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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

NO. 29358-7-II

IN THE COURT OF APPEALS, DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF

ARMONDO SHELBY

Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF PETITIONER

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ORIGINAL

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A. THE REFERENCE HEARING COURT FOUND THAT THERE WAS AN ACTUAL CONFLICT OF INTEREST IN SHELBY'S CASE THAT RESULTED IN A LAPSE IN REPRESENTATION AND THAT SHELBY IS ENTITLED TO A NEW TRIAL.

Mr. Shelby is in agreement with the reference hearing judge's finding that trial counsel had an actual conflict of interest that adversely affected his trial performance, and thus he is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

The following are the reference hearing court's findings that Shelby contends are in error:

1. The trial court erred in concluding that the Department of Assigned Counsel's (hereinafter DAC) representation of both Shelby and potential witness Tony Howard did not create a lapse in effective representation. Findings of Fact 10, 11, 12, 13, 37, 38, 40, 43 and Conclusions of Law 4 and 5.
2. The trial court was correct in finding that it was not objectively reasonable for counsel to fail to question Cubean, however the court erred in failing to conclude that counsel was ineffective for failing to question Cubean. Findings of Fact 28, 31, 37, 35 and Conclusion of Law 9.
3. The trial court erred in failing to consider Shelby's claim that his trial counsel was ineffective for failing to prepare him to testify and for failing to call him to testify when he asserted a claim of self-defense.

1. Issues Pertaining to the Assignments of Error

   1. Where DAC represented Tony Howard, and where Howard had information that would have supported Shelby's claim of self-defense, did DAC's failure to call Howard adversely affect the outcome in Shelby's case?

   2. Did the reference hearing court err in concluding that, although trial counsel's performance was deficient in failing to elicit evidence from Kevin Cubean (he heard scuffling before he heard the shots), that deficiency did not prejudice Shelby?

   3. Should Shelby's conviction also be reversed because his trial counsel did not properly advise him about his right to testify or call him as a witness?

C. STATEMENT OF THE CASE

1. Procedural History

On February 17, 1998 Armondo Shelby was charged with the aggravated premeditated murder of Tirrell Butler. The jury subsequently convicted him of the alternative charge of first-degree felony murder and first-degree burglary. The jury also found that he was armed with a firearm during these crimes. Shelby was also convicted of possession of a firearm and violation of a protective order.

Shelby's defense was that he acted in self-defense. However, no witnesses were called by Shelby's counsel. Nor did Shelby's counsel give opening statements to the jury. Counsel did not call Shelby to testify. At the close of trial, Judge Felnagle gave self-defense jury

instructions. But, by finding Shelby guilty of first degree felony murder the jury clearly rejected the self-defense claim. He was sentenced to a total of 47 years incarceration. Shelby filed an appeal of right but the Court of Appeals affirmed his convictions.

On September 17, 2002, Shelby filed a pro se personal restraint petition. In order to avoid needless duplication, he hereby incorporates by reference that briefing, the amended personal restraint petition and the reply brief (authored by counsel). In that Petition, he argued, among other things, that one of the juror's was biased, his trial counsel was ineffective, and that his trial counsel had a prejudicial conflict of interest. On December 5, 2003, this Court remanded this matter for an evidentiary hearing in a detailed order on the above three issues. Shelby is entitled to a new trial because, at the close of the evidentiary hearing, Judge Worswick concluded that his trial counsel had an actual conflict of interest that conflict was prejudicial to his defense.

But, it is Shelby's position that he is also entitled to a new trial on the grounds that his trial counsel was ineffective in failing to properly present other evidence (in addition to the evidence from Danion Singleton) that would also have supported his claim of self-defense to the jury.

