the State commented yet again on Mr. Beiers' silence at the close of cross-examination, when the prosecutor stated, "And rather than telling the police this terrifying story, you allowed them to arrest you?" (RP 512) Again, the only purpose for a question phrased in this manner was to link Mr. Beiers' silence with the fact of arrest, thereby "suggest[ing] to the jury that the silence was an admission of guilt." State v. Thomas, 142 Wn. App. 589, 595, 174 P.3d 1264 (2008). Such a comment is not within the narrow exception for impeachment—it was used as substantive evidence of guilt. The State's comments, therefore, violated Mr. Beiers' constitutional right to remain silent.

The State carried its theme into closing argument. During closing argument, the State argued:

> Well, the defendant says he didn't intend to inflict bodily injury. As a matter of fact, he denies doing certain things. But the defendant also testified to a hair-raising and frightening encounter with Nick O'Connor flinging himself on the defendant's Prius, all the while doing some sort of touching of his car. And then fearing for his life after being brutally beaten by Nick O'Connor. But, you know, he allowed himself to be arrested rather than tell the police about this brutal encounter with all these people in the yard, and everybody watching, and all these things happening.

(RP 536)

This theme was carried forward to the State's rebuttal argument:

> Officer Kester told you oftentimes people who experience a very dramatic event, they don't tell you everything. So look at that in light of the defendant who told you about what he thought was an equally traumatic event who didn't tell the police anything. He got arrested and went to jail rather than telling them what he told you in the courtroom today.

(RP 563)

The State is allowed to use pre-arrest, pre-Miranda silence for the limited purpose of impeaching a defendant's testimony at trial; meaning the defendant must testify. Id. Pre-arrest silence cannot, however, be used as substantive evidence of guilt. Id. "The critical distinction is whether the State uses the accused's silence to its advantage, either as evidence of guilt **or to suggest to the jury that the silence was an admission of guilt.**" State v. Thomas, 142 Wn. App. 589, 595, 174 P.3d 1264 (2008) (emphasis added) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)); State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996) (referring to defendant as "smart drunk" improperly used as evidence of guilt). Purposefully commenting on the defendant's silence in the face of arrest constitutes an "impermissible penalty" on the defendant's right to remain silent. See State v. Romero, 113 Wn. App.779, 789, 54 P.3d 1255 (2002) (quoting Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978)).

The most recent Supreme Court case addressing comments on the defendant's right to silence is State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). In Burke, the State commented on the defendant's refusal to talk to police during its opening statement, questioned a police officer about the arrest and the defendant invoking his right to remain silent, and then cross-examined the defendant on why he did not explain his story at the time of police questioning. Burke, 163 Wn.2d at 208-09. The defendant unsuccessfully moved for a new trial, arguing the State violated his right to silence by commenting on his father's advice to stop talking to police and his failure to tell police his story. Id. at 209-10.

On appeal, the Supreme Court noted it "has joined other courts in being skeptical of the probative value of impeachment based on silence." Id. Impeachment based on silence is of little value because "[a]n accused's failure to disclose every detail of an event when first contacted by law enforcement officials is not per se an inconsistency." Id. at 219; see also Easter, 130 Wn.2d at 239 ("If silence **after** arrest is 'insolubly ambiguous' according to the Doyle court, it is equally so **before** arrest."). When the State stressed the defendant's termination of the police interview when offered the opportunity to speak with an attorney, it did so for the improper purpose of inviting the jury to infer guilt from the invocation of

the right to counsel. Burke, 163 Wn.2d at 221. Implying guilt from silence violated the defendant's rights and was not harmless error. Id.

Similarly, in State v. Holmes, 122 Wn. App. 438, 444, 93 P.3d 212 (2004) the prosecutor asked a testifying detective whether anything about the defendant's demeanor changed when he was placed under arrest. The detective testified that the defendant did not act surprised or deny the charges as one would expect. Id. The testimony was not, as the State argued, an observation of whether the defendant was cooperative. Id. Rather, "[i]t was an observation on his failure to proclaim his innocence,...it provided a basis for an inference of guilt," and it was "fundamentally unfair." Id. at 444-45.

In rejecting Mr. Beiers' arguments, the Court of Appeals characterized the prosecutor's on-going efforts to link his silence with guilt as "subtle" remarks. (Opinion, p. 12) The prosecutor's remarks were anything but subtle. The prosecutor repeatedly linked Mr. Beiers' silence with his arrest as well as comments made during closing and rebuttal arguments. This was not a "subtle" approach. Rather, it was a transparent attempt to link Mr. Beiers' silence with guilt.

2. Mr. Beiers was denied effective assistance of counsel due to his counsel's unwaived conflict of interest with a key trial witness.

When Mr. Beiers hired Mr. Cossey to represent him, Mr. Beiers explained that this incident arose from a neighborhood dispute and that Officer McIntyre was the Neighborhood Resource Officer and would be a critical witness in his defense. (Aff. Beiers, ¶17-18) At that time, Mr. Beiers was advised that Mr. Cossey was currently representing Officer McIntyre in connection with a federal investigation of Spokane Police Officer Karl Thompson. (Beiers Aff. ¶17)

Unbeknownst to Mr. Beiers, Officer McIntyre's involvement with the Thompson case would cause her to be placed on Spokane County's list of Brady officers. (Hueber Aff. ¶7) Mr. Cossey had been directly involved with Officer McIntyre's placement on this list and the release of such to the media. (Hueber Aff. ¶7)

At no time was Mr. Beiers advised by Mr. Cossey that his simultaneous representation of Mr. Beiers and Officer McIntyre created an actual or potential conflict of interest, Mr. Beiers was not asked to waive this conflict (assuming this conflict could be waived) nor did Mr. Beiers agree to or sign a waiver of this conflict. (Beiers Aff., ¶17)

Trial counsel's performance was also deficient because he had an actual conflict of interest. Trial counsel represented Mr. Beiers, and his

defense was dependent upon the complete testimony of Officer McIntyre whom he was also representing. Officer McIntyre failed to testify as she had earlier provided in her interview with trial counsel. (McCann Aff., ¶5) This placed Mr. Cossey in the dilemma of trying to rehabilitate his own client that he knew was already a Brady officer. Faced with this dilemma, Mr. Cossey took no action to rehabilitate Officer McIntyre whose testimony was critical to Mr. Beiers' defense.

Mr. Cossey was simultaneously representing a key witness in Mr. Beiers' trial. The witness, Officer McIntyre, faced investigation involving her integrity and honesty as a witness. A fundamental minimum requirement for competent representation by a Washington criminal defense lawyer is undivided loyalty in defending one's client. Mr. Beiers, facing very serious assault charges, was entitled to defense counsel who did not suffer from divided loyalties to a key witness in his case. (Tolin Dec., ¶B(2)) This conflict prevented the jury from receiving testimony that was relevant and material to the self-defense claim of Mr. Beiers, but which was potentially damaging to the interests of Officer McIntyre in her professional career and ongoing criminal investigation into her conduct.

In any event, the cross-examination of an existing client is so likely to generate hesitancy on the part of a lawyer that it is likely to be a violation of the minimum standard of care for a minimally competent

Washington lawyer because the hesitancy to attack another client will influence the representation of a current client such as Mr. Beiers. (Tolin Dec., ¶C(3))

Although these were non-waivable conflicts, assuming they could be waived, no waiver was properly sought or received. (Beiers Aff., ¶17) The minimum standard for competent Washington criminal defense requires that a lawyer be unconflicted in representing a criminal defendant. The conflict between cross-examining and/or placing at risk a current and/or former client in violation of either RPC 1.7 or RPC 1.9, where counsel must attack the credibility of a former or current client and/or place the current client at risk by being limited in fully vetting the credibility of the witness is non-waivable. Assuming, for the sake of argument, the conflicts described supra were waivable, no waivers were sought nor were any given on the record. (Tolin Dec., ¶C(2))

The Sixth Amendment guarantees a defendant the right to representation by conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L.Ed. 2d 220 (1981); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). In order to merit relief, Mr. Beiers must demonstrate that his trial attorney was acting under the influence of an actual conflict of interest that adversely affected his performance at trial. An "actual conflict," for Sixth Amendment purposes, is a conflict of

interest that adversely affects counsel's performance. Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L.Ed.2d 291 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). If this standard is met, prejudice is presumed. Dhaliwal, 150 Wn.2d at 568.[2]

In Dhaliwal, the Washington Supreme Court clarified the analytical framework for determining whether counsel was burdened with an actual conflict of interest in violation of the Sixth Amendment. Notably, the Court held that the "'standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect.'" Id. at 571 (quoting Mickens, 535 U.S. at 172 n. 5, 122 S.Ct. 1237); see also United States v. Rodrigues, 347 F.3d 818, 823 & n. 7 (9th Cir. 2003) (rejecting dual inquiry). Instead, the proper inquiry involves a

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[2] Mr. Beiers need not show prejudice in the sense that the outcome of the proceeding would have been different were it not for his attorney's conflict of interest. As the Court noted in Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000):

> The Cuyler standard applicable when a criminal defendant alleges that counsel's performance was impaired by an actual conflict of interest differs substantially from the Strickland standard generally applicable to Sixth Amendment ineffectiveness claims. Strickland requires a showing that counsel's performance was deficient, in that it fell below an objective standard of reasonableness, as well as a showing of prejudice, which is defined as a reasonable probability that counsel's error changed the result of the proceeding, Cuyler, on the other hand, permits a defendant who raised no objection at trial to recover upon a showing that an actual conflict of interest adversely affected counsel's performance.

205 F.3d at 781 (internal citations omitted).

one-step process: "a defendant asserting a conflict of interest on the part of his or her counsel need only show that a conflict adversely affected the attorney's performance to show a violation of his or her Sixth Amendment right." Dhaliwal, 150 Wn.2d at 571.

"Adverse effect" can be demonstrated by showing the conflict either (1) "hampered" the defense, State v. Lingo, 32 Wn. App. 638, 646, 649 P.2d 130, review denied, 98 Wn.2d 1005 (1982), or (2) "likely" affected counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant. United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992), or (3) "cause[d] some lapse in representation contrary to the defendant's interests", Cuyler v. Sullivan, 723 F.2d at 1086.

Nevertheless, in this case, the adverse impact of trial counsel's conflict of interest is clearly demonstrated, regardless of which of the above three standards are applied. Mr. Cossey decided to not challenge the testimony at trial presented by his other client, Officer McIntyre.

Defense counsel interviewed Officer McIntyre prior to her testimony at Mr. Beiers' trial. Defense counsel stated:

> I interviewed Officer McIntyre prior to her testimony at Mr. Beiers' trial. Ms. McIntyre had been more forthcoming in her interview than she was at trial. I have no knowledge of whether anyone from the State had talked with Officer McIntyre before the trial to cause her to alter her anticipated testimony.

(See Declaration of Robert R. Cossey, Ex. "C")

Defense counsel called Officer McIntyre as a defense witness to present the anticipated testimony that she gave to defense counsel prior to trial. When Officer McIntyre testified at trial, she altered her anticipated testimony and became less forthcoming at trial than she had been in her interview. This put defense counsel in the position of needing to use confidences and secrets he obtained from a former client. (RPC 1.7(b); RPC 1.8 (b))

When counsel is faced with a trial witness who changes or alters the substance of her testimony from that which was given pre-trial, it becomes the obligation of counsel to inquire into that change and specifically probe into those inconsistencies. In this case, when defense counsel was faced with the reality that Officer McIntyre had altered her anticipated testimony, defense counsel did nothing. The reason that defense counsel did nothing was because the witness on the stand was also counsel's client. Defense counsel chose not to challenge Officer McIntyre and explore her Brady identification. But for the fact that Officer McIntyre was defense counsel's client, her decision to not give favorable testimony on behalf of Mr. Beiers would have been the subject of further examination by defense counsel.

Defense counsel's conflict precluded his ability to highlight the flaws in Officer McIntyre's testimony and her inclusion on the Brady list in explanation to the jury for this alteration of testimony.

3. Mr. Beiers was denied effective assistance of counsel due to his counsel's failure to make an opening statement in this self-defense case.

The first time the jury heard about self-defense was in the defense **closing** argument. No defense opening statement was given at the start of trial or at the opening of the defense case. The jury had listened to days of testimony without any roadmap as to what the defense case was about. Despite his acknowledged understanding that jurors are quickly influenced by evidence in a case (Beiers Aff., ¶8), Mr. Cossey failed to make any opening statement and waived his opportunity to do so initially and at the opening of the defense case.

Particularly in a self-defense case, not doing an opening statement and presenting no theory to apply to the minimal affirmative defense testimony presented does not meet the minimal standard of competent representation for a criminal defense lawyer in a serious felony case in Washington. Attempting to prove or raise a reasonable doubt about a self-defense shooting in the face of no opening statement, limited presentation of defense witnesses and not fully developing defense testimony available because of conflicted representation of witnesses

appears to violate the standard of care for a minimally competent criminal defense lawyer in Washington.

The State has offered no strategic or logical reason why defense counsel would not have given an opening statement in this case.

The jury sat through the State's opening statement, the testimony of nine witnesses, including Mr. Beiers, the State's closing argument, and finally hears from defense counsel during his closing that this is a self-defense case. There is no possible strategic or tactical reason for defense counsel to have not given an opening statement. The statement would have given the jury the benefit of evaluating all of the witnesses' testimony through the prism of self-defense.

The jury's evaluation of each witness's testimony would have been significantly different with the benefit of the defense theory of the case and the interplay of self-defense.[3]

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[3] The Court of Appeals summarily rejected this argument by calling it a "tactical" choice and relying upon In re Personal Restraint of Davis, 152 Wn.2d 647, 715, 101 P.3d 1 (2004). Davis holds that competent counsel may waive an opening statement as a strategic trial decision. Davis was not a self-defense case. There is nothing in the record to support any conclusion that counsel's failure to make an opening statement in this case was more than he forgot to do so due to his desire to commence his planned vacation. (Aff. Beiers, ¶3)

F. Conclusion.

Mr. Beiers requests that his Petition for Review be granted, that his conviction be reversed, and that he be granted a new trial.

DATED this 8th day of March, 2018.

CARL E. HUEBER, WSBA No. 12453
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
Attorneys for Petitioner/Appellant

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on March 8, 2018, I caused a true and correct copy of the foregoing document to be served on the following parties in the manners indicated:

Brian O'Brien and Gretchen Verhoef Spokane County Prosecutor's Office 1100 West Mallon Spokane, WA 99260 Attorneys for State of Washington Email: scpaappeals@spokanecounty.org	**VIA REGULAR MAIL** ☐ **VIA EMAIL (with consent)** ☒ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Keith W. Beiers P. O. Box 1749 Airway Heights, WA 99001	**VIA REGULAR MAIL** ☒ **VIA EMAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐

DATED on March 8, 2018, at Spokane, Washington.

Cheryl Hansen

1132873

APPENDIX A

FILED
FEBRUARY 8, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. KEITH WILLIAM BEIERS, Appellant.	)	No. 33962-9-III (consolidated with No. 35012-6-III) UNPUBLISHED OPINION
In the Matter of the Personal Restraint of KEITH WILLIAM BEIERS, Petitioner.	)	

PENNELL, J. — A jury convicted Keith Beiers of two counts of felony assault, each with a firearm enhancement. Mr. Beiers appeals his convictions. He has also filed a timely personal restraint petition (PRP). We affirm the convictions and dismiss the PRP.

FACTS

Background

Over a two-year period, Keith Beiers was involved in an escalating dispute with his neighbors. Things started with arguments over snow removal and firewood disposal, but eventually tensions escalated and the neighborhood became polarized. Mr. Beiers wound up routinely surveilling the area with binoculars and recording car license plates. Of particular concern to Mr. Beiers was a neighbor by the name of Bret Easley. Mr. Beiers knew Mr. Easley had some criminal convictions and was serving a term of probation. Mr. Beiers believed Mr. Easley was involved in some sort of illegal activity. Mr. Beiers became so concerned that he began carrying a gun in his car for protection.

