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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ARMONDO SHELBY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 04-2-04286-6

SUPPLEMENTAL BRIEF FOLLOWING REFERENCE HEARING

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

1. Has petitioner abandoned his claim that the Department of Assigned Counsel's simultaneous representation of Shelby and Howard created a lapse in representation where petition fails to argue this issue in his brief? (Petitioner's Assignment of Error No. 1) 1

2. Did the reference hearing court properly conclude that it was objectively reasonable for counsel not to call Tony Howard as a witness (Conclusion of Law No. 5)? (Petitioner's Assignment of Error No. 1) 1

3. Did the reference hearing court properly conclude that petitioner was not prejudiced, and therefore counsel was not ineffective, for failing to elicit evidence from Kevin Cubean that he heard "scuffling" prior to the shots being fired (Conclusion of Law No. 9)? (Petitioner's Assignment of Error No. 2)..... 1

4. Did the reference hearing court properly deny petitioner's request to consider additional claims beyond the scope of the reference hearing order? (Petitioner's Assignment of Error No. 3)..... 1

B. STATE'S ASSIGNMENTS OF ERROR..... 2

1. Did the trial court erroneously conclude that it was not objectively reasonable for counsel to fail to elicit testimony from Kevin Cubean that he heard scuffling before he heard shots (Conclusion of Law No. 9)? 2

2. Did the trial court err in its conclusion that Pierson's dual representation of Singleton and Shelby created an actual conflict of interest that resulted in a lapse of representation entitling Shelby to a new trial (Conclusion of Law Nos. 11, 12 and 13)? 2

C.	<u>ISSUES PERTAINING TO STATE'S ASSIGNMENTS OF ERROR</u>	2
1.	Was it reasonable for counsel not to inquire of Kevin Cuban that he heard scuffling prior to the shots being fired?	2
2.	Did the trial court err in concluding that counsel had an actual conflict of interest that affected counsel's performance?	2
B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure	2
2.	Facts	4
C.	<u>ARGUMENT</u>	8
1.	THE TRIAL COURT ENTERED APPROPRIATE FINDINGS OF FACT FOLLOWING THE REFERENCE HEARING; THE COURT'S CONCLUSIONS OF LAW NOS. 4, 5, AND 9 ARE ALSO PROPER.	8
2.	THE TRIAL COURT ERRED IN ITS CONCLUSION THAT DEFENSE COUNSEL'S DUAL REPRESENTATION OF SINGLETON AND SHELBY CREATED AN ACTUAL CONFLICT OF INTEREST THAT RESULTED IN A LAPSE OF REPRESENTATION ENTITLING SHELBY TO A NEW TRIAL.	19
3.	THE TRIAL COURT DID NOT ERR, AND PETITIONER WAS NOT PREJUDICED, BY DECLINING TO ADDRESS THE ISSUE OF WHETHER MR. THOENIG ADVISED THE DEFENDANT THAT HE HAD THE RIGHT TO TESTIFY	25
D.	<u>CONCLUSION</u>	28

Table of Authorities

Federal Cases

<u>Burger v. Kemp</u> , 483 U.S. 776, 784, 107 S. Ct. 3114, 3120, 97 L. Ed. 2d 638 (1987).....	12
<u>Cuyler v. Sullivan</u> , 446 U.S. 335, 349, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).....	12, 13, 20
<u>Mickens v. Taylor</u> , 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).....	12, 20
<u>Rock v. Arkansas</u> , 483 U.S. 44, 49-52, 107 S. Ct. 2704, 2708-09, 122 L. Ed. 2d 37 (1987).....	25
<u>Strickland v. Washington</u> , 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984).....	11, 15, 16
<u>United States v. Cronin</u> , 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19, 80 L. Ed. 2d 657 (1984).....	16, 17
<u>United States v. Iorizzo</u> , 786 F.2d 52, 58 (2 nd Cir. 1986).....	20
<u>United States v. Levy</u> , 25 F.3d 146, 157 (2 nd Cir. 1994).....	20

State Cases

<u>In re Hagler</u> , 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).....	24
<u>In re Lord</u> , 123 Wn.2d 296, 316, 868, P.2d 835, <u>cert. denied</u> , 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994).....	25
<u>In re Personal Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	8
<u>In re Personal Restraint of Gentry</u> , 137 Wn.2d 378, 410, 972 P.2d 1250 (1999).....	8
<u>In re Pirtle</u> , 136 Wn.2d 467, 475, 965 P.2d 593 (1998).....	12
<u>In re PRP of Brett</u> , 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001).....	10

