No. 35773-9

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

In re the Personal Restraint Petition of:

FILED
COURT OF APPEALS
DIVISION II
07 JAN -9 PM 12:30
STATE OF WASHINGTON
BY DEPUTY

JIMMEE CHEA,

Petitioner.

PERSONAL RESTRAINT PETITION

Jimmee Chea C-B-11, #843065
Clallam Bay Corr. Center
1830 Eagle Crest Way
Clallam Bay, Wa 98326

CERTIFICATE OF SERVICE
I certify that I mailed
copies of PRP
to Court appointed
atty
12/11/07 CM
Date Signed

PETITIONER MAY FILE THE
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Jimmee Chea was found guilty as an accomplice to five counts of Aggravated Murder in the First Degree and Five Counts of Assault in the First Degree based upon the testimony of co-defendants who received life-saving deals for their testimony. Despite having an alibi to the crimes, Mr. Chea's attorney failed to investigate the alibi or to present the testimony of witnesses who place Chea at home, asleep, at the time of the offenses. Mr. Chea asserts that counsel's failure to pursue this alibi defense rendered her representation constitutionally deficient. Mr. Chea's trial was further infected by a juror who consistently scowled at Chea during trial, and repeatedly smiled, winked and nodded at the prosecuting attorney, and was caught hugging the prosecutor in the hallway of the courthouse during trial. Mr. Chea asserts that this conduct violated his constitutional rights to a fair trial by an impartial jury.

In addition, Mr. Chea asserts that multiple convictions for Aggravated Murder in the First Degree, all based upon the theory that multiple murders were committed at the same time, violates the constitutional prohibition against Double Jeopardy. He likewise asserts that multiple convictions as an accomplice to Assault in the

First Degree based upon the intent to harm only a single person violates the Double Jeopardy prohibition. Lastly, Mr. Chea asserts that the state failed to prove every element of the crimes beyond a reasonable doubt. Mr. Chea seeks a dismissal of the charges against him or a new trial upon reduced charges.

I. STATUS OF PETITIONER.

Petitioner applies for relief from confinement. Mr. Chea is confined at the Clallam Bay Corrections Center, in Clallam Bay, Clallam County, Washington. He is in custody pursuant to felony convictions from the Pierce County Superior Court for five counts of Aggravated Murder in the First Degree and five counts of Assault in the First Degree. A finding that an accomplice was armed with a firearm was entered on each count. Pierce County Superior Court cause number 98-1-03157-5. Judgment was entered following a jury trial before the Honorable Karen Strombom. Mr. Chea was represented by Ann Farrel Stenberg and Kristi Minchau-Weeks at trial. The total sentence imposed was five consecutive terms of Life Without the Possibility of Parole for the aggravated first degree murder convictions, 500 months for the assault in the first degree convictions and 600 months in firearm enhancements.

This petition relies upon the trial court record, as well as the affidavits of Felisa Kamtansy, Bouaphan Tansy, Seak Heang Chea, Jesse Chea and Jimmee Chea.

Mr. Chea appealed his convictions. State v. Chea, COA No. 29027-8-II. Division Two affirmed the trial court decision on all grounds on May 3, 2005. Appellate counsel was Rita Griffith. Mr. Chea sought discretionary review of the Washington State Supreme Court, No. 770859. That court denied review on January 10, 2006. A mandate issued on January 18, 2006. Mr. Chea has not filed any previous personal restraint petitions.

II. GROUNDS FOR RELIEF.

1. Facts of the Case. This Court has previously observed that no physical evidence linked Mr. Chea to the charged crimes and that he was convicted solely upon the testimony of co-defendants. See Unpublished Opinion entered in State v. Chea, No. 29027-8-II. In order to obtain such testimony, the state reduced five counts of aggravated first degree murder and five counts of first degree assault against each co-defendant to a single count of first degree manslaughter. RP 3978-3988; 4479. The only person who plead guilty as charged to the crimes testified that Chea was not involved. RP 5960, 6016-6020.

Mr. Chea has always maintained that he was not involved with the shootings at the Trang Dai Cafe on July 5, 1998,[1] and that he was at home, asleep, at the time of the shootings RP 6358. Mr. Chea informed his attorneys of these facts prior to, and during, trial. Chea Declaration; see also RP 6664 (counsel requesting jury to accept Chea's lone alibi testimony as credible). However, counsel failed to interview any of the other occupants of the house. Mr. Chea's mother, father, sister and brother all witnessed him at home, either watching television or sleeping on the couch between midnight and 2:00 a.m. on the night of the shootings. Declarations of Kamtansy, Tansy, Seak Heang Chea and Jesse Chea. The state's evidence demonstrated that the shootings took place at approximately 1:45 a.m. on July 5, 1998. State v. Chea, 29027-8-II, Opinion at 2.