Mr. Beiers often called the police to report his neighbors' suspected illegal activities. His complaints were received by Spokane Police Officer Sandra McIntyre. Officer McIntyre described the dispute between Mr. Beiers and his neighbors as "a tit-for-tat thing" that was "really juvenile." 2 Verbatim Report of Proceedings (VRP) (Nov. 19, 2015) at 425-26. She said multiple individuals in the neighborhood were responsible for the neighborhood conflict, not just Mr. Beiers. Officer McIntyre never found any evidence to substantiate allegations made by Mr. Beiers against his neighbors. Officer McIntyre did admit she would have been afraid of Mr. Beiers if she were a resident of the neighborhood.

The offense conduct

The dispute between Mr. Beiers and his neighbors came to a head one night in November 2012. Mr. Beiers and his neighbors gave contrasting accounts of what happened. The neighbors claimed Mr. Beiers engaged in an unsolicited attack. Mr. Beiers testified he was the one who had been attacked and that he was only acting in self-defense.

The trouble began when a neighbor named Callie O'Connor saw Mr. Beiers sitting in his car outside of her home. Mrs. O'Connor told her husband, Nick, what she saw. Mr. O'Connor then went outside to confront Mr. Beiers. Bret Easley heard some commotion and went outside as well. According to Mr. Beiers, he had simply stopped in front of the O'Connor house to clean his gun. Given his suspicions of Mr. Easley, Mr. Beiers explained it was his custom to have his weapon loaded and ready before nearing Mr. Easley's home. The others at the scene denied Mr. Beiers was cleaning his gun. It was their belief that he had been masturbating.

After confronting Mr. Beiers, Mr. O'Connor called the police. As this was happening, Mr. Beiers began to drive slowly past the O'Connor home. According to Mr. Beiers, he drove away because he saw Mr. Easley running toward him, armed with a handgun. Mr. Easley denied having a weapon. No one else reported seeing Mr. Easley with a gun or other weapon.

At some point, Mr. O'Connor stepped out into the street to record Mr. Beiers's license plate number. Mr. Beiers's car then struck Mr. O'Connor. According to Mr. Beiers, Mr. O'Connor ran at his vehicle and threw himself on the hood. Other witnesses testified Mr. O'Connor only ended up on the hood as a result of being struck. Everyone agreed Mr. Beiers's car was moving very slowly when it hit Mr. O'Connor.

After the collision, Mr. Beiers got out of his car and a physical altercation ensued between Mr. Beiers and Mr. O'Connor. According to Mr. O'Connor, he was trying to keep Mr. Beiers subdued until police arrived. Mr. Beiers claimed Mr. O'Connor was trying to kill him. At some point during the altercation, Mr. Beiers reached into his car and retrieved his loaded firearm. Mr. Beiers fired a shot. Mr. Beiers testified it was a harmless warning shot. Mr. O'Connor testified the gun had been pointed at his head.

After the gun shot, the O'Connors ran away in different directions. Mr. Easley testified that as Mr. Beiers passed him, Mr. Beiers pointed his gun in Mr. Easley's direction. Mr. Easley then ran away. Mrs. O'Connor and other witnesses testified Mrs. O'Connor ran into a neighbor's yard where she slipped and fell to the ground. Mr. Beiers followed, pointed his gun at Mrs. O'Connor's head and stated, "I'm going to kill you all. Just leave me alone. I want to kill you all. I hate you all. I'm going to kill you all." 2 VRP (Nov. 18, 2015) at 250-51. According to Mrs. O'Connor, she begged for her life

while Mr. Beiers responded with more vitriol. Mrs. O'Connor claimed Mr. Beiers only lowered his weapon after the police arrived at the scene.

Mr. Beiers provided a completely different account of what happened after the gun shot. He testified he returned home in a dazed state and was only contacted by the police when he went to retrieve his vehicle. Mr. Beiers denied ever pointing his gun at either of the O'Connors or chasing them. He also denied pointing a gun at Mr. Easley.

After law enforcement arrived, Mr. Beiers complied with orders to drop his gun. He was then held on the ground at gunpoint until law enforcement determined he could be moved safely. Mr. Beiers was then detained in handcuffs and ultimately placed in the back seat of a patrol car. During his detention, Mr. Beiers told one of the officers his name and, in response to questions about some injuries to his head, stated something to the effect of, "I got the shit kicked out of me. I was in fear for my life." 1 VRP (Nov. 16, 2015) at 23. *Miranda*[1] warnings were administered and an officer asked Mr. Beiers if he would answer any more questions. Mr. Beiers responded, "No. I didn't do anything wrong. I was defending myself." *Id.* at 28. Mr. Beiers then invoked his right to silence and all questioning ceased. Additional officers on the scene spoke with other witnesses and neighbors.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Legal proceedings

Mr. Beiers was charged with one count of first degree assault against Mr. O'Connor, and two counts of second degree assault, one for Mrs. O'Connor and one for Mr. Easley. Each count included a firearm enhancement.

Prior to trial, Mr. Beiers filed a motion under CrR 3.5 regarding the admissibility of statements made to law enforcement on the night of his arrest. After presenting testimony from the officer who had questioned Mr. Beiers at the scene, the prosecutor commented that most of Mr. Beiers's statements were "self-serving" and that the State was unsure as to whether the statements would be elicited at trial. 1 VRP (Nov. 16, 2015) at 31. Despite having filed a CrR 3.5 motion, defense counsel argued the statements should come in and that if the State did not present the statements in its case-in-chief, the defense would elicit them on cross-examination. The trial court ruled Mr. Beiers's substantive statements were admissible under *Miranda*. Accordingly, the State would be permitted to present Mr. Beiers's statements in its case-in-chief if it chose to do so. However, the court instructed the prosecutor not to present evidence about Mr. Beiers exercising his right to silence.

At trial, the prosecutor took time to point out that each of the percipient witnesses to the charges against Mr. Beiers had given statements to the police on the night of the incident. The defense challenged the witnesses based on their prior statements by

pointing out inconsistencies between the prior statements and trial testimony. Of particular focus were inconsistencies in the testimony of Mr. O'Connor. For example, in his statement to police, Mr. O'Connor had said Mr. Beiers pointed the gun at his chest. But at trial, Mr. O'Connor testified the gun was pointed at his head. In addition, Mr. O'Connor testified he saw Mr. Beiers holding a gun inches away from his wife's head. This detail was never related to police on the scene.

In addition to pointing out the on-the-scene statements by various witnesses, the prosecutor also opted to present the fact that Mr. Beiers made statements the night of the incident. The prosecutor elicited the fact that Mr. Beiers's statements to police were quite limited.[2] The prosecutor asked if the officer who spoke to Mr. Beiers felt he had adequate time to talk to Mr. Beiers the night of Mr. Beiers's arrest. The officer responded, "[n]ot necessarily," because he was involved in several other tasks to secure the scene. When the officer volunteered that he eventually "did try to talk to Mr. Beiers, but—" the prosecutor interjected with, "Okay. But you got a statement from him; I mean, he did tell you that he had been injured by somebody else and that he felt that he was the nonaggressor; correct?" The officer answered, "That is correct." 1 VRP (Nov. 17, 2015) at 124.

[2] The prosecutor did not elicit the fact that Mr. Beiers said no, when asked if would answer more questions.

The prosecutor concluded her questions regarding Mr. Beiers's statements by pointing out how Mr. Beiers's statements related to his formal arrest. According to the testimony, Mr. Beiers was not formally arrested immediately after making his statements to police. Instead, the officer who had talked to Mr. Beiers consulted with other officers on the scene about what had been learned from the investigation, including contact with witnesses and victims. It was only after this consultation that law enforcement concluded there was probable cause to arrest Mr. Beiers.

The defense did not object to the prosecutor's handling of Mr. Beiers's prior statements. Instead, defense counsel emphasized Mr. Beiers's statements, pointing out Mr. Beiers had told police he "was in fear for his life." 1 VRP (Nov. 17, 2015) at 136. The defense also elicited testimony that Mr. Beiers's last statement to police was "I didn't do anything wrong. I was defending myself." *Id.* at 138.

Mr. Beiers testified during the defense case-in-chief. The prosecutor began her cross-examination by asking Mr. Beiers if he had told police the same detailed story that he had relayed to the jury. Mr. Beiers said he had not. The prosecutor then explored this issue by asking as follows:

> Q. So rather than tell the police just how dangerous that had been and how close [you] came [to] losing your life, you let them arrest you; correct?
> A. That's correct.

3 VRP (Nov. 19, 2015) at 501. At the close of the prosecutor's examination, she again broached the topic of what Mr. Beiers did not tell the police:

> Q. And rather than telling the police this terrifying story, you allowed them to arrest you?
> A. Yes, ma'am.

Id. at 512.

Defense counsel did not object to the prosecutor's questions on cross-examination. Instead, on redirect examination, defense counsel also raised the issue of what Mr. Beiers had told police at the time of his arrest. Through questioning by defense counsel, Mr. Beiers emphasized he had told the police he was acting in self-defense and that he was scared for his life because he had "just got the shit beat of [him]." *Id.*

The focus of the parties' summation was witness credibility. The prosecutor argued Mr. Beiers was not believable given his prior unproven suspicions against his neighbors, the implausible nature of his story, and the lack of detail he provided to police on the night of his arrest. Drawing from her cross-examination of Mr. Beiers, the prosecutor claimed Mr. Beiers "allowed himself to be arrested rather than tell the police" about his hair-raising version of the events. 3 VRP (Nov. 19, 2015) at 536.

During his closing argument, defense counsel claimed it was the State's witnesses who were not credible. Counsel placed great emphasis on differences between the in-

court testimony of the State's witnesses and prior statements made to police and 911 dispatch. Defense counsel urged the jurors to "look at the inconsistencies, look at your notes, talk about the differences. They are super and extremely important in this very serious case." *Id.* at 561.

The prosecutor brought up the issue of inconsistencies in her rebuttal statement. She noted:

> [P]eople who experience a very dramatic event, they don't tell you everything. So look at that in light of the defendant who told you about what he thought was [an event equally traumatic as that described by the victims] who didn't tell the police anything. He got arrested and went to jail rather than telling them what he told you in the courtroom today.

Id. at 563.

Prior to retiring for deliberations, the jury was given a self-defense instruction for the first degree assault charge against Mr. O'Connor, but not for the second degree assault charges against Mrs. O'Connor and Mr. Easley. The jury found Mr. Beiers guilty of first degree assault against Mr. O'Connor and second degree assault against Mrs. O'Connor. The jury also found the crimes were committed with a firearm. The jury acquitted Mr. Beiers of the second degree assault charge against Mr. Easley. Mr. Beiers was sentenced to 207 months' confinement. He appeals, and a PRP has been consolidated with his appeal.

ANALYSIS

Alleged comment on the right to silence

Mr. Beiers argues the prosecutor violated his Fifth Amendment[3] right against self-incrimination by improperly commenting on his right to silence. Mr. Beiers points out his statements to police were limited because he exercised his right to silence. By emphasizing at trial the limited nature of Mr. Beiers's statements to police, Mr. Beiers claims the prosecutor improperly emphasized Mr. Beiers's postarrest silence and suggested Mr. Beiers's failure to submit to a detailed interview was evidence of guilt.

The defense raised no objection at trial to the prosecutor's handling of Mr. Beiers's on-the-scene statements. Accordingly, our review turns on whether Mr. Beiers can establish manifest constitutional error, as contemplated by RAP 2.5.

To meet the threshold standard for review of an unpreserved issue under RAP 2.5(a)(3), "[a]n appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension." *See State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A "manifest" error is one that is "obvious." *Id.* at 99-100. It is an error that would have been apparent to the trial court, such that the trial court could have corrected the error even in the absence of an objection. *Id.* at 100. An error is not "manifest" in

[3] U.S. CONST., AMEND. V.

circumstances where a "prosecutor or trial counsel could have been justified in their actions or failure to object." *Id.*

The manifest error requirement is of particular importance in the context of a prosecutor's alleged comment on the right to silence. A subtle remark that merely *could* be interpreted as penalizing the defendant for exercising his or her right to silence is not the type of error that can be raised for the first time on appeal. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). Instead, the violation must be more blatant. The record must make it apparent that the prosecutor "'manifestly intended [her] remarks to be a comment on'" the defendant's exercise of the right to silence. *Id.* (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

The record here lacks any blatant reference to Mr. Beiers's silence. Neither the prosecutor nor any law enforcement witness ever explicitly said Mr. Beiers had chosen to remain silent. The prosecutor merely pointed out that Mr. Beiers's initial statements lacked detail. This lack of detail was relevant to the credibility of Mr. Beiers's trial testimony, which was much more detailed. It was also relevant to helping the jury compare Mr. Beiers's testimony to that of other witnesses, all of whom had given more complete prior statements and were impeached with inconsistencies in those prior statements at trial.

Despite the lack of any explicit testimony, Mr. Beiers argues the prosecutor

crossed the line into improper comments on silence when the prosecutor claimed Mr. Beiers allowed himself to be arrested instead of providing the police more detail. Mr. Beiers's claim is too subtle to meet the requirements of manifest error review. The evidence was that Mr. Beiers voluntarily made statements to the police, protesting his innocence. The problem for Mr. Beiers was not that he remained silent instead of talking, it was his statements lacked depth when he did choose to speak, especially compared to other witnesses. The State suggested this distinction resulted in Mr. Beiers's arrest, instead of others such as Mr. O'Connor or Mr. Easley. It was not manifestly improper for the prosecutor to impugn Mr. Beiers's credibility by referencing omissions from his initial statements to police. *See State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) ("When a defendant does not remain silent and instead talks to police, the state may comment on what he does *not* say.").

Had Mr. Beiers thought the prosecutor's analysis improperly allowed the jury to connect the brevity of Mr. Beiers's statements with his exercise of the right to silence, an objection should have been raised during trial. The trial court then could have taken corrective action. But that is not what happened. Defense counsel's failure to object was likely the result of a strategic decision to emphasize the exculpatory significance of Mr. Beiers's on-the-scene statements. An objection to the jury may have suggested the defense was hiding something or that the defense lacked confidence in Mr. Beiers's prior

statements. While counsel's choice was reasonable,[4] it was ultimately unsuccessful. Misgivings Mr. Beiers may now have about counsel's choice are not grounds for reversal.

Lack of self-defense instruction on count II

Mr. Beiers argues the lack of a self-defense instruction for the second degree assault charge as to Mrs. O'Connor violated his due process rights, and defense counsel was ineffective for failing to object to the lack of such an instruction. Having reviewed the record de novo, we disagree.

A defendant is only entitled to a self-defense instruction when the record provides evidentiary support for so doing. *State v. Thysell*, 194 Wn. App. 422, 426, 374 P.3d 1214 (2016). The charge regarding Mrs. O'Connor failed to reach this requirement. Mr. Beiers never claimed he threatened Mrs. O'Connor in self-defense. Instead, his defense was that the assault against Mrs. O'Connor never happened. A self-defense instruction is not warranted under these circumstances. *See State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) ("One cannot deny that he struck someone and then claim that he struck them in self-defense."); *accord State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

[4] Because defense counsel's decision to permit the prosecutor's line of reasoning was reasonably strategic, Mr. Beiers's claim that counsel was ineffective for failing to lodge an objection fails. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Ineffective assistance of counsel based on conflict of interest

As part of his PRP, Mr. Beiers argues he was denied effective assistance of counsel as a result of trial counsel's divided loyalties between Mr. Beiers and trial witness Officer Sandra McIntyre. We review this claim de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To show a constitutional violation of the right to conflict-free counsel, "a defendant must show that (a) defense counsel 'actively represented conflicting interests' and (b) the 'actual conflict of interest adversely affected' his performance." *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348-49, 325 P.3d 142 (2014) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). "An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant." *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995); *accord State v. Byrd*, 30 Wn. App. 794, 798, 638 P.2d 601 (1981); *see also* RPC 1.7. [5] A "[p]ossible or theoretical" conflict of interest is "'insufficient to impugn a criminal conviction.'" *Gomez*, 180 Wn.2d at 349 (quoting *Cuyler*, 446 U.S. at 350).