<u>Ino Ino, Inc. v. City of Bellevue</u> , 132 Wn.2d 103, 112, 937 P.2d 154 (1997).....	8
<u>Lassila v. Wenatchee</u> , 89 Wn.2d 804, 809, 576 P.2d 54 (1978).....	11
<u>State v. Callahan</u> , 87 Wn. App. 925, 934, 943 P.2d 676 (1997).....	22, 23
<u>State v. Davis</u> , 25 Wn. App. 134, 137 n.1, 605 P.2d 359 (1980).....	10
<u>State v. Dennison</u> , 115 Wn.2d 609, 615, 801 P.2d 193 (1990).....	21
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 573, 79 P.3d 432 (2003)	12, 13
<u>State v. Hatfield</u> , 51 Wn. App. 408, 413, 754 P.2d 136 (1988).....	12
<u>State v. Hill</u> , 123 Wn.2d 64, 870 P.2d 313 (1994).....	8
<u>State v. McFarland</u> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).....	18
<u>State v. Sherwood</u> , 71 Wn. App. 481, 483, 860 P.2d 407 (1993), <u>review denied</u> , 123 Wn.2d 1022 (1994).....	16
<u>State v. Thomas</u> , 128 Wn.2d 553, 558, 910 P.2d 475 (1996).....	25, 26
<u>State v. Wood</u> , 89 Wn.2d 97, 99, 569 P.2d 1148 (1977).....	11
<u>Valley View Indus. Park v. Redmond</u> , 107 Wn.2d 621, 630, 733 P.2d 182 (1987).....	9, 10

Constitutional Provisions

Sixth Amendment, United States Constitution	15, 16, 19, 25
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Statutes

RCW 9A.32.030(c)	21
------------------------	----

Rules and Regulations

CrR 3.5.....	26
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A. ISSUES PERTAINING TO PETITIONER'S ASSIGNMENTS OF ERROR.

1. Has petitioner abandoned his claim that the Department of Assigned Counsel's simultaneous representation of Shelby and Howard created a lapse in representation where petitioner fails to argue this issue in his brief?

(Petitioner's Assignment of Error No. 1)

2. Did the reference hearing court properly conclude that it was objectively reasonable for counsel not to call Tony Howard as a witness (Conclusion of Law No. 5)?

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4. Did the reference hearing court properly deny petitioner's request to consider additional claims beyond the scope of the reference hearing order?

(Petitioner's Assignment of Error No. 3)

B. STATE'S ASSIGNMENTS OF ERROR.

1. Did the trial court erroneously conclude that it was not objectively reasonable for counsel to fail to elicit testimony from Kevin Cubean that he heard scuffling before he heard shots (Conclusion of Law No. 9)?
2. Did the trial court err in its conclusion that Pierson's dual representation of Singleton and Shelby created an actual conflict of interest that resulted in a lapse of representation entitling Shelby to a new trial (Conclusion of Law Nos. 11, 12 and 13)?

C. ISSUES PERTAINING TO STATE'S ASSIGNMENTS OF ERROR.

1. Was it reasonable for counsel not to inquire of Kevin Cubean that he heard scuffling prior to the shots being fired?
2. Did the trial court err in concluding that counsel had an actual conflict of interest that affected counsel's performance?

D. STATEMENT OF THE CASE.

1. Procedure

The State adopts and incorporates the "Statement of the Case" included in the State's Response to Personal Restraint Petition and adds the following facts for the court's consideration.

Petitioner was charged by Information with aggravated murder in the first degree, burglary in the first degree and unlawful possession of a firearm in the first degree. A jury convicted petitioner of murder in the first degree, burglary in the first degree and unlawful possession of a firearm in the first degree on May 25, 1999 after a trial. The Court of Appeals, Division II, sustained petitioner's convictions on appeal. Petitioner then filed a personal restraint petition with the Court of Appeals. Counsel for petitioner presented evidence to the Court of Appeals sufficient to support three of petitioner's claims: (1) juror bias; (2) ineffective assistance of counsel; and (3) irreconcilable conflicts of interest of trial counsel. On December 5, 2003, the Court of Appeals directed the Pierce County Superior Court to hold a reference hearing and enter findings of fact specific to petitioner's three claims. The reference hearing was held before the Honorable Lisa Worswick on December 1 and 2, 2004. RP 1-324.

The court heard testimony from Jane Pierson (trial counsel for petitioner), Raymond Thoenig (trial counsel for petitioner), Michael Stortini (defense investigator), Armondo Shelby, Paul O'Brien (DAC attorney), Jean Brateng (juror), Robert DePan (DAC attorney), Kathleen Oliver (trial prosecutor), Jeffrey Brateng (correctional officer), John Chin (DAC attorney), and Diane Clarkson (prosecutor). The petitioner did not call Danion Singleton, Tony Howard, Daniel Griffith, Danielle Griffith, Kevin Cubean, Jeremy Cleveland, or Jennifer Bohlen.