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[1] Mr. Chea was also deprived of his right to present evidence concerning drug and gambling activities at the Trang Dai, thereby compromising his defense that the shootings were related to the owner of the Cafe's drug and gambling debts, State v. Chea, Unpublished Opinion at 19, that co-defendant Chak had plead guilty to a drive-by shooting the day before the Trang Dai shooting, RP 3921, 4023-4027, 4043, that an SUV was captured on surveillance videotape in front of the Cafe immediately after the shooting, and a letter from a separate person indicating his involvement with the shooting. RP 6289-6290, 6498-6503, 6510.

Mr. Chea's father informed a defense investigator of these facts. Affidavit of Seak Heang Chea. However, defense counsel never investigated further or summoned these witnesses to testify.

During trial, Juror number 11, a former crime victim who worked for the Kent Police Department, RP 1190-1191, 1193-1195, repeatedly scowled at Mr. Chea and his attorneys. This happened whenever victims or witnesses testified against Chea and/or when she entered the courtroom. Alternatively, Juror 11 repeatedly smiled, winked and waved at the prosecuting attorney and lead Detective. When defense attorney Minchau witnessed Juror 11 hugging Deputy Prosecuting Attorney Ed Murphy in the hallway of the courthouse during a trial break, the issue of Juror 11's behavior and external unauthorized prosecutorial contact was brought to the court's attention. The trial judge stated that she would take the matter under advisement, and that she would "watch" Juror 11. Chea Declaration.

As stated above, this petition relies upon the trial court record. Despite the fact that this objection was made in open court (in the absence of the jury), the trial transcripts Mr. Chea possesses contains no reference to this hearing or objection. Therefore, Mr. Chea requests

this Court to either order the trial court reporter to provide the relevant portions of the transcript, or, if they are unavailable or missing, to send this matter to the superior court to create an evidentiary foundation for this issue. The only mention of this issue in the transcripts Mr. Chea possesses was where his attorney informed the court that "the issue of Juror No. 11 [is still outstanding]. The court was going to take that under advisement." RP 5731. No further action was taken by the trial court. Chea Declaration.

2. Other Remedies are Inadequate.

Mr. Chea appealed his convictions. The Court of Appeals denied that appeal and the Washington State Supreme Court declined to accept review. Mr. Chea therefore has no adequate remedy at law to address the issues presented herein absent this petition.

3. The Restraint is Unlawful.

1. PETITIONER IS ENTITLED TO RELIEF BY PERSONAL RESTRAINT PETITION

The availability of personal restraint petitions is required by Article I, Section 13, and Article IV, Section 4, of the Washington State Constitution. "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." Tolliver v. Olsen, 109 Wn.2d

607, 609-10, 746 P.2d 809 (1987).

The proceeding is now denominated a "personal restraint petition" and the procedures are governed by the personal restraint petition rules. RAP 16.3-16.15; Tolliver, 109 Wn.2d at 613. RAP 16.4(a) states that relief "will" be granted if the petitioner is under restraint, RAP 16.4(b), other remedies are not available, RAP 16.4(d), and, in the words of RAP 16.4(c), the restraint is "unlawful" for the following reasons (relevant here):

> (2) The conviction was obtained . . . in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
>
> (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding . . ."

In addition, a petitioner must show that he was actually and substantially prejudiced by a violation of his constitutional rights or by a fundamental error of law. Personal Restraint of Pirtle, 136 Wn.2d 467, 473, 965 P.2d 593 (1998) (citations omitted). If the petitioner makes a prima facie showing of error, but the issue cannot be resolved on the existing record, the case must be transferred to the superior court for an evidentiary hearing. Id. (citing RAP 16.11(b)).

2. MR. CHEA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO INVESTIGATE AND PURSUE AN ALIBI DEFENSE

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove that counsel provided ineffective assistance, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced him. Personal Restraint of Woods, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Reasonableness is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. Personal Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. Pirtle, 136 Wn.2d at 487.