[5] The Rules of Professional Conduct do not fully embody the constitutional standard. *Gomez*, 180 Wn.2d at 349.

Mr. Beiers has failed to show he and Officer McIntyre had the type of competing interests that can give rise to a constitutional claim of ineffective assistance. Officer McIntyre and Mr. Beiers did not have any obviously competing interests. Officer McIntyre was not a witness to the immediate events leading up to Mr. Beiers's arrest. Defense counsel's representation of Officer McIntyre had nothing to do with Mr. Beiers or with Officer McIntyre's work in Mr. Beiers's neighborhood. Mr. Beiers claims defense counsel's representation of Officer McIntyre hampered counsel's ability to impeach Officer McIntyre at trial. Apart from the fact that Officer McIntyre was a defense witness, and thus not subject to defense cross-examination, Mr. Beiers fails to point out how Officer McIntyre would have been impeached had defense counsel not labored under a conflict. Mr. Beiers claims Officer McIntyre's trial testimony was less "forthcoming" than the information provided to Mr. Beiers's attorney during a pretrial interview. PRP Ex. D at 2. But this vague statement provides no indication of the nature or extent of any changes in Officer McIntyre's testimony that might permit an analysis of prejudice. Mr. Beiers's allegation regarding Officer McIntyre amounts to nothing more than a theoretical claim of conflict. It is insufficient to justify relief from conviction.

Remaining ineffective assistance claims

Mr. Beiers makes several additional claims that his counsel provided ineffective assistance. We review each claim under the two-part test that requires a showing of

deficient performance and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Lack of opening statement

Mr. Beiers argues defense counsel was ineffective for not providing an opening statement. We disagree. Choices about how to handle an opening statement are tactical. Accordingly, "[a] defense counsel's decision to waive an opening statement does not constitute deficient performance." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 715, 101 P.3d 1 (2004).

Alleged failure to interview witnesses

Mr. Beiers next argues his trial counsel failed to interview key witnesses. This argument fails for lack of factual support, as required by RAP 16.7(a)(2). The only evidence regarding lack of interviews is a declaration from appellate counsel, indicating trial counsel's file does not contain interview reports or notes. PRP Ex. C at 2-3. This is insufficient. Competent evidence would consist of a statement from a pertinent individual such as Mr. Beiers's trial counsel or an involved witness, declaring no interviews took place. The potential to develop such evidence was readily available to Mr. Beiers. Trial counsel has apparently been cooperative with Mr. Beiers during the PRP process. Trial counsel has submitted a declaration, outlining his work on the case.

He also participated in an interview with appellate counsel. Yet nowhere in the record does trial counsel explain the significance of his lack of interview notes or whether he failed to perform witness interviews. Mr. Beiers's speculation as to why trial counsel's file failed to include evidence of witness interviews is insufficient to establish no interviews took place.

Mr. Beiers also fails to show how he was prejudiced by any lack of defense interviews. Defense counsel thoroughly cross-examined all of the State's witnesses and had a clear theory and argument to present to the jury. Mr. Beiers's vague claim that defense counsel would have been better able to cross-examine witnesses after prior interviews is insufficient to meet the burden of showing prejudice.

Failure to introduce outdoors surveillance video

Mr. Beiers argues defense counsel should have shown a surveillance video to the jury. This claim fails based on lack of prejudice. The surveillance video purportedly could have been used to impeach Mr. Easley's testimony. But the jury acquitted Mr. Beiers of the charge regarding Mr. Easley. It is therefore not clear how the video could have been of further assistance. When it came to the charges resulting in conviction, Mr. Easley's testimony was cumulative at best. Mr. Beiers fails to meet his burden of demonstrating how additional impeachment of Mr. Easley could have changed the outcome of his case.

Failure to introduce Mr. Easley's criminal history

Mr. Beiers similarly argues defense counsel should have introduced more details on Mr. Easley's criminal history. Again, this argument fails in light of the jury's acquittal regarding Mr. Easley.

Failure to introduce Mr. Beiers's e-mails with Officer McIntyre

Mr. Beiers next argues defense counsel should have introduced into evidence his e-mails, letters, and reports to Officer McIntyre about his neighbors' activities. We find defense counsel's decision not to introduce these materials reasonably tactical. Not only were the various e-mails and reports lengthy, they reflect poorly on Mr. Beiers's demeanor and mental state. Given Officer McIntyre's confirmation that Mr. Beiers had submitted numerous complaints and that Mr. Beiers was not the only source of problems in the neighborhood, defense counsel could reasonably conclude that introducing the e-mails and other documents would result in more harm to Mr. Beiers's case than good.

Stating Mr. Beiers would not testify

Finally, Mr. Beiers argues defense counsel was ineffective for misstating during voir dire that Mr. Beiers would not testify. We find no prejudice. To the contrary, the fact defense counsel spent time admonishing the jury that Mr. Beiers had no obligation to testify may have enhanced Mr. Beiers's credibility and the value of his testimony to the jury. Reversal is unwarranted.

Cumulative error

Mr. Beiers claims the cumulative effect of defense counsel's multiple instances of ineffective assistance requires a new trial. As there was no ineffective assistance, this argument fails.

CONCLUSION

We affirm the judgment and sentence of the trial court and dismiss the PRP.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Korsmo, J.

APPENDIX B

WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 339629

STATE OF WASHINGTON,

Respondent,

vs.

KEITH W. BEIERS,

Appellant.

BRIEF OF APPELLANT

CARL E. HUEBER, WSBA No. 12453
COREY J. QUINN, WSBA No. 47475
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
601 W. Riverside Ave.
1900 Bank of America Financial Center
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Appellant

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I. PREFATORY NOTE

This brief is filed in support of a direct appeal as well as a Personal Restraint Petition. A Motion to Consolidate has been filed contemporaneously with this brief.

The primary issue raised in the Personal Restraint Petition is whether Mr. Beiers was denied his right to effective assistance of counsel. A Personal Restraint Petition is an appropriate vehicle to raise a claim of ineffective assistance of counsel. In re Richardson, 100 Wn.2d 669, 675 P.2d 209 (1983); State v. Byrd, 30 Wn.App. 794, 638 P.2d 601 (1981); State v. Jury, 19 Wn.App. 256, 576 P.2d 1302 (1978). Mr. Beiers relies primarily in his Personal Restraint Petition on the Declaration of Anna Tolin. Ms. Tolin is the Executive Director for the Innocence Project Northwest. Her full qualifications are set forth in the Declaration of Anna Tolin (Ex. "A," Section I).[1]

II. ASSIGNMENTS OF ERROR

1. The State violated Mr. Beiers' constitutional right against self-incrimination when it linked his silence with the reason for his arrest, thereby implying that he was silent because he was guilty.

2. The State used Mr. Beiers' pre-arrest silence as substantive evidence of guilt.

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[1] The supporting Affidavits and Declaration are attached to the Personal Restraint Petition.

3. The State committed prosecutorial misconduct when it invited the jury to infer guilt from Mr. Beiers' pre-arrest, pre-Miranda silence.

4. The trial court's failure to properly instruct the jury in Instruction No. 21 that there is a defense to Second Degree Assault as alleged in Count 2 that the force used was lawful violated Mr. Beiers' constitutional rights. (CP 41)

5. Mr. Beiers was denied effective assistance of counsel due to counsel's serious, unwaived conflict of interest which divided his loyalties owed to Mr. Beiers and a key trial witness, Sandra McIntyre

6. Mr. Beiers was denied effective assistance of counsel when his trial counsel failed to object to the State's comment on his silence.

7. Mr. Beiers was denied effective assistance of counsel when his trial counsel failed to make an opening statement in this self-defense case.

8. Mr. Beiers was denied effective assistance of counsel due to his counsel's failure to investigate and interview key witnesses.

9. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's failure to offer the defense surveillance tape into evidence.

10. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's failure to introduce Bret Easley's criminal history into evidence.

11. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's statement to the jury that Mr. Beiers would not testify.

12. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's failure to review and offer into evidence the packet of emails, letters and Block Watch reports.

13. Mr. Beiers was denied effective assistance of counsel due to his counsel's deficiencies which resulted in individual and cumulative instances of ineffectiveness that prejudiced the defense.

III. ISSUES

1. Whether the State violated Mr. Beiers' constitutional right against self-incrimination when it linked his silence with the reason for his arrest, thereby implying that he was silent because he was guilty.

2. Whether the trial court violated Mr. Beiers' due process rights by failing to properly instruct the jury in Instruction No. 21 that there is a defense to Second Degree Assault as alleged in Count II that the force used was lawful (i.e. self-defense). (CP 41)

3. Whether Mr. Beiers' counsel's simultaneous representation of Officer McIntyre created a serious and unwaived conflict of interest that operated to deny his right to effective assistance of counsel.

4. Whether Mr. Beiers was denied effective assistance of counsel when his trial attorney: (a) failed to make an opening statement in a self-defense case; (b) failed to object to the State's comment on his silence; (c) failed to investigate and interview key witnesses; (d) failed to offer the defense

surveillance tape; (e) failed to introduce Bret Easley's criminal record; (f) advised the jury Mr. Beiers would not testify; (g) failed to offer the packet of emails, letters and Block Watch reports into evidence; and (h) counsel's deficiencies resulted in individual and cumulative ineffectiveness that prejudiced Mr. Beiers.

IV. STATEMENT OF THE CASE

Keith Beiers is 70 years old. (RP 455) He served in the United States Army and was in the 82nd Airborne Division of the Paratroopers from 1963 to 1966. He was honorably discharged in 1966. (RP 456)

This case arose from a dispute in a North Spokane neighborhood. Mr. Beiers lived in this neighborhood for 14 years. (RP 459) Mr. Beiers had a great relationship with his neighbors until 2010. (RP 460) At that time, the neighborhood became polarized. (RP 465)

One of his neighbors was Bret Easley. There was constant traffic in and out of the Easley residence at all hours. (RP 467) Mr. Beiers believed that Mr. Easley was engaged in illegal activities and reported these activities to the Spokane Police Department and the Block Watch program. (RP 79)

Prior to the present incident, Bret Easley had pointed weapons at and threatened Mr. Beiers. (RP 472; Aff. of Beiers ¶9) Mr. Easley had an AK47 which he had pointed at Mr. Beiers. (RP 473) As a result of that incident, Mr. Beiers started to carry a properly licensed pistol with him in his car. (RP 474)

To minimize his contact with Mr. Easley, Mr. Beiers changed the way he drove home to his house. (RP 475) He would stop at a nearby park and load his weapon. He would put it on the seat as he drove to enter his driveway next to his house. (RP 475)

On the night in question, Mr. Beiers had forgotten to load his weapon at the park. He stopped and parked down the street in front of the house of Nick and Callie O'Connor. (RP 479) He had loaded a round into his weapon when both Mr. and Mrs. O'Connor came running out of their house and started looking through his car window. (RP 479)

Shortly thereafter, Mr. Easley came running down the sidewalk "like he was in a track race". Mr. Easley had a semi-automatic pistol in his hand and was pointing it at Mr. Beiers through the windshield. (RP 483) Mr. Beiers drove off. (RP 484)

Mr. Beiers had earlier met his girlfriend for dinner at a local restaurant. (RP 479) When Mr. Beiers returned to his home, he realized his girlfriend was not there. He decided to leave and go to a friend's house. (RP 485) As he was leaving, Nick O'Connor walked directly in the street in front of his car, stopped him, and put his hands all over the defendant's car. (RP 485-487)

Mr. Beiers started to drive away and Mr. O'Connor ran beside the car and threw himself on the hood. He was hanging onto the hood with both hands.

(RP 488) Mr. Beiers drove in a straight line towards the curb at an estimated 4 mph. (RP 488)

Mr. Beiers got out of his car and walked up to Mr. O'Connor and pushed him in the chest. Mr. O'Connor's heels hit the curb and he sat down on his hind end. (RP 490)

Mr. Beiers turned around to walk back to his car. Mr. O'Connor hit him in the back of his head twice and also hit him on the neck. (RP 491) Mr. Beiers opened his car door and Mr. O'Connor slammed his body into him and wouldn't let Mr. Beiers fully open his door. (RP 491) Mr. O'Connor hit Mr. Beiers several more times on the ear and on the head. (RP 492)

Mr. Beiers was finally able to open his car door and fall into his car. He was completely in his car with his arm laying across the console. His feet were still on the ground. (RP 495) Mr. Beiers grabbed his weapon, took the safety off, and fired a warning shot into the blacktop. (RP 496)

Mr. Beiers testified that he did not intend to shoot Mr. O'Connor nor did he ever point his gun toward Mr. Easley or the O'Connors. (RP 498-500)

Mr. Beiers testified that he was dazed and disoriented from being hit in the head. (RP 494) He started walking to his house. He realized that his car door was still open and his car was still running. He turned around to get his car when the police arrived. (RP 499)

The police arrived and spoke with Mr. Beiers. He told them "I didn't do anything wrong. I was defending myself" (RP 138) and "they were kicking the shit out of me, and I was in fear for my life". (RP 123)

The trial commenced with the understanding by all that it would be completed in four days. Unbeknownst to Mr. Beiers, his counsel had a vacation planned for the time immediately following this four-day trial. (Aff. Beiers ¶3)

The jury found Mr. Beiers guilty of one count of First Degree Assault against Mr. O'Connor while armed with a firearm and one count of Second Degree Assault against Mrs. O'Connor. (CP 50-51) Mr. Beiers was found not guilty of one count of Second Degree Assault against Mr. Easley. (CP 52) Mr. Beiers was sentenced to serve a total of 207 months in custody. (RP 607) A timely Notice of Appeal was filed.

V. ARGUMENT

A. The State violated Mr. Beiers' constitutional right against self-incrimination when it linked his silence with the reason for his arrest, thereby implying that he was silent because he was guilty.

The Fifth Amendment and the Washington Constitution safeguard a criminal defendant's right against self-incrimination. U.S. Const. amend. V; Const. art. I, §9. The right to remain silent exists before and after arrest "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with

the Government." State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (quoting Doe v. United States, 487 U.S. 201, 213, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)).

The State violated Mr. Beiers' right to remain silent when the prosecutor attempted to impeach him with his pre-arrest silence while implying to the jury that he would not have been arrested if he spoke up — that is, the reason he was silent was because he was guilty.

1. The State's dominant theme was that Mr. Beiers' pre-arrest silence was an admission of guilt.

Mr. Beiers did not speak extensively with law enforcement at the time of arrest. (RP 23-28) Prior to being Mirandized, he answered law enforcement's questions about his identity and provided a very short account of what transpired. (Id.) At the CrR 3.5 hearing, Officer Dollard testified that the statements Mr. Beiers made were in response to his attempt to secure the scene and not part of the investigative stage. (RP 29) By all accounts, this initial encounter lasted no longer than necessary to secure the scene, at which point law enforcement placed Mr. Beiers under arrest and read him his Miranda[2] rights. (RP 19-29) Mr. Beiers told Officer Dollard that he had done nothing wrong and was defending himself. (RP 28) Mr. Beiers then invoked his right to remain silent. (RP 28)

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At the close of the CrR 3.5 hearing, the trial court ruled that there were two groups of statements. The first group was pre-Miranda warning statements. The court ruled that the questions about Mr. Beiers' injuries and a gun being fired were investigatory type of statements to ascertain what was occurring. (RP 33) The trial court ruled that the pre-Miranda statements were admissible as they were just part of an investigation and not pointed towards any kind of guilt seeking questions. (RP 33) However, the trial court cautioned: "But for trial [the prosecutor] will caution the officer not to say anything about his exercising his rights." (RP 33)

The trial court also ruled that Mr. Beiers' statement that "I didn't do anything, I was defending myself" was not in response to a question or part of interrogation. The trial court ruled that these statements were admissible for Miranda purposes. The court also cautioned "So I will let all of those in. And if the state chooses to ask the questions, they may not. And then, again, Ms. Ervin will caution the officer not to talk about the rights being invoked, and we should be okay, sounds like." (RP 34)

Officer Dollard also testified at trial. The following colloquy was exchanged:

> Q: And so, Officer Dollard, do you feel that you had-do you feel that you had an adequate amount of time to talk to the defendant on scene that night in terms of being able to gather information?