Judge Worswick considered the exhibits and testimony of witnesses. At the conclusion of the hearing, Judge Worswick determined that the petitioner was entitled to a new trial. The court's findings of fact and conclusions of law were entered on March 18, 2005. CP 1-17.

This case is now back before this court for supplemental briefing on the reference hearing findings.

2. Facts

The substantive facts of the crime can be found in the State's Brief for Reference Hearing. CP 112-136. The following facts were elicited at the reference hearing.

Defendant was represented at trial by the Pierce County Department of Assigned Counsel (DAC). Attorneys Ray Thoenig and Jane Pierson were assigned to represent the defendant. RP 9; CP 1-17 (FOF 36).

Pierson was assigned to co-chair Shelby's case in February 1998. RP 9. Pierson testified that it was a joint decision between Thoenig and Pierson regarding who to call as witnesses in Shelby's case, although Thoenig made the ultimate decision. RP 11.

At the same time she represented Shelby, Pierson represented Danion Singleton in Pierce County Superior Court. RP 17. Singleton was a potential witness in Shelby's trial. RP 17. Pierson did not bring it to the

court's attention that she was representing Singleton and Thoenig was unaware of the dual representation. CP 1-17 (FOF 39); RP 28.

Defense investigator Mike Stortini interviewed Singleton on September 8, 1998. RP 117; Exhibit 2. Singleton was incarcerated with the defendant in the Pierce County Jail on domestic violence charges. Ex. 2. Singleton was acquainted with the defendant prior to their incarceration and he had also read about the defendant's case in the Tacoma News Tribune. Id. Singleton talked to the defendant in jail. Id. After talking to Singleton, defendant instructed Stortini to interview Singleton. Id. Stortini provided Thoenig with a report regarding Singleton's statements during the interview. Singleton claimed to have once had a run-in with a guy named Tirrell who was a gang member and went by the nickname "T-Dog." Id. Singleton did not know if this was the same Tirrell that the defendant had murdered. Id. Singleton claimed that the "run-in" occurred in January 1998 and involved the person named "T-Dog" pulling a gun during a gang confrontation. Id. Singleton told Stortini that he would be able to identify "T-dog" from a booking photo of the person. CP 1-17 (FOF 51). There was no follow up done by defense counsel on the issue of the identity of "T-dog." CP 1-17 (FOF 52). Thoenig testified at the reference hearing that, if he had information that the victim could have

been involved in a shooting prior to his death, he would have followed up on it. CP 1-17 (FOF 53); RP 94-95.

Singleton told Stortini that he did not see or speak to the defendant between January '98 and the murder in February '98, and thus Shelby had no knowledge of these alleged events. Singleton was not called as a witness at Shelby's trial and did not testify at the reference hearing. CP 1-17 (FOF 3).

Pierson testified at the reference hearing that she was "quite sure" that she told Shelby about her representation of Singleton, although Shelby did not sign a waiver of conflict. RP 19. Pierson did not recall any discussion regarding why Singleton would not be called as a witness, but it was her opinion that Singleton did not have evidence that would support Shelby's claim of self-defense. RP 18. There was no evidence presented at the reference hearing that Singleton had knowledge of the victim's propensity for violence. CP 1-17 (FOF 14). Pierson testified that her dual representation of Singleton and Shelby had nothing to do with not calling Singleton as a witness. RP 49.

Tony Howard was also a potential witness in Shelby's trial. Howard was represented by DAC Attorney John Chin while Shelby's case was pending. Thoenig was not aware that Chin was representing Howard. CP 1-17 (FOF 39). Stortini interviewed Tony Howard on March 5, 1999.

Howard was also acquainted with the defendant and in jail with him. Ex. 7. Howard was in jail and serving a 31-month sentence for reckless endangerment at the time of the interview. CP 1-17 (FOF 20); Ex. 7. This conviction and Howard's other criminal activity would have been issues for cross-examination. CP 1-17 (FOF 22). Stortini provided Thoenig with a report of the statements Howard made during the interview. Howard told Stortini that he was acquainted with Tirrell Butler and he described Butler as "pretty cool." Ex. 7. Howard told Stortini that he had never seen Butler with a gun. Id. Howard claimed to have overheard Jennifer Bohlen tell Danielle Griffith after the incident that the shooting was in self-defense. Id. Griffith and Bohlen denied that Bohlen made this statement. CP 1-17 (FOF 23). Howard was not called as a witness in Shelby's case and did not testify at the reference hearing. CP 1-17 (FOF 3).

At the reference hearing, Pierson testified that Chin's representation of Howard had no effect on her decision whether to call Howard as a witness. RP 53. Chin testified at the reference hearing that he did not disclose any client confidences to Pierson or Thoenig. RP 282.