2. *Facts Produced at the Evidentiary Hearing*

The evidence is undisputed that Shelby was assigned two attorneys from the Department of Assigned Counsel, Mr. Ray Thoenig and Ms. Jane Pierson. It is also undisputed that the state's witnesses Jennifer Bohlen and Jeremy Cleveland and potential defense witnesses Danion

Singleton and Tony Howard were currently or had been DAC clients. Ms Pierson did do a "conflicts check" of the witnesses before trial. Exhibit 3, 12/1/04 RP 27. She never brought the issue of her representation of Singleton or her office's prior representation of the many of the witnesses or potential witnesses to the trial court's attention. 12/1/04 RP 28. She acknowledged that it was trial counsel who made the determination about whether or not to bring conflicts to the court's attention. Id.[1]

In her testimony Ms. Pierson acknowledge that if DAC represented two clients, they owed an absolute duty of loyalty to both. 12/1/04 RP 50. It appears that in this particular case, she believed she had resolved any conflict issues simply by having the DAC investigator Mike Stortini interview the potential witnesses. 12/1/04 RP 61-62. In preparing for trial, the record reflects that both Mr. Thoenig and Ms. Pierson reviewed the interview notes prepared by him 12/1/04 RP at 22. The attorneys did not personally interview the potential witnesses, however, except that Ms. Pierson was present for the interview of Ms. Bohlen. 12/1/04 RP 22, 24.

As between Shelby's trial counsel, Mr. Thoenig was the more experienced of the two. 12/1/04 RP 73-74, 78. But, he testified that he recalled few of the specifics of his representation. RP 78. He stated that had he identified a conflict of interest in the case before trial, he would have discussed the conflict with Shelby. He did remember being appointed to represent Shelby in February 1998. That was not the only case he was assigned at the time. RP 76. Mr. Thoenig was also involved in Sap Kray, a months long aggravated murder case. After the verdict was

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[1] Ms. Pierson stated that she remained unconvinced that her simultaneous representation of Singleton and Shelby

rendered in that case, he had pneumonia. 12/1/04 RP 76. Then he began the Shelby trial. The first witness called at trial was Cubean. His testimony at the evidentiary hearing provided no illumination on any strategic choices before or during trial, due to his lack of memory and lack of notes in Shelby's file.

Thoenig did recall talking to Shelby about testifying but he could not remember any specifics. 12/1/04 RP 84.

Pierson testified that in a self-defense case, it was "critical" to find out "what the defendant's side of the story is." 12/1/04 RP 41. During the pretrial period, Shelby told his lawyers that he was acting in defense of himself and in defense of witness Jennifer Bohlen. 12/1/04 RP 48. Ms. Pierson's denied counseling Shelby that he could not testify at trial. She said:

> I did counsel him that if he did testify at trial, if I had anything to do with it, he better tell the truth. That's what you have to do. There were downside and upsides. I mean, you know, advantages to testifying and disadvantages to testifying. Again, the old mantra, this is the lawyer's duty.

12/1/04 RP 52. Pierson noted in a memo that she told Shelby if he did not testify, the trial judge would not give a instruction on "defense of others." 12/1/04 RP 66; Exhibit 5.

Pierson could not remember any discussion about whether or not the defense was going to call Tony Howard to the stand. 12/1/04 RP 53. She did admit that Howard had information that Bohlen had described Armondo as acting in self-defense. Exhibit 7; 12/1/04 RP 53, 59.

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was an "absolute conflict." 12/1/04 RP 29.

Kevin Cubean was called as a witness for the government and had helpful testimony for Shelby's case, but that helpful testimony was not brought out by counsel on cross examination due to lack of preparation. TR 396

At the evidentiary hearing, Shelby testified that he acted in defense of himself and Ms. Bohlen. 12/1/04 RP 145-168. He stated that he informed Mr. Theonig that he wanted to have Tony Howard called as witnesses on his behalf. 12/1/04 RP 181-183. But Theonig did not do so. Theonig never explained why he did not call these witnesses.

When asked if his lawyers prepared him to testify Shelby said that they did not. 12/1/04 RP182. The trial judge would not let Shelby go into the specifics surrounding those discussions. 12/1/04 RP 183. Shelby did testify that as a result of his "communications" with Thoenig, he did not testify. 12/1/04 RP 183.