A. Not necessarily. I mean, again, part of what I was still doing from-the time-all the way up to the point where he was placed in the back seat of a patrol car was just trying to secure the scene, trying to secure the scene to make sure that everybody was safe and that any injuries were being tended to. And then also the preservation of evidence.

Usually the investigation part will come-I mean-much after that. Once a scene has been secured, then we'll investigate. And I'm trying to do multiple things at the same time and not, you know, just talk to Mr. Beiers.

Eventually I did try to talk to Mr. Beiers, but-

Q. Okay. But you got a statement from him; I mean, he did tell you that he had been injured by somebody else and that he felt that he was the nonaggressor; correct?

A. That is correct.

(RP 124)

The State carried on its theme when another witness, Nicholas O'Connor, testified. Mr. O'Connor was asked:

Q. All right. And you talked to the police; correct?
A. Yes.
Q. And gave them a full statement?
A. Yes.

(RP 369)

Mr. Beiers testified at trial. (RP 455) He recounted his version of the events that night during direct examination. (RP 477, 500) The start of cross-examination began with the State asking, or rather telling, Mr. Beiers: "You never told them that, did you?" to which Mr. Beiers answered, "I never told them

that." (RP 501) In this instance, the State used Mr. Beiers' silence at the time of arrest as a prior inconsistent statement, see ER 801(d)(1), and may have fallen within the narrow circumstances in which the State could permissibly use Mr. Beiers' pre-arrest silence.

The State had already set the stage for impeaching Mr. Beiers during the direct examination of Officer Dollard, when the prosecutor asked him a series of questions about what Mr. Beiers said during the initial encounter with law enforcement, and each time the officer's response was "no." (RP 123-124) Also, when the State questioned Bret Easley about the event, it asked him "And when you talked to the police did you give them a full statement of everything that happened?" (RP 73)

However, the prosecutor did not end that line of questioning with Mr. Beiers. Instead, she stated, "So rather than tell the police just how dangerous that had been and how close to came you [sic] losing your life, you let them arrest you; correct?" (RP 501) At this point, Mr. Beiers had already been impeached with his silence, so the only purpose was to link his silence with the arrest and make him look guilty. To make matters worse, the State commented yet again on Mr. Beiers' silence at the close of cross-examination, when the prosecutor stated, "And rather than telling the police this terrifying story, you allowed them to arrest you?" (RP 512) Again, the only purpose for a question phrased in this manner was to link Mr. Beiers' silence with the fact of arrest, thereby "suggest[ing] to the

jury that the silence was an admission of guilt." State v. Thomas, 142 Wn.App. 589, 595, 174 P.3d 1264 (2008). Such a comment is not within the narrow exception for impeachment—it was used as substantive evidence of guilt. The State's comments, therefore, violated Mr. Beiers' constitutional right to remain silent.

The State carried its theme into closing argument. During closing argument, the State argued:

> Well, the defendant says he didn't intend to inflict bodily injury. As a matter of fact, he denies doing certain things. But the defendant also testified to a hair-raising and frightening encounter with Nick O'Connor flinging himself on the defendant's Prius, all the while doing some sort of touching of his car. And then fearing for his life after being brutally beaten by Nick O'Connor. But, you know, he allowed himself to be arrested rather than tell the police about this brutal encounter with all these people in the yard, and everybody watching, and all these things happening.

(RP 536)

This theme was carried forward to the State's rebuttal argument:

> Officer Kester told you oftentimes people who experience a very dramatic event, they don't tell you everything. So look at that in light of the defendant who told you about what he thought was an equally traumatic event who didn't tell the police anything. He got arrested and went to jail rather than telling them what he told you in the courtroom today.

(RP 563)

2. The State could not use Mr. Beiers' pre-arrest silence as substantive evidence of guilt.

In certain circumstances, the State may use a defendant's silence for impeachment; however, "the courts have created a fine line between what is forbidden and what is allowed." Karl B. Teglund, 5B Washington Practice, Evidence: Law & Practice § 801.46 (5th ed. 2007). When the defendant does not testify at trial or waive the right to remain silent, the Fifth Amendment prohibits using silence for impeachment. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). Further, due process prohibits using a defendant's post-Miranda[3] silence for impeachment, regardless of whether the defendant testifies at trial. Id.

The State is allowed to use pre-arrest, pre-Miranda silence for the limited purpose of impeaching a defendant's testimony at trial; meaning the defendant must testify. Id. Pre-arrest silence cannot, however, be used as substantive evidence of guilt. Id. "The critical distinction is whether the State uses the accused's silence to its advantage, either as evidence of guilt **or to suggest to the jury that the silence was an admission of guilt.**" State v. Thomas, 142 Wn.App. 589, 595, 174 P.3d 1264 (2008) (emphasis added) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)); State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996) (referring to defendant as "smart drunk" improperly used as

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[3] Doyle v. Ohio, 426 US. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

evidence of guilt). Purposefully commenting on the defendant's silence in the face of arrest constitutes an "impermissible penalty" on the defendant's right to remain silent. See State v. Romero, 113 Wn.App.779, 789, 54 P.3d 1255 (2002) (quoting Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978)).

The most recent Supreme Court case addressing comments on the defendant's right to silence is State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). In Burke, the State commented on the defendant's refusal to talk to police during its opening statement, questioned a police officer about the arrest and the defendant invoking his right to remain silent, and then cross-examined the defendant on why he did not explain his story at the time of police questioning. Burke, 163 Wn.2d at 208-09. The defendant unsuccessfully moved for a new trial, arguing the State violated his right to silence by commenting on his father's advice to stop talking to police and his failure to tell police his story. Id. at 209-10.

On appeal, the Supreme Court noted it "has joined other courts in being skeptical of the probative value of impeachment based on silence." Id. Impeachment based on silence is of little value because "[a]n accused's failure to disclose every detail of an event when first contacted by law enforcement officials is not per se an inconsistency." Id. at 219; see also Easter, 130 Wn.2d at 239 ("If silence **after** arrest is 'insolubly ambiguous' according to the Doyle court, it is

equally so **before** arrest."). When the State stressed the defendant's termination of the police interview when offered the opportunity to speak with an attorney, it did so for the improper purpose of inviting the jury to infer guilt from the invocation of the right to counsel.[4] Burke, 163 Wn.2d at 221. Implying guilt from silence violated the defendant's rights and was not harmless error. Id.

Similarly, in State v. Holmes, 122 Wn.App. 438, 444, 93 P.3d 212 (2004) the prosecutor asked a testifying detective whether anything about the defendant's demeanor changed when he was placed under arrest. The detective testified that the defendant did not act surprised or deny the charges as one would expect. Id. The testimony was not, as the State argued, an observation of whether the defendant was cooperative. Id. Rather, "[i]t was an observation on his failure to proclaim his innocence,...it provided a basis for an inference of guilt," and it was "fundamentally unfair." Id. at 444-45.

In Thomas, the State turned what was a permissible, "passing reference" to the defendant's silence into a constitutionally impermissible comment by emphasizing that the defendant had been accused of a crime and would not talk to the police. Id. The State's comments "plainly conveyed the message that if [the

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[4] The investigating officer accepted the defendant's question about talking with counsel as an assertion of his right to silence and counsel. Burke, 163 Wn.2d at 221.

defendant] was not guilty, he would have returned to the crime scene to tell his side of the story." Id. Given the credibility problems, the State could not meet its burden to show harmless error. Id. at 597.

Similarly, in State v. Knapp, 148 Wn.App. 414, 419, 199 P.3d 505 (2009), a detective testified the defendant's reaction to being identified was complacent and cooperative. In closing statements, though, the State commented on the defendant's reaction to being identified, stating "Did he say, 'No. It wasn't me'? [sic] No." Id. at 420. On appeal, the State conceded this was an improper comment and implied that an innocent person would have denied the accusation. Id. at 421. Again, the State could not meet its burden to show harmless error. Id.

3. It was prosecutorial misconduct for the prosecutor to invite the jury to infer guilt from Mr. Beiers' pre-arrest, pre-Miranda silence.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial. Knapp, 148 Wn. App at 419; Thomas, 142 Wn.App. at 593. Prejudice is a substantial likelihood the misconduct impacted the jury's verdict. Id. If the defendant does not object or request a curative instruction, the error is waived unless the remark was "so flagrant and ill-intentioned" that no instruction could have cured the resulting prejudice. Id. Possible prejudice is measured by considering the strength of the State's case. Thomas, 142 Wn.App. at 594.

At trial, the prosecutor commented on Mr. Beiers' pre-Miranda silence two different times during cross-examination, each time implying that his silence led to his arrest, so he must be guilty. (RP 501) The prosecutor's comments were an affront to Mr. Beiers' constitutional rights and done for the improper purpose of inviting the jury to infer guilt from silence. See Section A.0, supra.

Mr. Beiers' counsel did not object to the prosecutor's comments. However, an objection was not necessary because the comments were a flagrant and ill-intentioned attempt to link Mr. Beiers' silence with guilt. Furthermore, no instruction from the court could have cured the prejudice to Mr. Beiers. If anything, an objection or curative instruction would have called further attention to the improper comments and amplified the prejudice. E.g., State v. Curtis, 110 Wn.App. 6, 15, 37 P.3d 1274 (2002).

4. Counsel's performance prevented Mr. Beiers from receiving a fair trial.

Like several other cases that involve improper comments on a defendant's silence, Mr. Beiers did not receive a fair trial. See e.g., Burke,163 Wn.2d at 222; Knapp, 148 Wn.App at 424-25; Thomas, 142 Wn.App. at 597-98; Holmes, 122 Wn.App at 447. Given that the outcome of trial ultimately depended on the credibility of witnesses, Mr. Beiers' credibility was of utmost importance. By not objecting to the second comment, trial counsel allowed the State to punctuate its cross-examination with an invitation for the jury to not only disbelieve Mr. Beiers'

testimony, but also to infer that he was silent because he was guilty. Doing so exceeded the permissible uses of Mr. Beiers' silence and prejudiced him.

5. Mr. Beiers is not barred from raising these errors for the first time on appeal.

Appellate courts will consider for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Constitutional errors are afforded special treatment because they often result in serious injustice to the accused and may negatively impact the perceptions of the judicial system's fairness and integrity. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). A "manifest error" is one of "truly constitutional magnitude" and must have actually prejudiced the defendant. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). To demonstrate actual prejudice, appellant must plausibly show the error "had practical and identifiable consequences in the trial of the case." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009), as corrected (Jan. 21, 2010) (internal quotation marks omitted).

The Court may consider the issue of whether the State violated Mr. Beiers' right to silence for the first time on appeal because the issue involves Mr. Beiers' constitutional right to silence. This Court has previously held that an impermissible comment on a defendant's right to silence is a manifest error affecting a constitutional right and may be raised for the first time on appeal. See State v. Romero, 113 Wn.App. 779, 786, 54 P.3d 1255 (2002); see also Holmes,

122 Wn.App at 445 (concluding that comments amounted to manifest error under RAP 2.5(a) even though the defendant did not object at trial). Mr. Beiers was under no obligation to tell his version of the facts to law enforcement at the time of arrest—indeed, he enjoyed a constitutional right not to tell law enforcement anything. Although the State could use Mr. Beiers' pre-arrest silence to impeach his testimony, it could not link his silence to the fact of arrest in a manner to suggest to the jury that his silence was an admission of guilt or evidence of guilt. By telling the jury that rather than tell police his version of the facts, he let them arrest him, the State violated Mr. Beiers' constitutional right to silence.

Further, the prosecutor's statements prejudiced Mr. Beiers. At trial, the only direct evidence of the alleged assault was testimony from bystanders, who were all friends, and several of whom did not actually witness all the events that night. The outcome of trial hinged on the credibility of witnesses, who all told different versions of what happened. Mr. Beiers' testimony was critical. The State's repeated references to Mr. Beiers' silence in the face of arrest undermined his credibility, and at the same time presented substantive evidence, or at least the implication of guilt to the jury.

B. The trial court's failure to properly instruct the jury that there is a defense to Second Degree Assault as alleged in Count 2 that the force used was lawful violated Mr. Beiers' constitutional rights.

Mr. Beiers was charged with three counts of assault. Count 1 was for First Degree Assault alleged against Nicholas O'Connor. The second count was

Second Degree Assault alleged against Callie O'Connor. Count 3 was a Second Degree Assault charge alleged against Bret Easley. (CP 1) The jury found Mr. Beiers guilty of Counts 1 and 2 and not guilty of Count 3. (CP 50-53)

The trial court record does not contain any proposed instructions from the State or the defense. Mr. Cossey's file does not contain a copy of any proposed instructions that may have been submitted to the court. (Aff. Hueber, ¶4) Neither side objected to the court's instructions. (RP 450-452)

The jury was properly instructed as to Count 1. The element instruction was set forth in Instruction No. 18. (CP 38)

Instruction No. 19 set forth the defense that the force used in the charge of First Degree Assault (Count 1) was lawful as defined in this instruction. That instruction provides:

> It is a defense to a charge of 1st Degree Assault against Nicholas O'Connor that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State of Washington has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State of Washington has not proved the absence

> of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to 1st Degree Assault against Nicholas O'Connor in Count I.

(CP 39)

Instruction Nos. 20 and 21 set forth the definition and elements of Second Degree Assault as charged in Count 2. (CP 40-41)[5] Instruction No. 21 provides:

> To convict the defendant of the crime of assault in the second degree as charged in Count II, each of the following elements of the crime must be provided beyond a reasonable doubt:
>
> (1) That on or about the 3rd day of November 2012, the defendant assaulted Callie A. O'Connor with a firearm or with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

(CP 41)

The court's instructions did not advise the jury that it is a defense to the charge of Second Degree Assault against Callie O'Connor that the force used by Mr. Beiers was lawful as defined in the instructions. This failure resulted in the

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[5] The same problem exists with Count 3 failing to set forth the defense that the force used was lawful (i.e., self-defense). However, the jury found Mr. Beiers not guilty on Count 3. Accordingly, no assignment of error has been raised as to the absence of this instruction.

jury not being advised that self-defense applied and that the State had the burden to prove the absence of this defense beyond a reasonable doubt as it pertains to Count 2.

In State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984), the Court held that the State has the burden of proving the absence of self-defense in prosecutions for assault. The Court held that the burden of proving self-defense may not constitutionally be placed on the defendant if proof of self-defense tends to negate one or more elements of the crime charged. The Court also noted that placing the burden of proof on the defendant in such cases would relieve the State of its burden of proving every element of the crime beyond a reasonable doubt.

The failure to instruct the jury that the State has the burden of proving the absence of self-defense beyond a reasonable doubt was reversible error when there was sufficient evidence of self-defense to present the issue to the jury. State v. Redwine, 72 Wn.App. 625, 865 P.2d 552 (1994).

As set forth in State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996):

> First, the court must determine whether the defense is an element of the crime or whether the defense negates an element of the crime. Under the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the State must prove every element of an offense beyond a reasonable doubt. If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt.

State v. Lively, 130 Wn.2d at 10-11.

From the state of the record, it is not clear whether defense trial counsel offered a proper self-defense instruction for Count 2 and Second Degree Assault. It is clear that no objection was made to the jury instructions as given and the fact that the court's instructions failed to instruct on self-defense as applied to Count 2. The failure to properly instruct on self-defense violated Mr. Beiers' due process rights. The failure to object to the absence of the appropriate instruction constitutes ineffective assistance of counsel.

C. Mr. Beiers was denied effective assistance of counsel due to counsel's serious, unwaived conflict of interest which divided his loyalties owed to Mr. Beiers and a key trial witness, Sandra McIntyre.