Kevin Cubean was a witness at Shelby's trial, but did not testify at the reference hearing. CP 1-17 (FOF 3). Cubean told officers shortly

after the incident that he heard scuffling prior to the shots being fired. The defense did not question Cuban about this at trial. CP 1-17 (FOF 28).

E. ARGUMENT.

1. THE TRIAL COURT ENTERED APPROPRIATE FINDINGS OF FACT FOLLOWING THE REFERENCE HEARING; THE COURT'S CONCLUSIONS OF LAW NOS. 4, 5, AND 9 ARE ALSO PROPER.

A personal restraint petitioner bears the burden of proving issues in a reference hearing by a preponderance of the evidence. In re Personal Restraint of Gentry, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999). Where a trial court makes factual findings, those that go unchallenged are verities on appeal. In re Personal Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004)(citing State v. Hill, 123 Wn.2d 64, 870 P.2d 313 (1994)). An appellate court's review of *challenged* factual findings is limited to determining whether the findings are supported by substantial evidence. In re Gentry, 137 Wn.2d at 410. "Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." In re Davis, 152 Wn.2d at 679-80 (citing Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112, 937 P.2d 154 (1997)). A party abandons an assignment of error to

findings of fact by failing to argue them in his or her brief. Valley View Indus. Park v. Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987).

Petitioner assigns error to eleven findings of fact¹, but does not claim that there is an absence of substantial evidence supporting the

¹ The challenged findings are:

10. The only testimony witness Tony Howard would have offered regarding the victim's propensity for violence was useful only as potential rebuttal evidence.
11. Howard's testimony, if admissible, could only have been offered for the limited purpose of testing the veracity of witness Jennifer Bohlen.
12. Thus, Howard's testimony would not have been admissible to prove the truth of the matter asserted.
13. There is no other testimony of Howard in the record, which would go to the victim's propensity to violence, as Howard told the defense investigator that the victim seemed "pretty cool";
28. The defense did not question Cuban about the scuffling he heard prior to hearing the shots being fired.
31. Because the evidence was capable of both interpretations, the outcome of the proceedings would not have been difference [*sic*] even if this testimony had been offered.
35. [Cleveland's statements that the victim had a 'gangster type attitude' and 'saw himself as a tough guy'] would not be admissible to prove the victim's violent tendencies.
37. The Department of Assigned Counsel also represented Tony Howard, Jeremy Cleveland, Daniel Griffith and Jennifer Bohlen.
38. None of these conflicts created any lapse in representation of Shelby.
40. There were plausible strategic concerns sufficient to overcome an inference that divided loyalty was the reason Mr. Howard was not called. Thus, counsel engaged in a strategic decision to avoid that problem.

findings. The State presumes that petitioner has abandoned his argument with respect to unsupported findings. See Valley View Indus. Park v. Redmond, supra.

Instead, petitioner claims that the trial court erred in its conclusions from the findings. Petitioner assigns error to the trial court's conclusions of law 4, 5, and 9, which provide:

4. It was objectively reasonable for counsel not to call witnesses Danion Singleton and Troy [*sic*] Howard on the issue of the victim's propensity for violence.
5. It was objectively reasonable for counsel to fail to call Tony Howard as a witness.
9. It was not objectively reasonable for counsel to fail to elicit testimony from Kevin Cubean that he heard scuffling before he heard the shots. However, this court finds that the outcome of the proceedings would not have differed even if this testimony had been elicited.

Because this court ordered a reference hearing only, the legal conclusions flowing from the findings and testimony are reviewed de novo. In re PRP of Brett, 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001); State v. Davis, 25 Wn. App. 134, 137 n.1, 605 P.2d 359 (1980). Thus, this court should apply the reference hearing facts to the law and draw its own conclusions regarding the petitioner's claims.

- a. Petitioner has abandoned his argument that the trial court's conclusion of law number 4 was erroneous.

Petitioner assigns error to the court's conclusion of law no. 4, which states:

It was objectively reasonable for counsel not to call witnesses Danion Singleton and Troy Howard on the issue of the victim's propensity for violence.

Petitioner has not provided any argument regarding why the court's conclusion is erroneous. The State presumes that petitioner's failure to brief this matter constitutes an abandonment of the issue. See Lassila v. Wenatchee, 89 Wn.2d 804, 809, 576 P.2d 54 (1978); State v. Wood, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977).

- b. The trial court properly concluded that it was objectively reasonable for counsel not to call Tony Howard as a witness (COL 5).

Petitioner claims that counsel had a conflict of interest which resulted in Howard not being called as a witness and thus, the trial court erroneously concluded that it was objectively reasonable for counsel not to call Tony Howard as a witness.