D. ARGUMENT

1. At the close of the evidentiary hearing the judge correctly found that trial counsel for Shelby had an actual conflict of interest that adversely affected her trial performance. Based upon that finding Shelby is entitled to a new trial.

The undisputed evidence from the hearing is that Jane Pierson represented both Shelby and a potential witness, Danion Singleton, simultaneously. Pierson never informed Shelby she also represented Singleton. When Singleton was identified as a potential witness he was interviewed by DAC investigator Mike Stortini. Stortini's notes of that interview demonstrate that Singleton told him that the victim (otherwise know as "T-Dog") pulled a gun on him during

a confrontation. Exhibit 2. Defense counsel took no further actions to follow up on this information.

Theonig testified that had he known of this type of information, he would have followed-up on it. But Pierson, the attorney who was simultaneously representing Shelby and Singleton, and was the primary attorney involved in pre-trial preparation, made the decision not to call Singleton and made the decision not to interview him further.

Judge Worswick correctly found that Pierson had an actual conflict of interest in representing both Singleton and Shelby. She also found that because of this conflict, Pierson did not question Singleton and, thus, never called him as witness. Her failure to do so adversely affected Mr. Shelby's defense. To prevail in an ineffective assistance claim based on conflict of interest, a defendant must show that there was an actual conflict that adversely affected his or her lawyer's performance. *State v. Dhaliwal*, 150 Wn. 2d 559, 573 (2003). Because this lapse in representing Shelby was caused by her actual conflict of interest, Shelby is entitled to a new trial.

2. *Was it objectively reasonable not to call witnesses Howard who had information that supported Shelby's claim of self-defense, and impeach some of witness Bohlen's testimony.*

Judge Worswick found that it was not reasonable for trial counsel's failure to call Tony Howard as a witness. Howard gave a pre-trial statement that corroborated Shelby's claim of justifiable homicide. Mr. Howard, who used to date one of Ms. Bohlen's friends, informed defense investigator Stortini that he had overheard Ms. Bohlen telling her friends that Shelby shot Butler during a struggle and in self-defense. Exhibit 7. Like Singleton, Howard had been

represented by DAC. There is no evidence that the conflict was discussed with Mr. Shelby or that a conflict waiver was signed.

"Under the Sixth Amendment, if a defendant has a constitutional right to counsel, he also has a corresponding right to representation that is free from any conflict of interest." *United States v. Vaguero*, 997 F.2d 78, 89 (5th Cir. 1993) (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

To prevail on his claim, Shelby must show that his trial attorney was acting under the influence of an actual conflict of interest that adversely affected his performance at trial. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); see also *Strickland v. Washington*, 466 U.S. 668 (1984); *Perillo v Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). He need not show prejudice in the sense that the outcome of the proceeding would have been different if it were not for his attorney's conflict of interest.[2] *Perillo*, 205 F.3d at 781-82 ("Assuming the defendant establishes an actual conflict that adversely affected counsel's performance, prejudice is presumed without any further inquiry in the effect of the actual conflict on the outcome of the defendant's trial."). The *Cuyler* standard applies here because Shelby's claim involves his attorney's conflict of interest

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[2] As the Court noted in *Perillo*:

> The *Cuyler* standard is 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 charged the result of the proceeding. *Cuyler*, on the other hand, permits a defendant who raised no objection at trial to recover upon showing that an actual conflict of interest adversely affected counsel's performance.

stemming from multiple representation, rather than a conflict of interest springing "from a conflict between the attorney's personal interest and that of his client." *United States v. Newell*, 315 F.3d 510, 516 (5th Cir. 2002) (quoting *Beets v. Scott*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc)).[3] The determinations whether a conflict existed and whether the conflict had an adverse effect are mixed questions of law and fact, which we review de novo. *Strickland*, 466 U.S. at 698; *Perillo*, 205 F.3d at 781.