When Mr. Beiers hired Mr. Cossey to represent him, Mr. Beiers explained that this incident arose from a neighborhood dispute and Officer McIntyre was the Neighborhood Resource Officer and would be a critical witness in his defense. (Aff. Beiers, ¶17-18) When Mr. Beiers hired Mr. Cossey, he was advised that Mr. Cossey was currently representing Officer McIntyre in connection with a federal investigation of Spokane Police Officer Karl Thompson. (Beiers Aff. ¶17)

Unbeknownst to Mr. Beiers, Officer McIntyre's involvement with the Thompson case would cause her to be placed on Spokane County's list of Brady officers. (Hueber Aff. ¶7) Mr. Cossey had been directly involved with Officer McIntyre's placement on this list and the release of such to the media. (Hueber Aff. , ¶7)

At no time was Mr. Beiers advised by Mr. Cossey that his simultaneous representation of Mr. Beiers and Officer McIntyre created an actual or potential conflict of interest, Mr. Beiers was not asked to waive this conflict (assuming this conflict could be waived) nor did Mr. Beiers agree to or sign a waiver of this conflict. (Beiers Aff., ¶17)

Mr. Cossey was simultaneously representing a key witness in the case against Mr. Beiers. The witness, Officer McIntyre, faced investigation involving her integrity and honesty as a witness. A fundamental minimum requirement for competent representation by a Washington criminal defense lawyer is undivided loyalty in defending one's client. Mr. Beiers, facing very serious assault charges, was entitled to a defense counsel who did not suffer from divided loyalties to a key witness in his case. (Tolin Dec., ¶B(2)) This conflict prevented the jury from receiving testimony that was relevant and material to the self-defense claim of Mr. Beiers, but which was potentially damaging to the interests of Officer McIntyre in her professional career and ongoing criminal investigation into her conduct.

In any event, the cross-examination of an existing client is so likely to generate hesitancy on the part of a lawyer that it is likely to be a violation of the minimum standard of care for a minimally competent Washington lawyer because the hesitancy to attack another client will influence the representation of a current client such as Mr. Beiers. (Tolin Dec., ¶C(3))

Although these were non-waivable conflicts, assuming they could be waived, no waiver was properly sought or received. (Beiers Aff., ¶17) The minimum standard for minimum competent Washington criminal defense requires that a lawyer be unconflicted in representing a criminal defendant. The conflict between cross-examining and/or placing at risk a current and/or former client in violation of either WRPC 1.7 or WRPC 1.9, where counsel must attack the credibility of a former or current client and/or place the current client at risk by being limited in fully vetting the credibility of the witness is non-waivable. Assuming, for the sake of argument, the conflicts described supra were waivable, no waivers were sought nor were any given on the record. (Tolin Dec., ¶C(2))

The Sixth Amendment guarantees a defendant the right to representation by conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L.Ed. 2d 220 (1981); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). In order to merit relief, Mr. Beiers must demonstrate that his trial attorney was acting under the influence of an actual conflict of interest that adversely affected his performance at trial. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L.Ed.2d 291 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L.

Ed. 2d 333 (1980). If this standard is met, prejudice is presumed. Dhaliwal, 150 Wn.2d at 568.[6]

In Dhaliwal, the Washington Supreme Court clarified the analytical framework for determining whether counsel was burdened with an actual conflict of interest in violation of the Sixth Amendment. Notably, the Court held that the "'standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect.'" Id. at 571 (quoting Mickens, 535 U.S. at 172 n. 5, 122 S.Ct. 1237); see also United States v. Rodrigues, 347 F.3d 818, 823 & n. 7 (9th Cir. 2003) (rejecting dual inquiry). Instead, the proper inquiry involves a one-step process: "a defendant asserting a conflict of interest on the part of his or her counsel need only show that a conflict adversely affected the attorney's performance to show a violation of his or her Sixth Amendment right." Dhaliwal, 150 Wn.2d at 571.

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[6] Mr. Beiers need not show prejudice in the sense that the outcome of the proceeding would have been different were it not for his attorney's conflict of interest. As the Court noted in Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000):

> The Cuyler standard applicable when a criminal defendant alleges that counsel's performance was impaired by an actual conflict of interest differs substantially from the Strickland standard generally applicable to Sixth Amendment ineffectiveness claims. Strickland requires a showing that counsel's performance was deficient, in that it fell below an objective standard of reasonableness, as well as a showing of prejudice, which is defined as a reasonable probability that counsel's error changed the result of the proceeding. Cuyler, on the other hand, permits a defendant who raised no objection at trial to recover upon a showing that an actual conflict of interest adversely affected counsel's performance.

205 F.3d at 781 (internal citations omitted).

"Adverse effect" can be demonstrated by showing the conflict either (1) "hampered" the defense, State v. Lingo, 32 Wn.App. 638, 646, 649 P.2d 130, review denied, 98 Wn.2d 1005 (1982), or (2) "likely" affected counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant. United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992), or (3) "cause[d] some lapse in representation contrary to the defendant's interests", Cuyler v. Sullivan, 723 F.2d at 1086.

Nevertheless, in this case, the adverse impact of trial counsel's conflict of interest is clearly demonstrated, regardless of which of the above three standards are applied. Mr. Beiers has made this showing by presenting competent evidence that Mr. Cossey decided to not challenge the testimony at trial presented by his other client, Officer McIntyre.

Trial counsel's performance was also deficient because he had an actual conflict of interest. Trial counsel represented Mr. Beiers, and his defense was dependent upon the complete testimony of Officer McIntyre whom he was also representing. Officer McIntyre failed to testify as she had earlier provided in her interview with trial counsel. (McCann Aff., ¶5) This placed Mr. Cossey in the dilemma of trying to rehabilitate his own client that he knew was already a Brady officer. Faced with this dilemma, Mr. Cossey took no action to rehabilitate Officer McIntyre whose testimony was critical to Mr. Beiers' defense.

D. Mr. Beiers was denied his right to effective assistance of counsel by his trial counsel's performance.

The constitutional requirement of effective assistance of counsel was violated here, since counsel's performance fell below an objective standard of reasonableness and there was a reasonable probability that without counsel's deficiencies the result would have been different. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); Duncan v. Ornoski, 528 F.3d 1222, 1233 (9th Cir. 2008).

The Sixth Amendment "relies...on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Courts, commentators and local and national Bar organizations continue to emphasize the importance of compliance with such standards.[7] The American Bar Association

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[7] See Alan Berlow, The Wrong Man, THE ATLANTIC MONTHLY, Nov. 1999, at 66 (Causes of wrongful convictions include ineffective assistance. States need "to adopt and enforce reasonable standards for the appointment and performance of defense attorneys...Criminal defendants, and capital defendants especially, need attorneys who are well trained, experienced, and adequately paid."); see also WSBA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 1.1(b) (2011) [hereinafter WSBA GUIDELINES] ("It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes of the legal profession applicable in Washington."); ABA CRIMINAL JUSTICE COMM., ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 79-91 (Paul Gianelli et al. eds., 2006) [hereinafter ACHIEVING JUSTICE] ("[U]rg[ing] federal, state, local and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel in serious non-capital criminal cases..."); Dennis E. Curtis & Judith Resnik, Grieving Criminal Defense Lawyers, 70 FORDHAM L. REV. 1615, 1624 (2002) (Proposing grievance procedures in response to Deborah Rhode's book, In the Interests of Justice, where she

defines standards that give substance to the presumptions found in Strickland.[8]

The Supreme Court has made clear that established standards are important in determining counsel's minimum duties. State v. ANJ, 168 Wn.2d 91, 110, 225 P.3d 956 (2010); In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d (2004) (quoting Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)) (ineffective assistance shown if representation was unreasonable under prevailing professional norms).

The Supreme Court has used standards to determine the minimum performance required by an attorney. ANJ, 168 Wn.2d at 110. Here, trial counsel was obligated to represent Mr. Beiers accordance with the standards applicable to the criminal defense bar in Washington. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-1.2(e) (3rd ed. 1993) [hereinafter ABA STANDARDS] ("Defense counsel...is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct."). Professional standards for criminal defense attorneys apply to both retained and appointed counsel. E.g., WSBA GUIDELINES 1.1(b) ("[T]he functions and duties of defense counsel are the same whether defense counsel is assigned [or]

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concludes that the legal system "fails to provide necessary...standards...to ensure effective representation.").

[8] See, e.g., ACHIEVING JUSTICE XXV (arguing for assurance of "high quality," as opposed to constitutionally effective, legal representation in serious criminal cases).

privately retained..."). Even when not codified, and especially when not novel, established standards form "an integral thread in the fabric of constitutionally effective representation." Bean v. Calderon, 163 F.3d 1073, 1079-80 (9th Cir. 1998) ("[R]udimentary trial preparation and presentation [has for a long time consisted of] providing experts with requested information, performing recommended testing, conducting an adequate investigation, and preparing witnesses for trial testimony.").

The plain language of the Constitution supports the rule that all defense counsel, whether appointed or retained, must provide effective assistance. Neither the Sixth Amendment nor Wash. Const. art. 1, sec. 22, allows a lesser standard by retained or appointed counsel. Both provisions start out by stating "In all criminal prosecutions ..." (U.S. Const. amend. VI) or "In criminal prosecutions ..." (Wash. Const. art. 1, sec. 22). Since the constitutional right to effective assistance of counsel applies to all criminal defendants, counsel in this case was obligated to comply with the professional standards that form the fabric of constitutionally effective representation. Based on the failure to comply with these standards, the Court should find counsel's performance deficient and prejudicial.

1. Mr. Beiers was denied effective assistance of counsel due to his counsel's failure to make an opening statement to the jury in a self-defense case.

The first time the jury heard about self-defense was in the defense **closing** argument. No defense opening statement was given. The jury had listened to days of testimony without any roadmap as to what the defense case was about. Despite his acknowledged understanding that jurors are quickly influenced by evidence in a case (Beiers Aff., ¶8), Mr. Cossey failed to make any opening statement and waived his opportunity to do so initially and at the opening of the defense case.

Particularly in a self-defense case, not doing an opening statement and presenting no theory to apply to the minimal affirmative defense testimony presented does not meet the minimal standard of competent representation for a criminal defense lawyer in a serious felony case in Washington. Attempting to prove or raise a reasonable doubt about a self-defense shooting in the face of no opening statement, limited presentation of defense witnesses and not fully developing defense testimony available because of conflicted representation of witnesses appears to violate the standard of care for a minimally competent criminal defense lawyer in Washington.

The following Opening Statement could have been given which would have been critical to the jury understanding the defense:

Ladies and gentlemen of the jury, I represent Keith Beiers. This case is about a 70 year old Vietnam War combat veteran who had an ongoing dispute with some of his neighbors.

Mr. Beiers lived in this neighborhood for 14 years and, prior to 2010, got along well with everyone. Everything changed in 2010 when Bret Easley moved into the neighborhood. Mr. Beiers will tell you that Mr. Easley had vehicles coming to his house at all hours of the day and night for very short stays.

Mr. Beiers will tell you that he was active in the Block Watch program and believed that Mr. Easley was selling drugs and trafficking in stolen property out of his house.

Mr. Beiers will tell you that as a result of his suspicions and reported complaints, the Spokane Police Department put up a "pole cam" which was positioned on a telephone pole to record the coming and going of visitors to Mr. Easley's house. You will watch this video. This video will show you what happened on the night of this incident, that Mr. Easley was in his garage with another man, was seen leaving his garage to engage in the conflict with Mr. Beiers which occurred just outside of the video camera angle of the pole cam. Mr. Beiers will walk you through what can be seen on this video.

You will hear from a number of Mr. Beiers' neighbors who will testify as to what occurred that evening. These witnesses will all give you their version of what happened. You will hear their biases and interests. What will be important is the wild swings in this testimony. None of the neighbors' testimony lines up. In fact, several of their stories are physically impossible to have happened.

Mr. Beiers will tell you of a prior incident he had with Mr. Easley wherein Mr. Easley pointed an AK47 at him and repeatedly threatened to injure and kill him. Mr. Beiers reported these incidents to the Police Department and you will hear Officer Sandy McIntyre testify concerning Mr. Beiers' reports on what was going on in his neighborhood. You will hear that Mr. Easley has 15 felony convictions including one for Theft of a Firearm.

As a result of Mr. Easley's threats and action, Mr. Beiers started carrying a gun in his vehicle to protect himself from another threat

from Mr. Easley. Mr. Beiers carried the unloaded gun in his glove box and separately carried the ammunition. Mr. Beiers was properly registered and licensed to carry a concealed weapon.

When Mr. Beiers would drive to his neighborhood, he would pull over to the side of the road and load his handgun. On this particular night, he pulled over in front of the O'Connor house. He laid two utility towels on the passenger seat to load his firearm. At this point, he was confronted by neighbors, Nick and Callie O'Connor.

Nick O'Connor will tell you that he thought Mr. Beiers was masturbating in his car in front of his house. Mr. Beiers will adamantly deny this and tell you that he was loading his firearm as he prepared to drive by Mr. Easley's house.

Mr. O'Connor will tell you that he believed he had caught Mr. Beiers committing a crime and was determined to hold him until the police could arrive and arrest him. A fight broke out between Mr. O'Connor and Mr. Beiers. Mr. O'Connor will tell you that he hit Mr. Beiers in the head in an attempt to daze him to keep him from leaving. Mr. Beiers was injured from being struck in the head repeatedly by Mr. O'Connor. You will see pictures of his injuries.

You will hear a number of versions of what Mr. Beiers did with his gun while Mr. O'Connor was trying to detain him. We have witnesses to these events all over the board as to what happened. Mr. Beiers will tell you that he feared for his life and he fired one round into the street to stop the beating he was receiving. Mr. O'Connor will tell you he heard the shot "ping" off the blacktop.

In addition to what the neighbors tell you, you will also hear from the police officers at the scene who took statements from the neighbors. It is important to compare the statements that were made that night with what you hear from the stand this week.

Judge Clarke will instruct you as to how a person has the right to defend themselves. You will be asked to put yourself in Mr. Beiers' shoes and determine whether he acted legally when he was being held by Mr. O'Connor, being knocked in his head and physically kept from leaving.

> Ladies and gentlemen, you will hear evidence that Mr. Beiers acted in self-defense and did not assault anyone that night. Thank you.

In a self-defense case, a reasonable attorney would not fail to give an opening statement. See, Donald Vinson, How to Persuade Jurors, 71 A.B.A. J. 72 (1985); Ira Mickenberg, Opening Statements at Trial, West Virginia Public Defender Services Manual for Trial Lawyers (2005). The failure to give such a statement would likely be viewed as affecting the outcome of the case. See Richard J. Crawford, Opening Statements for the Defense in Criminal Cases, 8 Litigation 26 (1981-1982); William Lewis Burke et al., Fact or Fiction: The Effect of the Opening Statement, 19 J. Contemp. L. 195 (1992).

Counsel is deemed ineffective if: (1) the representation was deficient, meaning the representation fell below an objective standard of reasonableness; and (2) the deficiency prejudiced the defendant, affecting the outcome of the case. Strickland, 466 U.S. at 688-690; see also, In re Davis, 152 Wn.2d at 672-73. Counsel is also considered ineffective if: (1) a defendant is denied counsel at a critical stage of trial; (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; (3) counsel labors under an actual conflict of interest; or (4) the circumstances are such that the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without further inquiry (e.g. governmental interference with defendant's attorney-client relationship). Id.; see also, In re Davis, 152 Wn.2d

at 657; Boulas v. The Superior Court, 233 Cal.Rptr. 487 (Cal.Ct.App. 1986) (governmental interference). Under these circumstances, no showing of prejudice to the defendant is necessary. Strickland, 466 U.S. at 681-82.