A defendant who claims conflict of interest must establish an actual conflict of interest. Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). An "actual conflict"

exists if the lawyer's duty to another client materially limits the representation of the defendant. In re Pirtle, 136 Wn.2d 467, 475, 965 P.2d 593 (1998). The defendant must establish that his lawyer represented two clients with materially adverse interests such that the lawyer was caught in a "struggle to serve two masters." State v. Hatfield, 51 Wn. App. 408, 413, 754 P.2d 136 (1988). Reviewing courts presume that a lawyer is fully conscious of the duty of complete loyalty to his or her client. Burger v. Kemp, 483 U.S. 776, 784, 107 S. Ct. 3114, 3120, 97 L. Ed. 2d 638 (1987).

To prevail on a claim of conflict of interest due to the concurrent representation of clients, the petitioner must show that a conflict of interest adversely affected his counsel's performance. Mickens v. Tayler, 535 U.S. 162, 174, 112 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). To show an adverse effect, petitioner must show counsel "actively represented conflicting interests" and the conflict "significantly affected" counsel's performance, thereby rendering the verdict unreliable. Mickens, 535 U.S. at 173, 175. The mere possibility of a conflict is not enough to warrant reversal of a conviction. State v. Dhaliwal, 150 Wn.2d 559, 573, 79 P.3d 432 (2003)(citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). A trial attorney's legitimate tactical decision is not

evidence of a conflict of interest. Dhaliwal, 150 Wn.2d at 572-73 (citing Cuyler, 446 U.S. at 347-48)).

In this case, Thoenig's decision not to call Howard was not a result of a conflict of interest. Instead, Thoenig made a legitimate tactical decision not to call Howard. First, Thoenig was not even aware that DAC was representing Howard at the time. CP 1-17 (FOF 39). Second, based on the unchallenged² findings of fact, Howard's proposed testimony that he overheard Jennifer Bohlen tell Danielle Griffith that the shooting was in self-defense could only have been offered for the limited purpose of testing the veracity of witness Jennifer Bohlen. CP 1-17 (FOF 11). In order to get Howard's testimony before the jury, Thoenig would have first had to confront Bohlen with the alleged out-of-court statement. Bohlen would have denied this statement, at which time Howard's testimony would have been admissible to impeach Bohlen.³ CP 1-17 (FOF 23). But Thoenig knew from the discovery that Griffith would also deny that Bohlen made the statement. CP 1-17 (FOF 41). In addition, several unpleasant facts about Howard could have been elicited had Howard

² Petitioner assigned error to the findings of fact, but did not present argument on how the findings are unsupported. The findings are therefore verities.

³ Howard's testimony would not have been admissible for its truth. (FOF 12).

testified. For example, Howard was serving time for a drive-by shooting at the time that he told defendant about the conversation he allegedly overheard. CP 1-17 (FOF 20). If Howard had been called as a defense witness, his conviction for reckless endangerment and other criminal activity would have been issues for cross-examination. CP 1-17 (FOF 20, 22). The State also had evidence that the defendant had been attempting to manipulate the evidence in the case. Calling Howard to impeach Bohlen would have opened the door to Bohlen's prior consistent statements, which in turn would have opened the door to damaging testimony regarding defendant's efforts to manipulate Bohlen's testimony. (CP 1-17 (FOF 42). Calling Howard was fraught with problems and it was objectively reasonable for Thoenig not to transport him from prison to the trial and call him as a witness. These are plausible strategic concerns sufficient to overcome an inference that divided loyalty was the reason Mr. Howard was not called. (FOF 40).

The trial court properly entered conclusion of law number 5.

- c. The trial court properly concluded that counsel was not ineffective for failing to elicit testimony from Kevin Cuban that he heard scuffling before he heard shots (COL 9).

“In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.” U.S. Const., amend. VI. The right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984). The standard for judging any claim of ineffective assistance of counsel is whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id. at 686, 104 S. Ct. at 2064.

“No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Id., 466 U.S. at 688-89, 104 S.Ct. at 2065. A reviewing court must give great deference to defense counsel’s decision-making because it is too easy for a criminal defendant to second-guess his counsel after a conviction; and it is too easy for a reviewing court to second-guess a trial decision and find it unreasonable in hindsight. Id. Review of trial counsel’s performance must be confined to whether

counsel's assistance was reasonable considering all of the circumstances at the time of the trial. Id. at 688, 104 S.Ct. at 2065.

The test for determining whether a criminal defendant received effective assistance of counsel consists of two parts: (1) whether defense counsel's performance fell below an objective standard of reasonableness, and (2) whether the defendant was actually prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The defendant has the heavy burden of proving, after a review of the entire record, that trial counsel's performance fell below an objective standard of reasonableness considering all of the circumstances. State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993), review denied, 123 Wn.2d 1022 (1994). The Sixth Amendment does not require counsel to do what is impossible. United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19, 80 L. Ed. 2d 657 (1984). There is a strong presumption that defense counsel made all significant decisions in the exercise of reasonable professional judgment. Sherwood at 483.