Courts applying *Cuyler* traditionally have couched its test in terms of two questions: (1) whether there was an *actual* conflict of interest, as opposed to a merely potential or hypothetical conflict, and (2) whether the actual conflict adversely affected counsel's representation. See, e.g., *Perillo*, 205 F.3d at 782; *Hernandez v. Johnson*, 108 F.3d 554, 559-61 (5th Cir. 1997). However, in *Mickens*, the Supreme Court announced that "the *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. 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 (2002). Regardless of this clarification of the terminology, the relevant questions remain the same, and this Court must ask whether the DAC attorneys labored under a conflict of interest, which was not merely hypothetical, and whether that conflict adversely affected the representation (i.e., whether it was

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

[3] The *Cuyler* standard applies to Shelby's claim notwithstanding the Supreme Court's recent decision in *Mickens v. Taylor*, 535 U.S. 162 (2002). In *Mickens*, the Supreme Court noted that it has never extended *Cuyler* to cases of successive, as opposed to concurrent, representation, and the Court expressed concern about whether *Cuyler* or *Strickland* provides the proper standard for resolving conflict-of-interest claims involving successive representation. See *Mickens*, 535 U.S. at 174-76.

an actual conflict). See *McFarland v. Yukins*, 356 F.3d 688, 705-06 (6th Cir. 2004) (noting that *Mickens* changed the terminology, but not the substance, of the *Cuyler* test); *Moss v. United States*, 323 F.3d 445, 467 n.23 (6th Cir. 2003).

"A conflict [of interest] exists when defense counsel places himself in a position conducive to divided loyalties." *United States v. Medina*, 161 F.3d 867, 870 n.1 (1998) (quoting *United States v. Carpenter*, 769 F.2d 258, 263 (5th Cir. 1985)) (alternation in original) (internal quotation marks omitted); accord *Mitchell v. Maggio*, 679 F.2d 77, 79 (5th Cir. 1982). This question is highly fact-sensitive. See *Perillo*, 205 F.3d at 782, 798-99. Whether a conflict of interest exists depends on a number of factors, including, but not limited to, whether the attorney has confidential information that is helpful to one client but harmful to another; whether and how closely the subject matter of the multiple representations is related; how close in time the multiple representations are related; and whether the prior representation has been unambiguously terminated. *See id.* at 798-99.

"An adverse effect on counsel's performance may be shown with evidence that counsel's judgment was actually fettered by concern over the effect of certain trial decisions on other clients." *Perillo*, 205 F.3d at 807 (internal quotations omitted).

> [W] hen a [defendant's] claim is premised solely upon what a conflicted lawyer failed to do on his or her behalf, the [defendant] must generally establish adverse effect by demonstrating that there was some plausible alternative defense strategy that could have been pursued, but was not, because of the actual conflict.

Id.

The evidentiary hearing established two important facts relevant to these issues. The first is that, throughout the proceedings, trial counsel knew that Shelby was asserting that he acted in self-defense. The second fact is that, although the DAC attorneys acknowledged that representation of both a defendant and potential witness raised actual conflicts of interest, they resolved the issue by failing to interview or challenge their witness/clients including those who had evidence that supported Shelby's defense.

The problem is that rather than solving the problem, this procedure actually exacerbated it. The Ninth Circuit has repeatedly found that "a lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (finding defense counsel's performance deficient because he failed to review or introduce at trial documents corroborating defense witness's testimony); see also *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (finding defense counsel's performance deficient because he failed to interview or call at trial three witnesses who had told police and investigators that they saw the victim alive a day after the defendant allegedly killed her).

The *Lord* case is particularly instructive here. In that case, defense counsel had their investigator speak to three alibi witnesses. The trial attorneys discounted the credibility of these potential witnesses without ever personally interviewing the witnesses; rather they relied on the report of the investigator. The Ninth Circuit found that this "cursory" investigation and subsequent failure to call the alibi witnesses was deficient performance. *Lord* at 1093. The

Court said that while it would ordinarily defer to counsel's judgment about calling witnesses, such deference was not appropriate where judgments were made about a witness "without looking him in the eye and hearing him tell his story." *Id.* at 1095.