The court assumes a strong presumption that counsel's representation was effective, but the presumption can be rebutted by proving the representation was unreasonable under prevailing professional norms and that the action was not sound strategy. In re Davis, 152 Wn.2d at 673; see also, State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) ("[T]he defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.") It is the prevailing professional norm to not waive an opening statement in a criminal trial, especially in cases of self-defense. See, Richard J. Crawford, Opening Statements for the Defense in Criminal Cases, 8 Litigation 26 (1981-1982); William Lewis Burke et al., Fact or Fiction: The Effect of the Opening Statement, 19 J. Contemp. L. 195 (1992); Kenneth J. Melilli, Succeeding in the Opening Statement, 19 Am.J.Trial Advoc. 525 (2005-2006); Robert B. Hirschhorn, Opening Statements, 42 Mercer L. Rev. 605 (1990-1991).

The prevailing practice is to give an opening statement in criminal cases as it is believed to be highly influential in jurors' final decisions. Id.; see also, Shelley C. Spiecker and Debra L. Worthington, The Influence of Opening Statement/Closing Argument Organizational Strategy on Juror Verdict and

Damage Awards, 27; 4 Law and Human Behavior 437 (2003); Donald E. Vinson, How to Persuade Jurors, 71 A.B.A. J. 72 (1985).

Here, Mr. Beiers' trial counsel told the jury that he learned early in his career that jurors make up their mind very early in the process. (RP 686) Despite this belief, trial counsel failed to help the jury in its early decision making process by giving an opening statement.

Failure to give an opening statement in a self-defense case goes against prevailing professional norms and falls below the objective standard of reasonableness. Additionally, the failure to give an opening statement in a self-defense case may significantly impact a jury's final decision. This is especially true when the first time a jury hears the self-defense claim is during closing statements, by which time many jurors have typically made up their minds. See, Kenneth J. Melilli, Succeeding in the Opening Statement, 19 Am.J.Trial Advoc. 525 (2005-2006); Shelley C. Spiecker and Debra L. Worthington, The Influence of Opening Statement/Closing Argument Organizational Strategy on Juror Verdict and Damage Awards, 27; 4 Law and Human Behavior 437 (2003).

2. Mr. Beiers was denied effective assistance of counsel when his attorney failed to object to the State's comments on his silence.

In the event this Court determines that Mr. Beiers waived his prosecutorial

misconduct claim because he did not object at trial, he received ineffective assistance of counsel.

Counsel's performance did not meet Sixth Amendment standards. Deficient performance is that which falls below an objective standard of reasonableness. Id. The defendant must overcome a strong presumption of reasonable performance, particularly with respect to legitimate trial tactics or strategy. Id. However, not all conduct that can be characterized as trial strategy or tactics is immune from attack, especially when "there is no conceivable legitimate tactic explaining counsel's performance." Id. (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

To rebut the presumption that counsel's representation was effective, the defendant may show that "his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Davis, 152 Wn.2d at 673. Counsel's performance is "evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Id. The question is not whether the choices were strategic, but whether they were reasonable. State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "[W]hen counsel fails to object to the admission of evidence, a defendant alleging ineffective assistance must show that the trial court would likely have sustained the objection." In re Detention of Strand, 139 Wn.App. 904, 912, 162 P.3d 1195 (2007).

Mr. Beiers' counsel did not object to either of the prosecutor's comments at trial. Failing to object in response to the first comment could have been a strategic decision to avoid calling further attention to the misconduct. See Curtis, 110 Wn.App. at 15. As noted by the court in Holmes, "the bell is hard to unring." Holmes, 122 Wn.App at 446.

Counsel should have objected the second time the State invited the jury to infer that Mr. Beiers was silent because he was guilty. (RP 512:4-5) At that point, the bell had been rung, and any further prejudice that may have resulted from counsel's objection would have been less than simply letting the prosecutor's comments stand. While failing to object to the first comment could be a legitimate tactic to avoid emphasizing the issue to the jury, there is no reasonable explanation for not objecting to the second comment. For the reasons previously discussed, the trial court likely would have sustained the objection. By not objecting, counsel's performance was deficient.

3. Mr. Beiers was denied effective assistance of counsel due to his counsel's failure to investigate and interview key witnesses.

Mr. Cossey failed to personally interview any of the key witnesses involved in this case. (Hueber Aff., ¶6) The standard of care for minimally competent defense lawyers in Washington on a self-defense case in which there are divergent descriptions of the assault would require careful interview of each of

the key witnesses identified by the State as well as potential witnesses to be called by the defense. (Tolin Dec.)

Credibility in self-defense cases is always a critical, if not the critical choice for the trier of fact. A minimally competent Washington criminal defense lawyer cannot depend on an investigator's evaluation of the credibility of a key State witness. No investigator's judgment can completely substitute for the trial counsel who intends to present a self-defense theory to the jury since investigators are not trained advocates and cannot substitute for Sixth Amendment effective assistance of counsel. The failure to interview the large majority of the State's witnesses and the failure to personally interview the key State's witnesses does not meet the standard of care. Although it may be a tactical decision not to question a witness or to limit the questioning of a hostile witness on cross-examination, that tactical decision cannot be made unless the lawyer has performed the pretrial interviews upon which it necessarily depends. The absence of any pretrial interviews by Mr. Cossey fails to meet the Sixth Amendment standard of care for a Washington criminal defense lawyer in a serious felony assault case. (Tolin Dec., ¶D(2))

Defense counsel is obligated to perform a reasonable investigation. See WSBA GUIDELINES 4.1 (basic requirements and strategies for investigation); ABA STANDARDS 4-4.1 (defense counsel's duty to investigate). The reasonableness of the investigation depends upon the sufficiency of the evidence

already gathered by counsel. Duncan, 528 F.3d at 1235 ("We allow lawyers considerable discretion to make strategic decisions about what to investigate, but only after those lawyers have gathered sufficient evidence upon which to base their tactical choices.") (internal citation omitted). While counsel is afforded discretion in making strategic decisions — those based on having first done adequate investigation — decisions based on counsel's beliefs are not entitled to deference. Id. (citing Avila v. Galaza, 297 F.3d 911, 920 (9th Cir. 2002)).

Trial counsel here violated WSBA standards which state: "[c]ounsel should consider whether to interview...potential witnesses..." WSBA GUIDELINES 4.1(b)(3). Failure to comply with this standard was particularly egregious given the nature of the factual evidence in this case. Counsel has a duty to investigate and interview potential eyewitnesses to the crime charged. Avila, 297 F.3d at 920 (quoting Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1994)) ("A lawyer has a duty to investigate what information...potential eyewitnesses possess[], even if he later decide[s] not to put them on the stand."). Counsel has a concomitant duty to investigate and interview potentially exculpatory witnesses. Lord v. Wood, 184 F.3d 1083, 1093-96 (9th Cir. 1999) (holding counsel ineffective where he did not personally interview and present at trial potentially exculpatory witnesses). This duty exists even where potential witnesses have previously undergone extensive questioning and counsel has knowledge of, and access to, information gleaned from that questioning. Id. at 1093.

A legal system which fails to enforce compliance with the established standards for criminal defense risks wrongful convictions.[9] Each of trial counsel's violations of the above-cited standards individually prejudiced Mr. Beiers. Taken as whole, the numerous violations, each of them serious, resulted in cumulative prejudice. The abundant deficiencies satisfy the constitutional standard for prejudice. Harris v. Wood, 64 F.3d 1432, 1438-1439 (9th Cir. 1995).

For instance, the O'Connors testified at length as to how the trauma of this incident created significant problems for them. (RP 254, 369-71) Because Mr. Cossey had not interviewed them prior to trial, he was not prepared to rebut this testimony which would have directly challenged their credibility.

Likewise, trial counsel was aware that Mr. Beiers' girlfriend, Della James, had personally witnessed Mr. Easley make personal threats against Mr. Beiers. She was never interviewed by Mr. Cossey and never called as a witness at trial. (Beiers Aff., ¶18)

4. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's failure to offer the defense surveillance tape into evidence.

Prior to this incident, the conflict between Mr. Beiers and his neighbors

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[9] Examples can be found in Washington (see, e.g., ANJ, 168 Wn.2d 91; Alexandra Natapoff, Snitch Based Convictions Overturned in Washington, Snitching Blog (December 15, 2012, 12:57 PM), http://snitching.org/2012/12/snitchbased_convictions_overtu.html.) and nationally (Robert Wilbur, Witness to Innocence: Wrongful Execution and Exoneration, TRUTHOUT (July 22, 2012, 7:37 AM), http:// truth-out.org/news/item/10439- witness-to-innocence-wrongful-execution-and-exoneration).

had been repeatedly reported to the Spokane Police Department and the Block Watch program. Officer McIntyre testified that she was a neighborhood resource officer involved with this neighborhood dispute. (RP 423) Mr. Beiers made reports against his neighbors. His neighbors made repeated reports about Mr. Beiers. "It was a two-way street". (RP 428)

As a result of the neighborhood complaints and the intervention of Officer McIntyre, the Spokane Police Department placed a "pole cam" on a telephone pole to record the activities of Mr. Easley. (RP 437; Beiers Aff., ¶9)

Mr. Cossey planned to utilize this surveillance video at trial. He had pre-marked it as Defense Exhibit 102. (Hueber Aff., ¶5) When he was cross examining Mr. Easley, the following exchange occurred:

Mr. Cossey:	...There is a surveillance tape across the street from your residence and Mr. Beiers'. Were you aware of that?
Mr. Easley:	Surveillance tape?
Mr. Cossey:	Yes.
Mr. Easley:	I don't know anything about surveillance tape.
Mr. Cossey:	There is a tape that is going to be played.
Mr. Easley:	Okay.
Mr. Cossey:	I can see you in your garage as you described to Counsel.
Mr. Easley:	Yes.
Mr. Cossey:	There was another man, or an individual that is with you that kind of walks around. When you leave to go down the block, he sits there and he watches you and watches you come back. Who is that individual?
Mr. Easley:	Surveillance tape in my neighborhood that night?
Mr. Cossey:	Let's back off of that for a second. We'll deal with that later. I am asking you: the night that this started you were working in your garage.

Mr. Easley: Yes.
Mr. Cossey: Okay. Were you by yourself?
Mr. Easley: I was by myself.
Mr. Cossey: Was there ever another individual while you were in your garage going back and forth in the time that you literally walked down the street towards the O'Connors; was there another man or woman?
Mr. Easley: My wife was the only person I was in contact with that night.
Mr. Cossey: Okay. Was she out working with you in the garage?
Mr. Easley: She came out to the garage and explained what was going on...

(RP 82-83)

Mr. Beiers had reviewed the surveillance tape prior to trial and had expected it to be played to the jury. (Beiers Aff., ¶11) Mr. Beiers would have been able to walk the jury through this tape and point out who the persons depicted therein were. The surveillance tape would have directly attacked Mr. Easley's credibility, which was also used by the State to bolster the testimony of the O'Connors. Mr. Easley testified on direct examination that no other individual other than his wife was present with him that night. (RP 83) Mr. Easley also testified he was working by himself in his garage. (RP 83) The tape directly refutes this testimony.

The surveillance tape showed Mr. Easley and another male individual in the garage. (Beiers Aff., ¶10) This would have directly contradicted Mr. Easley's testimony and go straight to his credibility.

5. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's failure to introduce Bret Easley's criminal history into evidence.

At the time of trial, Mr. Easley had 15 felony convictions. (See Affidavit of Tim McCann, Ex. "C", ¶6) The felony convictions were for Possession of a Stolen Vehicle, three separate convictions of Second Degree Burglary, Theft of a Motor Vehicle, two counts of Second Degree Theft, Possession of Stolen Property, Controlled Substance Possession, two counts of Residential Burglary, Trafficking in Stolen Property, Theft of a Firearm, and two counts of Taking a Motor Vehicle without Permission. (Beiers Aff. ¶12)

Prior to jury selection, the court inquired of both counsel about any ER 609 issues with Mr. Easley. Both Ms. Ervin and Mr. Cossey stated that the 609 issues had been dealt with and they both knew what those were. (RP 16) Ms. Ervin stated:

> I think we're both precluded from getting into the fact that any of them, I think it is just the existence of the criminal convictions and the fact he has done time in prison for some property-based crimes that are there.

(RP 16-17)

During the trial, Mr. Easley testified that he was living in a prison transition house or prison work release facility for property crimes-burglary and vehicle theft. (RP 56) No specifics were provided to the jury concerning Mr. Easley's criminal record.

For unexplained reasons, the jury only heard that Mr. Easley had convictions for "property crimes-burglary and vehicle theft". (RP 56) Mr. Cossey has stated that he received discovery from the State prior to trial which disclosed Mr. Easley's prior convictions. His file does not contain any such documents. (Hueber Aff., ¶3) Mr. Beiers has stated that following his conviction, he was concerned that the jury had not heard about Mr. Easley's extensive felony history. He asked Mr. Cossey to run a criminal history check on Mr. Easley and learned at that time that he had 15 assorted felony convictions. The jury never heard this. The trial court did not hear this until it was brought up at Mr. Beiers' sentencing hearing. (Beiers Aff., ¶19 and RP 603) The referenced report was run by Mr. Cossey's office on December 10, 2015, two weeks after the jury verdict and contemporaneously to when Mr. Beiers asked Mr. Cossey to get this report. (Hueber Aff., ¶3)

There are two problems with the agreed use of Mr. Easley's felony conviction record in this case. First, the joint representation made to the court was incorrect. Mr. Easley's convictions were not limited to property crimes. He also had a controlled substance conviction and a conviction for theft of a firearm. The firearm conviction testimony would have directly supported Mr. Beiers' testimony that Mr. Easley had arrived at the scene with a firearm in his hand. It would have also explained Mr. Easley's familiarity with firearms. Second, the jury was never told which specific prior convictions Mr. Easley had.

ER 609(a)(1) allows evidence that a witness has been convicted of a crime that was punishable by imprisonment in excess of one year under the law which the witness was convicted to be admitted for purpose of attacking the credibility of a witness, as long as the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, and as long as less than ten years have passed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is later.

In State v. Coe, 101 Wn.2d 772, 776, 684 P.2d 668 (1984), the court held "cross examination on prior convictions under ER 609(a) is limited to facts contained in the record of the prior conviction: the fact of conviction, the type of crime, and the punishment imposed".

In State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997), the court held that "unnaming a felony 'is not a substitute for the balancing process required' under ER 609(a)(1). ...If the balance merits admission, it is anomalous to unname the felony as it is generally the nature of the prior felony which renders it probative of veracity." The court should not admit unnamed felonies under ER 609(a)(1) unless they can articulate how unnaming the felony still renders it probative of veracity.

In light of these cases, Mr. Beiers was entitled to have Mr. Easley's prior felonies named as well as the punishment imposed. It is unclear whether these steps were not taken because trial counsel did not have access to this information

or whether trial counsel just failed to do so. In either event, the jury should have been told the specifics of Mr. Easley's extensive prior criminal record.

6. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's statement to the jury that Mr. Beiers would not testify.

Mr. Beiers had always intended to testify in his own defense at his trial. (Beiers Aff., ¶16) During jury selection, defense counsel stated that "Mr. Beiers isn't going to testify, going to tell everybody that right now". (RP 702)

Mr. Beiers was shocked when he heard Mr. Cossey tell the jury that he would not testify. (Beiers Aff., ¶16)

This misstatement was compounded by the fact that defense counsel did not make an opening statement. Had he done so, he would not have caused the jury to sit through the State's opening statement and the State's evidence with the understanding that Mr. Beiers was not going to testify.

Defense counsel's statement to the jury that Mr. Beiers would not testify on his own behalf constitutes ineffective assistance of counsel.

7. Mr. Beiers was denied effective assistance of counsel due to his trial counsel's failure to review and offer into evidence the packet of emails, letters and Block Watch report.

From Mr. Beiers' viewpoint, the central part of his defense was the longstanding disagreements that he had had with his neighbors, particularly Mr. Easley. Mr. Beiers had provided his attorney with a stack of emails, letters

and other reports that were to be used in his defense. (Beiers Aff., ¶18) This packet was never offered or admitted into evidence.