When considering the evidence in this case, the court must remember that a lawyer representing a criminal defendant is presumed to be competent. Cronin, 466 U.S. at 658, 104 S. Ct. at 2047. The burden rests upon the accused to demonstrate a violation of the right to the effective assistance of counsel. Id. If trial counsel was a reasonably

effective advocate, counsel satisfied the constitutional requirement of effective counsel. Id., 466 U.S. at 657, 104 S. Ct. at 2047.

In this case, the trial court concluded that it was *not* objectively reasonable for counsel to fail to elicit testimony from Kevin Cubean that he heard scuffling before the shots, but that counsel's failure to elicit this testimony did not affect the outcome of the trial. The State disagrees with the court's conclusion that it was not objectively reasonable not to ask Cubean about the scuffling. After all, Cubean told police that he was outside of the apartment when he heard this and thus could not have testified as to what was actually going on inside. On the other hand, Jennifer Bohlen, who was *inside* the apartment immediately prior to the shooting testified that the defendant forced his way through the bedroom door and then forced his way through the bathroom door – these actions obviously made some noise. Because there is no evidence that Cubean would have attributed the “scuffling” sound to any person's conduct, Thoenig's failure to ask him about the scuffling did not fall below a standard of reasonableness.

Regardless of this court's determination regarding the reasonableness of Thoenig's actions in failing to ask about the scuffling, the court properly concluded that the defendant was not prejudiced by counsel's failure to elicit this evidence. In a claim of ineffective

assistance, a criminal defendant bears the burden of showing both deficient performance **and** resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice is established only where "there is a reasonable probability that, except for counsel's unprofessional errors, *the result of the proceeding would have been different.*" McFarland, 127 Wn.2d at 335 (emphasis added).

Defendant presented no evidence or argument as to why such a question would have been important or likely to change the outcome of the trial. As stated earlier, Cubean testified that he was outside of the apartment. Bohlen testified at trial that the defendant forced his way through the bedroom door and then forced his way through the bathroom door. These actions obviously would have made some noise and even if Cubean would have testified that he heard "scuffling" inside the apartment, Cubean could not have testified as to what was actually going on. Bohlen and Cleveland were eyewitnesses to what happened and they told the jury what happened.

Moreover, the issue of scuffling pertains to Shelby's claim of self-defense. The trial record reflects that Shelby's claim of self-defense would not have prevailed in any event for two reasons: (1) there was *overwhelming* evidence that Shelby was the first aggressor; and (2) Shelby's claim of self-defense was weak, marred by inconsistencies, and

unsupported by either testimony from other witnesses or by the physical evidence.

The trial court should have concluded that it was objectively reasonable for Thoenig not to ask about the scuffling. The trial court's conclusion to the contrary is erroneous. Regardless, the trial court properly concluded that petitioner was not prejudiced by counsel's failure to elicit this testimony.

2. THE TRIAL COURT ERRED IN ITS CONCLUSION THAT DEFENSE COUNSEL'S DUAL REPRESENTATION OF SINGLETON AND SHELBY CREATED AN ACTUAL CONFLICT OF INTEREST THAT RESULTED IN A LAPSE OF REPRESENTATION ENTITLING SHELBY TO A NEW TRIAL.

The facts elicited at the reference hearing do not support the trial court's conclusion that Pierson had an actual conflict of interest that resulted in a lapse of representation and deprived Shelby of his Sixth Amendment right to counsel. CP 1-17 (COL 11-13). Petitioner has not shown that Pierson's simultaneous representation of Shelby and Singleton created an *actual* conflict of interest. The trial court's conclusions of law nos. 11-13 on this issue are erroneous.

To show a violation of the Sixth Amendment right to counsel free from conflict, the defendant must always demonstrate that his or her attorney had a conflict of interest that adversely affected his or her

performance. Mickens v. Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). “An actual conflict of interest means precisely a conflict that affected counsel’s performance – as opposed to a mere theoretical division of loyalties.” Mickens, 535 U.S. at 171. While the defendant need not establish prejudice, the defendant must demonstrate that a ‘lapse in representation’ resulted from the conflict. United States v. Iorizzo, 786 F.2d 52, 58 (2nd Cir. 1986)(quoting Cuyler v. Sullivan, 446 U.S. 335, 349, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). To prove a lapse in representation, a defendant must demonstrate that some “plausible alternative defense strategy or tactic might have been pursued” and that the ‘alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.’” United States v. Levy, 25 F.3d 146, 157 (2nd Cir. 1994). Prejudice is presumed if the defendant makes this showing. Sullivan, 446 U.S. at 349-50.