In order to prevail on Shelby's defenses, the defense needed to present all the available corroborating evidence – including the evidence from Mr. Howard. It is clear from Mr. Stortini's notes in Exhibit 7 that Howard had evidence to support Shelby's claim of self-defense and it was not fully investigated or presented. This prejudiced his defense. The evidence in this case was not so strong that Shelby might not have prevailed on his claim of self-defense. For example, the jury found that the evidence did not demonstrate that Shelby premeditated the murders. Had the proper, available evidence been presented, the jury may well have concluded that Shelby broke into the apartment in an effort to protect Ms. Bohlen and fired the gun only after Mr. Butler came at him or feigned having a gun himself.

The only explanation for counsel's failure to investigate, interview or call Howard as a witness is that he was a prior client of DAC. Thus, the DAC attorney's chose to honor their duties to Howard over their duties to Shelby. Thus, this Court should find that this is a separate basis for granting Shelby a new trial.

3. Was it ineffective assistance of counsel to fail to elicit testimony from Kevin Cubean that he heard scuffling before he heard shots?

In *Strickland v. Washington*, the Supreme Court propounded a two prong test whereby a defendant claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," and (2) the

attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. The *Strickland* Court made clear that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. See also *Williams v. Taylor*, 529 U.S. 362, 395, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

As argued in Shelby's original pleading in this Court, in reading the trial transcripts it is clear Mr. Thoenig was not prepared to question Mr. Cubean. Kevin Cubean had been interviewed by Mr. Stortini, the investigator, but after the state called him to testify, Mr. Thoenig told the court that he was not prepared to cross-examine Mr. Cubean. TR 396. Mr. Cubean seemed surprised and asked to talk to defense counsel. TR 396-398. It is unknown what was said, but in any event, counsel gave up the opportunity for cross-examination that could have emphasized the positive information that Mr. Cubean told the defense investigator. Mr. Cubean would have confirmed that Mr. Shelby was calm as they headed to the apartment, that Shelby was just planning to talk with Ms. Bohlen, he did not think Mr. Shelby had a gun with him, and that he heard scuffling before any shots were fired. APP 124-126. Mr. Cubean could have also contradicted Jeremy Cleveland's testimony that he had heard Mr. Shelby say "Do you like that, do you want some more" after the shooting. Cleveland testified that he had heard this as he was passing Mr. Cubean when he left the apartment, but Mr. Cubean never testified to any such statement. TR 434; APP 124-126. Counsel's statements and actions at trial suggest that his failure to cross-examine this witness was not tactical, but due to a lack of preparation. Nor did

Mr. Thoenig provide any evidence at the reference hearing that his decisions to fail to elicit any information from Cubean was in any way strategic.

Judge Worswick properly concluded that this failure to prepare for and cross-examine Mr. Cubean to bring out his favorable testimony was deficient performance. She erred, however, in concluding that it was not prejudicial to the presentation of Shelby's defense. As argued above, the case against Shelby was not overwhelming and every piece of evidence that supported his claim of self-defense was essential. Thus, the trial court should have granted Shelby a new trial on this issue.

4. Should the trial court have considered Shelby's claim that Thoenig ineffective when he failed to prepare Shelby for testifying and, failed to call him as a witness.

The United States Supreme Court has made it clear that a criminal defendant has a constitutional right to testify at trial. *United State v. Dunnigan*, 507 U.S. 87, 96, 113 S.Ct. 1111, 1117, 122 L.Ed.2d 445 (1993); *Rock v. Arkansas*, 483 U.S. 44, 49-52, 107 S.Ct. 2704, 2708-2709, 97 L.Ed.2d 37 (1987); *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983); *Faretta v. California*, 422 U.S. 806, 829-834, 95 S.Ct. 2525, 2538-41, 45 L.Ed.2d 562 (1975); *Harris v. New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971). In *Rock v. Arkansas*, the Supreme Court stated that, although, under the common law, a criminal defendant was disqualified from testifying, "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas,* 483 U.S. at 49, 107 S.Ct. at 2708. The right to testify. The Washington State Supreme Court, relying on *Rock*, has

stated that the defendant, not counsel, has the authority to decide whether to testify or not. *State v. Thomas*, 128 Wash 2nd 553, 558, 910 P. 2nd 475 (1996).