During trial, defense counsel had this packet, and it was the subject of frequent colloquy with the court. Prior to hearing motions in limine, the court was advised of the existence of this packet. Defense counsel stated that he would present the court with the ones "that I think pass muster and we can deal with those then". (RP 15) Defense counsel was told by the court to go through and indicate which emails he thought were relevant to the defense. The court advised defense counsel "I'll direct that you do some work on the emails. If you want me to do some further work, I'm happy to do it." (RP 18)

Near the close of testimony, the packet of emails was discussed again. Defense counsel stated that he didn't go through the emails because he couldn't make sense of them and was unable to block out the relevant portions. (RP 507) One of the pages from the email packet was used as Defense Exhibit 101 which referred to Mr. Easley's pointing an AK47 at Mr. Beiers. (RP 431-42)

Mr. Beiers was a regular in the neighborhood Block Watch meetings. (RP 430) Officer McIntyre testified that she didn't believe that the defendant was an official member of Block Watch. (RP 437)

The Block Watch reports substantiated Mr. Beiers' testimony of the ongoing problems that he had with Mr. Easley and his other neighbors. Many of these documents pertain directly to complaints made to the Spokane Police

Department. They would have bolstered Mr. Beiers' testimony and credibility. However, from the record, it appears that defense counsel did not take the time to review, redact and offer them. This constitutes ineffective assistance of counsel.

8. Mr. Beiers was denied effective assistance of counsel when trial counsel's deficiencies resulted in individual and cumulative instances of ineffectiveness that prejudiced the defense.

Mr. Beiers was denied his Sixth Amendment right to effective assistance of counsel. See, U.S. amend VI; Wash. Const. art I, §22; see also, Cuyler, 446 U.S. at 335; McMann v. Richardson, 397 U.S. 750, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. Adams, 91 Wn.2d 86, 586 P.2d 1168 (1978). Trial counsel operated under a conflict of interest, failed to object to the State's comments on defendant's silence, failed to introduce Mr. Easley's criminal record, failed to except to the jury instructions, failed to investigate and interview key witnesses, failed to give an opening statement, failed to read, evaluate, and present the Block Watch emails, and advised the jury Mr. Beiers would not testify.

Ms. Tolin concluded:

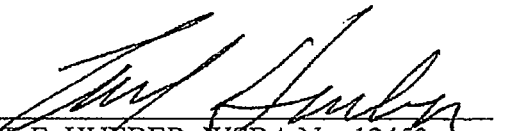
> Based upon my analysis of the materials provided to date, and in light of my experience combined with relevant laws, rules and standards, Mr. Cossey did not render effective assistance of counsel in Mr. Beiers' self-defense assault case. Operating under an unwaived conflict of interest, counsel's multiple deficiencies in pretrial and trial representation failed to meet the standard of care for a minimally competent criminal defense lawyer in a serious felony assault case in Washington.

(Tolin Dec., ¶VII)

VI. CONCLUSION

For the reasons set forth in this brief, Mr. Beiers requests that his Personal Restraint Petition be granted, his conviction be reversed, and that he be granted a new trial.

DATED this 13th day of January, 2017.



CARL E. HUEBER, WSBA No. 12453
COREY J. QUINN, WSBA No. 46475
WINSTON & CASHATT
Attorneys for Petitioner/Appellant

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 31st day of January, 2017, I caused a true and correct copy of the foregoing replacement pages (title page and page 14 of Appellant's Brief) to be served on the following parties in the manners indicated:

Brian O'Brien Spokane County Prosecutor's Office 1100 West Mallon Spokane, WA 99260 Attorney for State of Washington Email: scpaappeals@spokanecounty.org	**VIA REGULAR MAIL** ☐ **VIA EMAIL (with consent)** ☒ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Keith W. Beiers P. O. Box 1749 Airway Heights, WA 99001	**VIA REGULAR MAIL** ☒ **VIA EMAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐

DATED on January 31, 2017, at Spokane, Washington.

Cheryl Hansen

APPENDIX C

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. KEITH W. BEIERS, Petitioner/Appellant.	No. 350126 PERSONAL RESTRAINT PETITION

A. Status of Petitioner.

The petitioner is Keith W. Beiers. His present address is P.O. Box 1749, Airway Heights, WA 99001. This petition is being filed by his attorney, Carl E. Hueber, 601 W. Riverside Ave., 1900 Bank of America Financial Center, Spokane, WA 99201. Mr. Beiers applies for relief from a disability resulting from a judgment and sentence in a criminal case.

1 The court in which Mr. Beiers was sentenced is the Spokane County Superior Court (Cause No. 12-1-03897-1).

2. Mr. Beiers was convicted of one count of First Degree Assault and one count of Second Degree Assault.

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1900
Spokane, Washington 99201-0695
(509) 838-6131

3. Mr. Beiers was sentenced on December 16, 2015. The judge who imposed the sentence was the Honorable Harold D. Clarke III.

4. Mr. Beiers' lawyer at sentencing was Robert R. Cossey, 902 N. Monroe, Spokane, WA 99201.

5. Mr. Beiers appealed the decision of the trial court to the Washington State Court of Appeals – Division III. The Court of Appeals' Docket number is 339629. Mr. Beiers' lawyer on appeal is Carl E. Hueber, 601 W. Riverside Ave., 1900 Bank of America Financial Center, Spokane, WA 99201. The appeal is presently pending. A motion is being contemporaneously filed to consolidate this Personal Restraint Petition with the pending appeal.

6. Since his conviction, Mr. Beiers has not asked a court for any relief of his sentence other than that set forth above.

B. Grounds for Relief.

Mr. Beiers should be granted a new trial because he was denied his right to effective assistance of counsel. The arguments and authority in support of this ground for relief are set forth in the brief which is being filed contemporaneously with this Petition in the appeal.

In support of this Petition, Mr. Beiers has appended to this Petition:

A) Declaration of Anna Tolin;

B) Affidavit of Keith W. Beiers (with Exhibits A-C);

C) Affidavit of Carl E. Hueber (with Exhibits A-C); and

D) Affidavit of Tim McCann (with Exhibits A and B).

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C. Request for Relief.

Mr. Beiers asks this Court to vacate his conviction and grant him a new trial.

DATED this 13TH day of January, 2017.

CARL E. HUEBER, WSBA No. 12453
WINSTON & CASHATT
Attorneys for Petitioner/Appellant

Oath

STATE OF WASHINGTON)
) ss.
County of Spokane)

CARL E. HUEBER, being first duly sworn upon oath, deposes and says:

1. That I am the attorney for the petitioner. I have read the Petition, know its contents, and believe the Petition is true.

CARL E. HUEBER

SUBSCRIBED AND SWORN TO before me this 13TH day of January, 2017.

Notary Public
State of Washington
MARY L. MYERS
MY COMMISSION EXPIRES
FEBRUARY 01, 2018

Mary L. Myers
Notary Public in and for the State of Washington, residing at Spokane
My Commission expires: 2-1-18

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 13th day of January, 2017, I caused a true and correct copy of the foregoing Personal Restraint Petition and all attachments to be served on the following parties in the manners indicated:

Brian O'Brien Spokane County Prosecutor's Office 1100 West Mallon Spokane, WA 99260 Attorney for State of Washington Email: scpaappeals@spokanecounty.org	**VIA REGULAR MAIL** ☐ **VIA EMAIL (with consent)** ☒ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Keith W. Beiers P. O. Box 1749 Airway Heights, WA 99001	**VIA REGULAR MAIL** ☒ **VIA EMAIL** ☐ **HAND DELIVERED** ☐ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐

DATED on January 13, 2017, at Spokane, Washington.

Cheryl Hansen

884938

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(509) 838-6131

Exhibit "A" – Declaration of Anna Tolin

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

IN RE THE PERSONAL RESTRAINT PETITION OF **KEITH BEIERS,** Petitioner.	No. 339269-III DECLARATION OF ANNA TOLIN IN SUPPORT OF KEITH BEIERS' SIXTH AMENDMENT CLAIMS

I, Anna M. Tolin, declare and state as follows:

I. QUALIFICATIONS OF DECLARANT:

1. I am an attorney in good standing admitted to practice law in the State of Washington. I make this declaration based on my experience and review of the facts and materials provided by Winston & Cashatt attorney Carl Hueber regarding *State of Washington v. Keith Beiers,* Spokane Superior Court No. 12-1-03897-1, COA No. 33962-9-III.
2. I received my law degree from Cornell Law School in 1992. I am currently admitted to practice law in Washington State, the United States District

Courts for Eastern and Western District of Washington and the Ninth Circuit Court of Appeals. For the past 25 years, I have practiced criminal defense at all levels of Washington State and federal courts handling pretrial and grand jury investigations, jury trials, appeals and post-conviction cases. I have experience representing clients as a public defender and private practitioner, and I am well acquainted with relevant court rules, legal standards, and guidelines for providing competent criminal defense counsel in Washington. Additional details of my professional experience and educational background are set forth in my attached curriculum vitae.

3. In 2011, I joined the faculty of the University of Washington School of Law, where I currently serve as Executive Director for the Innocence Project Northwest (IPNW) and a part-time Lecturer in the clinical law program. This work involves direct client representation and supervision of students and staff attorneys working on post-conviction innocence cases for Washington prisoners. In the course of this work, I regularly review trial records to evaluate viable claims of innocence. This includes evaluating cases for issues such as ineffective assistance of trial counsel.

4. While in private practice, I assisted clients in both trials and appeals and represented dozens of clients involved in serious federal grand jury investigations. I also represented numerous law enforcement officers facing criminal charges, and I am familiar with the civil and employment ramifications involved with these investigations.

5. I frequently teach and lecture to students, lawyers and other groups about criminal trial and appellate practice skills, forensic science and DNA evidence, wrongful convictions, and legal ethics. I am a former President of the Washington Association of Criminal Defense Lawyers and an emeritus member of the Criminal Justice Act Panel for the Western District of Washington and Ninth Circuit Court of Appeals.

II. SCOPE OF THE OPINION

1. I have been asked to opine whether attorney Robert Cossey provided effective trial counsel to Keith Beiers on three serious felony charges including one count of assault in the first degree and two counts of assault in the second degree, all with deadly weapon enhancements. Mr. Beiers was convicted on two of these counts and sentenced to more than 17 years in prison.
2. The conclusions contained herein are my own personal opinions. My affiliation with IPNW, UW Law and other entities referenced above are provided solely to establish my experience and background that have helped inform my knowledge of criminal practice standards applied to my evaluation of this case.
3. I do not personally know attorney Robert Cossey, but I recognize he has extensive experience as a criminal defense attorney. The expression of my opinions below should not be taken as a general criticism of Mr. Cossey nor his performance in other cases. Even good lawyers can fail to meet the standards of the Sixth Amendment in a particular case.

III. STANDARD OF REVIEW

In conducting my review, I have relied on the Sixth Amendment standards as stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d (1984) and its progeny; the Washington Rules of Professional Conduct; a wide range of case law, treatises, legal scholarship and research; as well as my own experience, training, research and teaching of standards of competence in representing criminal defendants in Washington.

IV. MATERIALS REVIEWED

In order to render my opinions in this case, I reviewed the following materials:

1. The transcript of trial including *voir dire* in Spokane Superior Court cause number 12-1-03897-1;
2. Clerks Papers designated in the case and the index thereto;
3. Affidavit of Keith Beiers;
4. Affidavit of Carl Hueber;
5. Affidavit of Tim McCann;
6. Summary of Interview with Rob Cossey;
7. Various documents obtained from discovery and the post-conviction investigation including:
    a. Emails between Keith Beiers and Sandra McIntyre;
    b. Pole camera video recordings from Spokane Police Department;
    c. Criminal History WATCH report for Brett Easley;

d. Media articles related to incident and investigation of Officer Sandra McIntyre;

e. Transcripts of 911 recordings relevant to this case;

f. Public records produced of communications between Spokane County Prosecutor's office and attorney Robert Cossey regarding designation of his client Sandra McIntyre as a *Brady* officer; and

8. Personal Restraint Petition and Opening Brief of Keith Beiers;

V. SUMMARY OF OPINIONS

Based on my review of the listed materials, my experience as a defense counsel, my experience evaluating cases and teaching about Sixth Amendment standards, trial skills and professional responsibility for Washington law students and criminal defense lawyers; it is my opinion that Mr. Cossey did not render effective assistance of counsel to Mr. Beiers in this case:

1. Mr. Cossey suffered from a serious, unwaived conflict of interest which violated the Washington Rules for Professional Conduct and divided the loyalties counsel owed to Mr. Beiers as well as a key trial witness in his case, Officer Sandra McIntyre, which likely prejudiced the outcome of Mr. Cossey's trial and interfered with Mr. Cossey's minimal obligations to provide competent, loyal, and adequate criminal defense.

2. In addition to this conflict of interest, the materials reviewed, absent additional discovery and explanation of Mr. Cossey's representation, present *prima facie* evidence of ineffective assistance of counsel at trial because of counsel's failure to interview witnesses, evaluate credibility, identify and

litigate motions in limine, present an opening statement, offer available impeachment against key witnesses, object to improper testimony, and failure to offer available exculpatory and/or impeachment evidence that would have likely altered the jury's view of the allegations in this self-defense case.

3. Cumulatively, the deficiencies in Mr. Cossey's trial preparation and performance in this serious felony case, combined with an unwaived conflict of interest in violation of the Rules of Professional conduct, violated Mr. Cossey's obligation to provide minimally effective assistance of counsel to Mr. Beiers in this case.

VI. ANALYSIS OF OPINIONS

My opinions address the first prong of *Strickland;* whether Keith Beiers' trial counsel, Robert Cossey, rendered competent and effective representation to Mr. Beiers as would a minimally competent Washington defense lawyer under the same or similar circumstances.

A. Trial Counsel's Conflict of Interest Violates the Standard for Effective Assistance of Counsel.

1. Mr. Cossey's simultaneous and possible subsequent representation of Mr. Beiers and a witness in his case, Officer Sandra McIntyre, violates not only the Sixth Amendment standard but also the minimum licensing standard for Washington criminal defense lawyers.

2. The Washington Rules of Professional Conduct (RPC's) prohibit lawyers from representing two clients with conflicting interests. It is a violation of the

RPC's for a lawyer to engage in simultaneous adverse representation of two clients. RPC 1.7(a)(1). Similarly, lawyers must not represent a client when the lawyer's duties to other clients and/or self-interest would materially affect the representation. RPC 1.7(a)(2). Even when representing clients on separate cases, lawyers may not engage in representation that calls for the use of confidences and secrets obtained from a former client adversely to that client without permission. RPC 1.7(b) and 1.8(b).

B. Counsel had a non-waivable conflict of interest under RPC 1.7 requiring him to withdraw from representing Mr. Beiers.

1. The materials reviewed establish that when Mr. Cossey agreed to represent Keith Beiers on the underlying charges, he was simultaneously representing Officer Sandra McIntyre, an important witness in Mr. Beiers' case. Officer McIntyre had extensive involvement in interactions between Mr. Beiers, the victims, and the witnesses in this case. At the same time, Robert Cossey was advocating for Officer McIntyre in an ongoing federal investigation of obstruction of justice charges pertaining to her integrity and honesty as a witness and law enforcement officer in an excessive force and wrongful death investigation.
2. A fundamental minimum requirement for competent representation by a Washington criminal defense lawyer is undivided loyalty in defending one's client. Mr. Beiers, facing very serious assault charges, was entitled to a defense counsel who did not suffer from divided loyalties to a key witness in his case.

3. The facts provided confirm that Officer McIntyre was involved in soliciting reports of neighborhood criminal activity and received significant information from Mr. Beiers in this regard. This information became relevant to the issues under dispute in this case, and made it necessary for Mr. Cossey as defense counsel to call her as a witness. In doing so, he would need unfettered ability to examine Officer McIntyre about her involvement and conduct in the case. At the same time, Mr. Cossey owed a conflicting duty to Officer McIntyre. Information about Officer McIntyre being the target of a serious federal investigation that questioned her honesty and credibility had the potential to discredit or at least color her testimony as a witness, and it could be contrary to Officer McIntyre's interests to be viewed as opposing the conviction being pursued by the prosecutor by offering helpful information to Mr. Beiers' defense.