The key issue in this case is whether defense counsel failed to pursue a “plausible” alternative defense theory. If not, then petitioner has not shown a lapse in representation entitling him to a new trial. The findings from the reference hearing clearly establish that counsel’s reasons for not following up on the Danion Singleton testimony were tactical. Counsel did not fail to pursue a *plausible* defense because Singleton’s testimony was not relevant to a plausible defense. Danion Singleton, at best, had evidence relevant to self-defense. Defendant could not claim self-defense to the crime of felony murder in the first degree.

In first degree felony murder, the elements of “premeditation” or “extreme indifference to human life” are replaced by circumstances specific to the felonies enumerated in the felony murder statute, including burglary in the first degree. RCW 9A.32.030(c). If a homicide occurs during the course of the commission of the crime of burglary in the first degree, it unnecessary for the State to prove that the slayer acted with malice, design, or premeditation. RCW 9A.32.030(c); State v. Dennison, 115 Wn.2d 609, 615, 801 P.2d 193 (1990).

All of the felonies enumerated in RCW 9A.32.030(c) are violent felonies. The felony murder statute holds felons strictly liable for any death occurring during the course of the violent felony because the felony’s self-determined conduct inherently enhances the risk of death to others. State v. Dennison, 115 Wn.2d 609, 615-616, 801 P.2d 193 (1990). The felony murder statute has harsh consequences for those felons who make the decision to use force and risk the death of others. Id. at 615. Accordingly, a felony who kills during the commission of a violent felony may not claim self-defense. Id. at 616-16.

In the present case, the defendant could not claim self-defense to the charge of felony murder in the first degree. Dennison, supra. Thus, Singleton’s potential testimony was only relevant to a defense that defendant was not entitled to. Accordingly, the trial court’s conclusion

from the reference hearing that the defendant was actually prejudiced by defense counsel's conflict of interest with Danion Singleton is erroneous and must be vacated.

Even if petitioner was entitled to self-defense, Singleton's testimony regarding a violent encounter he had with Tirrell Butler, if true, would not have been admissible because Shelby had no personal knowledge of the alleged incident at the time of the shooting. A claim of self-defense based upon the defendant's knowledge of the victim's violent reputation requires evidence that the defendant had personal knowledge of the reputation at the time he defended himself. State v. Callahan, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). Such evidence does not exist here because Singleton did not tell the defendant about "T-dog" until after the defendant killed Tirrell Butler.

The only other situation where a victim's reputation for violence would be admissible is to show that it is more likely that the victim was the first aggressor. State v. Callahan, 87 Wn. App. 925, 934-35, 943 P.2d 676 (1997). In this situation, the defendant does not need to be aware of the victim's reputation. Thus, Singleton's testimony regarding his run-in with Tirrell (assuming for the sake of argument that "T-dog" is Tirrell) would have been admissible if there was an issue regarding first aggressor. There was no issue regarding first aggressor in this case. Defendant's testimony at the reference hearing, in conjunction with the State's

evidence at trial, made it an undisputed fact that the defendant was the initial aggressor. This fact would not have been an issue and Singleton's proposed testimony was therefore irrelevant and inadmissible.

Additionally, the defendant never presented any evidence to demonstrate that Singleton could testify to true "reputation" evidence. Evidence offered for purposes of establishing a reputation for violence must come from a witness who has "personal knowledge of the victim's reputation in a relevant community during a relevant time period." Callahan, 87 Wn. App. at 934. Here, defendant failed to demonstrate at the reference hearing that Singleton had knowledge of Butler's reputation within a relevant community.

Simply put, Danion Singleton was not a viable witness in this case. Counsel had legitimate reasons for not following up on Singleton's statement. Even if Singleton was provided a montage and identified Tirrell as "T-dog", that evidence would not have been admissible at trial. Counsel likely realized this and made the determination not to waste time and effort following up on evidence that was ultimately inadmissible. Counsel's decision not to call Singleton as a witness was not a result of her wanting to protect Singleton from incriminating himself. Rather, it was a decision based on the undisputed fact that Singleton had nothing to add to Shelby's defense.

The trial court's conclusion that Pierson's dual representation of Shelby and Singleton created a conflict of interest that resulted in a lapse

of representation is erroneous. A new trial should not be granted on this issue. It would be contrary to any notion of logic, fairness, or justice to grant a new trial for an admitted conflict of interest that had absolutely no bearing on the outcome of the case. This court is well familiar with the principle that Washington courts recognize that collateral relief undermines the principle of finality of litigation. In re Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Collateral relief degrades the prominence of the trial proceedings and sometimes costs society the right to punish guilty offenders. Id. These are significant costs which require that collateral relief be limited by Washington courts. Id. An error that may justify or even require reversal on direct appeal will not necessarily support a collateral attack on the judgment and sentence. Id.