A defendant's right to testify at a criminal trial originates in three provisions of the United States Constitution. The Fourteenth Amendment's guarantee of due process of law includes the right to be heard and to offer testimony. *Rock v. Arkansas*, 483 U.S. at 51, 107 S.Ct. at 2709; *Faretta v. California*, 422 U.S. at 819 n. 15, 95 S.Ct. at 2533 n. 15. The Sixth Amendment, which grants an accused the right to call witnesses, logically includes the right to testify at trial if the accused decides it would be advantageous to place his or her testimony before the jury. *Rock v. Arkansas*, 483 U.S. at 52, 107 S.Ct. at 2709. Moreover, the Court recognized that, under the Sixth Amendment, the right to present the accused's version of events in the accused's own words is even more fundamental than the right to self-representation, a right "necessarily implied by the structure of the amendment." Id. (quoting *Faretta v. California*, 422 U.S. at 819, 95 S.Ct. at 2533). The right to testify is also "a necessary corollary" to the Fifth Amendment's guarantee against compelled self-incrimination. Id. The most serious decisions in a criminal case are whether to have counsel or represent oneself, to stand trial or to plead guilty, to be tried by a judge or a jury, and to tell one's story or to keep silent, *United States v. Boyd*, 86 F.3d 719, 723 (7th Cir.1996), and the decision whether to testify may be the single most important factor in a criminal case. *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir.1992). "In fact, the most important witness for the defense in many criminal cases is the defendant himself," *Rock v. Arkansas*, 483 U.S. 44, 52,107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987), and as the Court has noted in another context, "[t]he most persuasive counsel may not be able to speak for a defendant

as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961) (plurality opinion).

Thus, a waiver of the right to testify must be knowing, voluntary and intelligent. *State v. Thomas*, 128 Wash. 2nd at 559. It is trial counsel's duty to explain that right to the defendant. *Id.* at 560.

Even though this Court stated in footnote 1 in the Order transferring Petition for Reference Hearing that it did not intend to limit the trial court in its examination of Shelby's claims of ineffective assistance of counsel, the trial judge refused to allow Shelby to develop the evidence on this issue. But evidence from the defendant is particularly critical when the defendant claims self-defense. In Washington, evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *State v. Janes*, 121 Wash.2d 220, 238, 850 P.2d 495 (1993) (citing *State v. Allery*, 101 Wash.2d 591, 594, 682 P.2d 312 (1984)). This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wash.2d at 238, 850 P.2d 495.

It is nearly impossible for the jury to put themselves in the shoes of the defendant if they do not hear from him. In this case, defense counsel knew from the outset that Shelby claimed that he acted in self-defense. The failure to prepare Shelby to testify and to allow him to make

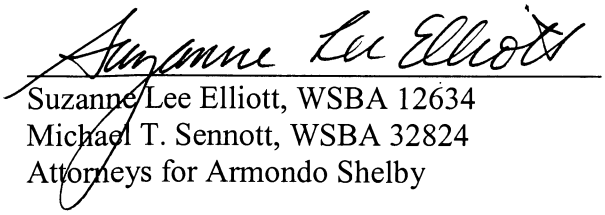
that decision, was deficient performance. And, this deficiency was prejudicial to Shelby's defense.

The trial court should have granted Shelby a new trial on this basis as well.

E. CONCLUSION

The trial judge correctly concluded that Shelby's trial counsel had an actual conflict of interest when she simultaneously represented Shelby and Singleton and that the conflict adversely affected the outcome of Shelby's trial. The trial court should also have granted him a new trial because his counsel failed to call Howard, failed to elicit favorable evidence from Cubean, and failed to properly prepare and call Shelby as a witness.

Respectfully submitted this 10th day of February, 2006.



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Certification of Service by Mail

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