4. The failure to recognize this conflict prevented Mr. Beiers' from receiving minimally competent counsel in this case.

C. The Conflict Continued During Mr. Beiers' Trial and Violated the Minimum Standard of Care for a Competent Defense Lawyer in Washington.

1. The record suggests that Mr. Cossey's representation of Officer McIntyre may have continued through the time of Mr. Beiers' trial. However, even if his active representation had concluded, he continued to owe a duty of loyalty to Officer McIntyre as his former client that was ultimately adverse to Mr. Beiers' interest.

2. Although it is my opinion that these were non-waivable conflicts, assuming they could be waived, no waiver was properly sought or received. The minimum standard for minimum competent Washington criminal defense requires that a lawyer be unconflicted in representing a criminal defendant. The conflict between vigorously examining and/or placing at risk a current and/or former client and effectively advocating for another client results in a violation of the RPC's.

3. The difficulty with challenging, vigorously examining, or cross-examining a former client is so likely to generate hesitancy on the part of a lawyer that it is likely to violate the minimum standard of care for a minimally competent Washington lawyer because the hesitancy to attack a former client will influence the representation of a current client such as Mr. Beiers.

5. In the materials reviewed in this case, Mr. Cossey conceded that Officer McIntyre did not testify as favorably toward Mr. Beiers' as her earlier statements had suggested. Yet well before trial, the Spokane County Prosecutor's office had designated Officer McIntyre a "*Brady*" officer, meaning they must disclose to defense counsel a history of dishonesty or problematic conduct that could be used to impeach her testimony. Mr. Cossey's conflicted loyalties prevented him from presenting testimony that was relevant to Mr. Beiers' self-defense claim, while potentially damaging to the interests of Officer McIntyre in her professional career and any ongoing investigation into her conduct.

D. Defense Counsel Failed to Render Effective Assistance of Counsel in Pretrial and Trial Representation of Mr. Beiers.

The record and materials reviewed establish the following instances where trial counsel's representation failed to meet the minimum standards for competent counsel in Washington and failed to afford Mr. Beiers effective assistance of counsel in this serious case:

1. The record suggests that other than previous contact with Officer McIntyre, attorney Cossey either failed to personally conduct any pretrial witness interviews, and relied on only limited interviews of a few witnesses conducted by an investigator. The standard of care for minimally competent defense lawyers in Washington – particularly on a self-defense case in which there are divergent descriptions of the assault – would require careful interview of each of the key witnesses identified by the State as well as potential witnesses to be called by the defense.
2. Credibility in self-defense cases is always a critical, if not **the** critical choice for the trier of fact. A minimally competent Washington criminal defense lawyer cannot depend on an investigator's evaluation of the credibility of a key State witness. No investigator's judgment can completely substitute for the trial counsel who intends to present a self-defense theory to the jury since investigators are not trained advocates and cannot substitute for Sixth Amendment effective assistance of counsel. The failure to interview most State's witnesses and the failure to personally interview any of the key State's witnesses does not meet the minimum standard of care. In my

opinion, the absence of any pretrial interviews of state witnesses by Mr. Cossey fails to meet the Sixth Amendment standard of care for a Washington criminal defense lawyer in a serious felony assault case.

3. As widely recognized in research, defense counsel acknowledges that jurors are quickly influenced by evidence in a case, yet Mr. Cossey failed to make any opening statement and waived his opportunity to do so initially and at the opening of the defense case. Particularly in a self-defense case, not doing an opening statement and presenting no theory to apply to the affirmative defense testimony presented does not meet the minimal standard of competent representation for a criminal defense lawyer in a serious felony case in Washington. A review of the record revels no plausible strategic reasons to avoid giving an opening statement in this case.
4. In my opinion it was highly risky to waive initial opening argument that eliminated a crucial opportunity to provide the jury with a narrative of the defense theory of the case before the state's evidence was offered. This decision may have been influenced by the lack of pretrial interviews and desire to hear the state's presentation of evidence before opening. Yet even this questionable strategy was undermined by the failure to present *any* opening argument at trial. The record in this case leads me to conclude that the ability to raise reasonable doubt about a self-defense shooting in the face of no opening statement violates the standard of care for minimally competent counsel.

5. The records reflect Mr. Cossey represented Mr. Beiers for approximately three years before this case was brought to trial. Yet during trial, counsel admitted he had not reviewed all the potential evidence, including the emails between Officer McIntyre and Mr. Beiers that were relevant to the case. Counsel stipulated to the admissibility of 911 calls but had not produced transcripts before trial or attempted to raise any motions in limine to exclude irrelevant or potentially prejudicial information contained therein, suggesting they had not been subject to careful review. Adequately evaluating and assessing available evidence are minimal obligations of competent defense counsel handling a serious felony case in Washington.
6. The record is unclear as to when the information was obtained, but Mr. Cossey recalls that he was aware of Brett Easley's criminal history pretrial. In any event, the failure to impeach Mr. Easley with this readily available evidence fell below the standard of minimally competent defense counsel. Easley was a key witness against Mr. Beiers, and his prior involvement with firearms along with his significant criminal history provided ample and valuable impeachment and evidence that supported Mr. Beiers' own testimony and his defense. Similarly, counsel's failure to offer impeaching pole camera footage further suggests that counsel was not adequately prepared to cross-examine this witness.
7. Given the limited presentation of argument and evidence available in the case, Mr. Beiers' defense was further weakened when counsel failed to object to the state's improper use of Mr. Beiers' silence. Particularly, in a

case where the defense relied so heavily on Mr. Beiers' testimony, the failure to object to this improper questioning and testimony on multiple occasions fell below the standard of care for minimally competent counsel.

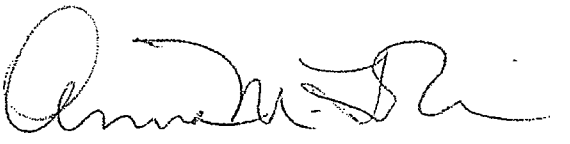
8. The cumulation of these deficiencies lead me to conclude that there was no viable strategy that could explain counsel's performance in this case. These deficiencies likely impacted the jury's determination in this case, and Mr. Beiers was denied effective assistance of counsel afforded him by the Sixth Amendment.

VII. CONCLUSION

Based upon my analysis of the materials provided to date, and in light of my experience combined with relevant laws, rules and standards, Mr. Cossey did not render effective assistance of counsel in Mr. Beiers' self-defense assault case. Operating under an unwaived conflict of interest, counsel's multiple deficiencies in pretrial and trial representation failed to meet the standard of care for a minimally competent criminal defense lawyer in a serious felony assault case in Washington.

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

Signed this 10th day of January 2017, signed at Kirkland, Washington.



Anna M. Tolin

Exhibit "B" – Affidavit of Keith Beiers

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. KEITH W. BEIERS, Petitioner/Appellant.	No. 339629 AFFIDAVIT OF KEITH W. BEIERS

STATE OF WASHINGTON)
: ss.
County of Spokane)

I, KEITH W. BEIERS, being first duly sworn on oath, say:

1. I make this affidavit upon first-hand knowledge of the facts and circumstances in this case.

2. I am the Appellant in the appeal and the Petitioner in my Personal Restraint Petition which is being filed contemporaneously with this affidavit.

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3. My trial started on Monday, November 16, 2015. I was represented by Robert Cossey. I had never been advised by Mr. Cossey that he had a vacation that was scheduled to commence on Friday, November 20, 2015. The jury returned its verdict on Friday, November 20, 2015. I did not learn until the following Monday, November 23, 2015, when I called Mr. Cossey's office and was advised by his staff that Mr. Cossey and his investigator were on vacation. It is my belief now that Mr. Cossey took shortcuts and held off presenting evidence in my defense so as to not interfere with his plans.

4. The first day of trial was Monday, November 16, 2015. At approximately 2:45 p.m. on that afternoon, the court heard motions in limine.

5. The second day of the trial was on Tuesday, November 17, 2015. Jury selection occurred that morning. The prosecutor made her opening statement. Mr. Cossey did not make an opening statement which surprised me as I was not aware that he had decided not to make one. I believe that making a defense opening statement would have helped the jury understand the defense evidence as well as how that played into self-defense. The State called two witnesses to the stand that afternoon. The court closed the courtroom at approximately 3:20 p.m. due to severe weather conditions. (RP 102-03)

6. The third trial day was on Wednesday, November 18, 2015. The State called nine witnesses that day.

7. The fourth day of trial was on Thursday, November 19, 2015. The State called three witnesses and then rested. Mr. Cossey did not make any motions. There was no discussion about the opening statement that had been reserved. Mr. Cossey went directly into

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calling witnesses. I testified in my own behalf, and was cross-examined by the State. The defense rested. The State said it had nothing further. The instructions were given to the jury. Closing arguments were made.

8. During jury selection, Mr. Cossey told the jury that he learned early in his career that jurors make up their mind very early in the process. (RP 686) I wonder why he would have not made an opening statement which would have helped the jurors in their early decision making process.

9. Prior to this incident, I had made repeated complaints to the Spokane Police Department and to the Block Watch program concerning my neighbor, Bret Easley's threats to harm me. As a result of my reporting and the assistance of Spokane Police Officer Sandy McIntyre, a "pole cam" was placed to record these activities.

10. During trial, Mr. Cossey cross-examined Mr. Easley, the complainant in one of the assault charges. Mr. Cossey questioned Mr. Easley:

Q: There is a tape that is going to be played.
A: Okay.
Q: I can see you in your garage as you described to counsel.
A: Yes.

(RP 82) Mr. Cossey told Mr. Easley that there was an individual that was with Mr. Easley who stayed in Mr. Easley's garage and watched Mr. Easley go to the confrontation with me and return. (RP 83) Mr. Cossey asked Mr. Easley if there was another individual while he was in his garage at the time he walked to the confrontation with me. Mr. Easley stated, "My wife was

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the only person I was in contact with that night". (RP 83) Mr. Easley also testified that he was working by himself in his garage. (RP 83)

11. I knew this testimony to be untrue as I had seen the defense surveillance tape and saw Mr. Easley and another male individual in the garage who was not Mr. Easley's wife. I expected Mr. Cossey would play the surveillance tape to show the jury that Mr. Easley was not telling the truth. I could have provided this testimony by walking the jury through its viewing of the tapes.

12. I am now aware that at the time of my trial, Mr. Easley had 15 felony convictions. The felony convictions were for Possession of a Stolen Vehicle, three counts of Second Degree Burglary, Theft of a Motor Vehicle, two counts of Second Degree Theft, Possession of Stolen Property, Controlled Substance Possession, two counts of Residential Burglaries, Trafficking in Stolen Property, theft of a firearm, and two counts of Taking a Motor Vehicle Without Permission.

13. Prior to jury selection, the court inquired of both counsel about any 609 issues with Mr. Easley. Both Ms. Ervin and Mr. Cossey stated that the 609 issues had been dealt with and they both knew what those are. (RP 16) Ms. Ervin stated:

> I think we're both precluded from getting into the fact that any of them, I think it is just the existence of the criminal convictions and the fact he has done time in prison for some property-based crimes that are there.

(RP 16-17)

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14. At the time of my trial, Mr. Easley testified that he was living in a prison transition house or prison work release facility for property crimes-burglary and vehicle theft. (RP 56) The Block Watch reports made by me and not offered at trial all support the criminal activities of Mr. Easley. No specifics were provided to the jury concerning Mr. Easley's criminal record.

15. I was surprised when Mr. Cossey failed to introduce Mr. Easley's specific prior convictions. I realize now that prior to trial Mr. Cossey did not know about the specifics of Mr. Easley's criminal record as he did not run a background check on Mr. Easley or any of the State's witnesses. The jury was told that he was in prison for property crimes-burglary and vehicle theft. (RP 56) In fact, Mr. Easley told me prior to trial that if you counted all of his criminal convictions, including juvenile, that he had served 96 months in custody. Mr. Easley was 27 years old at the time. In the month following my sentencing, Mr. Easley was sentenced to an additional 60 months. The jury was not told that Mr. Easley had three separate convictions of Second Degree Burglary, one conviction of Residential Burglary, one Controlled Substance Possession conviction, and a conviction for theft of a firearm. The firearm conviction testimony would have directly supported my testimony that Mr. Easley had arrived at the scene with a firearm in his hand. It would have also explained his familiarity with firearms. Mr. Easley was also used to bolster the O'Connors' testimony about the incident.

16. I had always planned to testify in my own defense at my trial. I was shocked when Mr. Cossey stated during jury selection that I would not testify. (RP 702) This was another incidence of the jury being advised that something was or was not going to happen

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which was not accurate. Had Mr. Cossey given an opening statement, he could have cleared up his misstatement.

17. When I first retained Mr. Cossey, I was advised that Mr. Cossey was personally representing Officer Sandra McIntyre in regards to an ongoing criminal investigation and prosecution in connection with the federal prosecution of Spokane Police Officer Karl F. Thompson, Jr. I have attached a news clipping from October 21, 2011 that references Officer McIntyre facing a federal obstruction of justice charge. (Ex. A) I have also attached a news clipping from April 25, 2013 that provides:

> U.S. Attorney Mike Ormsby declined to comment on the case or on the federal investigation. He also declined to comment on the status of the investigation relating to Officer Sandra McIntyre. Her attorney, Rob Cossey, confirmed last year that he also had entered discussions with prosecutors about potential charges relating to her testimony during the federal investigation into Thompson. An attempt to reach Cossey was unsuccessful Wednesday afternoon.
>
> McIntyre testified three times before the grand jury in 2009. She admitted during her testimony at Thompson's 2011 trial that she met with an assistant city attorney who suggested that she answer "I don't recall" to questions about the incident, when in fact she did remember some portions of the event.

(Ex. B)

I have also attached an article from October 21, 2011, concerning Officer McIntyre's involvement with the Thompson case. (Ex. C) It is my understanding that Mr. Cossey's representation of Officer McIntyre continued throughout the conclusion of my trial. I was not made aware that this representation may have been a conflict of interest, nor was I asked to, nor

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did I, waive such possible conflict. Until a few weeks ago, I had never heard of a Brady list. I was never told prior to trial that Officer McIntyre was on the Brady list.

18. The central part of my defense was the longstanding disagreements that I had with my neighbors, particularly Mr. Easley. For instance, my girlfriend, Della James, personally witnessed Mr. Easley make verbal threats against me. Ms. James was never interviewed by Mr. Cossey and was never called as a witness at trial. I had provided Mr. Cossey with a stack of emails, letters and Block Watch reports that were to be used in my defense. Mr. Cossey had these reports, and there was ongoing discussion with the Court about their use. Mr. Cossey did not offer these Block Watch reports as evidence in my trial. I believe that these Block Watch reports should have been offered, admitted, and used as part of my defense at trial. During the course of trial, Mr. Cossey made several statements to the Court that he could not offer them because he had not yet reviewed them. I believe I was denied effective assistance of counsel based on Mr. Cossey's failure to review, offer, and use these Block Watch reports in my defense. These reports are attached to Tim McCann's Affidavit.

19. Following my conviction, I was concerned that the jury had not heard about Mr. Easley's extensive felony history. I asked Mr. Cossey to run a criminal history check on him and learned he had 15 assorted felony convictions. The jury never heard this. The trial

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court did not hear this until I brought it up at my sentencing hearing. (RP 603)

Keith W. Beiers

KEITH W. BEIERS

SUBSCRIBED AND SWORN to before me this 10 day of January, 2017.

Notary Public
State of Washington
BEVERLY R BRIGGS
MY COMMISSION EXPIRES
AUGUST 15, 2020

Beverly R Briggs

Notary Public in and for the State of Washington, residing at Spokane
My appointment expires: 8/15/2020

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Spokane, Washington 99201-0695
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