In this case, granting a new trial because defense counsel failed to pursue a line of investigation that was irrelevant to the jury's verdict on felony murder would essentially allow a new trial for a guilty offender for no reason that affected the jury's verdict. Granting a new trial would undermine a jury verdict that had nothing to do with the claimed error. This is even truer when considering the defendant's testimony at the reference hearing, where he essentially confessed to committing felony murder in the first degree. The petition must be dismissed.

3. THE TRIAL COURT DID NOT ERR, AND PETITIONER WAS NOT PREJUDICED, BY DECLINING TO ADDRESS THE ISSUE OF WHETHER MR. THOENIG ADVISED THE DEFENDANT THAT HE HAD THE RIGHT TO TESTIFY.

A criminal defendant has the right to testify at his jury trial, regardless of the counsel of his lawyer. Rock v. Arkansas, 483 U.S. 44, 49-52, 107 S. Ct. 2704, 2708-09, 122 L. Ed. 2d 37 (1987); State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). The trial judge has no duty to engage the defendant in a colloquy concerning his right to testify before the jury because there is a danger that the judge may intrude into the attorney-client relationship protected by the Sixth Amendment. In re Lord, 123 Wn.2d 296, 316, 868, P.2d 835, cert. denied, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994).

A defendant's decision not to testify must be a knowing, intelligent, voluntary decision. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Accordingly, it is the responsibility of the defendant's lawyer to discuss the defendant's right to testify with the defendant. Id. at 317. A defendant's decision not to testify after discussion with his lawyer is not subject to an evidentiary hearing on voluntariness unless the defendant alleges that his counsel *actually prevented* him from testifying. Id. at 557.

In the present case, there is no claim that the petitioner's lawyers actually prevented him from testifying. As such, there was no need for an evidentiary hearing under Thomas and no need for the referencing hearing court to facilitate development of testimony regarding this issue.

Moreover, all of the evidence in the record demonstrates that the defendant was fully aware of his right to testify at trial and that this subject was discussed with him by his attorneys. Prior to the CrR 3.5 hearing, the trial court advised the defendant:

It's my duty to advise you, Mr. Shelby, that you may but need not testify at the hearing on the circumstances surrounding your statement. If you do testify at the hearing, you'll be subject to cross-examination with respect to the circumstances surrounding the statement and with respect to your credibility.

If you do testify at the hearing, you do not by so testifying waive your right to remain silent during trial. And if you do testify at the hearing, neither this fact nor your testimony at the hearing shall be mentioned at trial ***unless you testify concerning the statement at trial.***

TRP 97-98. Although this advisement was specific to the CrR 3.5 hearing and was not intended to be an advisement concerning the defendant's right to testify at trial, the court's statements clearly indicated to the defendant he could testify at trial.

All of the testimony at the reference hearing, including the defendant's own testimony, established that his counsel discussed testifying with him. Counsel Jane Pierson testified that she discussed

testifying at trial with the defendant and there were “downsides and upsides.” RP 52. Pierson also discussed testifying with the defendant in writing. Exhibit 5; RP 66. Lead counsel Ray Thoenig also testified that he discussed trial testimony with the defendant. RP 84. Thoenig testified that he had never told a client he could not testify at trial. RP 96. Thoenig further related that he would have discussed with the defendant the impact of his prior convictions on his trial testimony. RP 96.

Most importantly, the defendant admitted at the reference hearing that both of his lawyers discussed testifying with him:

Q: Did you ever discuss your claim of self-defense with Ms. Pierson?

A: Yes, I did.

Q: And did you ever discuss the possibility of you having to testify at trial with her?

A: Yes, I did.

RP 172.

Q: Did you discuss you testifying at trial with Mr. Thoenig?

A: Yes, I did.

RP 183. Defendant admitted again on cross-examination that Thoenig discussed testifying at trial with him. RP 221. The defendant further

admitted that he lied repeatedly to his counsel during trial preparations.

RP 224.

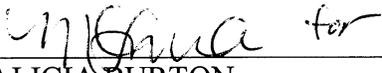
Finally, petitioner's claim that the trial court refused to allow him to develop testimony along these lines is contradicted by the record. The trial court sustained a hearsay objection but told petitioner's counsel that the issue could be raised later. RP 184. Petitioner chose not to pursue the issue any further. Petitioner's claim fails.

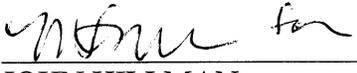
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court dismiss petitioner's personal restraint petition.

DATED: May 16, 2006

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/16/15
Date
Signature

FILED
COURT OF APPEALS
06 MAY 15 AM 11:45
STATE OF WASHINGTON
BY _____
DEPUTY