"[A] lawyer who fails to adequately investigate and introduce evidence that demonstrates his client's factual innocence, or

that raises significant doubt that undermines confidence in the verdict, renders deficient performance." State v. Riofta, ___ Wn.App. ___ (Div. II 2006)(citing Avila v. Galaza, 297 F.3d 911, 919 (9th Cir. 2002)). Such a holding rests upon the fact that defense counsel must "conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena witnesses." State v. Mourice, 79 Wn.Ap. 544, 552, 903 P.2d 514 (1995). As the Washington State Supreme Court has recognized, the "failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest." State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

Here, defense counsel was specifically informed prior to trial that Mr. Chea was at home on the evening of the Trang Dai Cafe shootings. Declaration of Jimmee Chea. Moreover, counsel was informed that Mr. Chea was living at his parents home and that others lived in that house Id. Despite this knowledge, counsel failed to speak with other members of the Chea household. Mr. Chea's father even informed a defense investigator that he saw his son at home, asleep,

on the night of the shootings. Declaration of Seak Heang Chea. This evidence was never pursued by counsel. During trial, Mr. Chea informed counsel that his family desired to testify to witnessing him at home at the time of the shootings. Declaration of Jimmee Chea. Mr. Chea specifically testified that he was at home on the night of the shootings. RP 6358. However, counsel failed to call known and available witnesses to corroborate this alibi.

This is deficient performance. No competent attorney would failed to investigate, pursue and present an alibi defense, or corroborating alibi witnesses, in a highly circumstantial case which rests solely upon the testimony of co-defendants who took life-saving deals in exchange for implicating Chea. Because this case turned solely upon credibility determinations, it was prejudicial to fail to present known corroborating alibi witnesses testimony. Cf. RP 6661-64 (defense counsel characterizing police investigation as ineffective and unreliable because they failed to investigate and substantiate co-defendant and witness' alibis). Without this corroborating testimony, no evidence existed to bolster Chea's credibility or to attack the testifying co-defendants veracity. Critically, Mr. Chea's

mother, father, sister and brother **were the only available witnesses** in this criminal trial who were not convicted criminals, gang members or were implicated by others in the shooting. Thus, they were far more reliable, un-impeachable, witnesses than those who implicated Chea to save their lives.

Such ineffective and prejudicial assistance by counsel in a trial where a citizen is facing multiple terms of life without the possibility of parole clearly calls the fairness of the trial into question and casts significant doubt upon its outcome. See Strickland, 466 U.S. at 687 (prejudice demonstrated when counsel's performance deprived defendant of a "fair trial, a trial whose result is reliable."); Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir. 1994)(counsel's failure to investigate alibi witness was prejudicially ineffective because alibi witness was known); State v. Claiborne, ___ Wn.App. ___ (1998)(DOC's computorized "law library lists this case as published but provides no cite)(reversing conviction because of ineffective assistance of counsel under facts virtually identical Chea's). Mr. Chea's convictions should be vacated and this case remanded for a new trial with competent defense counsel.

3. MR. CHEA WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY BY THE BIASED CONDUCT OF JUROR 11 AND HER UNAUTHORIZED CONTACT WITH THE PROSECUTOR

The Sixth And Fourteenth Amendments to the United States Constitution guarantees a criminal defendant the right to a fair trial by an impartial jury. In Remmer v. United States, 347 U.S. 227, 229, 98 L.Ed. 654, 74 S.Ct. 450 (1954), the Supreme Court held that any unapproved private communication, contact or tampering with a juror during a criminal trial is presumptively prejudicial. Trial judges are responsible for ensuring that the defendant receives a fair trial. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 555, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976). When improper conduct or contact with a juror is brought to the trial court's attention, the court must hold a hearing to determine any prejudicial impact. Remmer, 347 U.S. at 230.

Juror 11's conduct and unauthorized contact with the prosecuting attorney was brought to the trial court's attention. Chea Declaration; RP 5731. Despite taking the matter "under advisement", the trial court failed to make any further inquiry, question Juror 11, or to question the rest of the jury to determine if her improper conduct and contact had influenced them.

This conduct, coupled with the trial court's failure to evaluate the juror's bias, unathorized contact and potential influence on the rest of the jury is presumptively prejudicial and requires a new trial. See United States v. Schwarz, 283 F.3d 76, 98-99 (2d Cir. 2002)(abuse of discretion to fail to hold hearing regarding allegations of juror misconduct); United States v. Davis, 177 F.3d 552, 556-57 (6th Cir. 1999)(abuse of discretion to fail to question whether remaining jurors were influenced by biased juror's conduct); and United States v. Humphrey, 208 F.3d 1190, 1199 (10th Cir. 2000)(abuse of discretion to fail to conduct full investigation into juror misconduct).

As stated above, Mr. Chea has submitted evidence to this Court that Juror 11's conduct was objected to and brought to the attention of the trial court. Chea Declaration. The report of proceedings, however, only makes passing reference to this matter. RP 5731. Because of this deficiency, Mr. Chea requests this Court to order the record of these objections produced. RAP 16.11(b) & 16.15(h). If such a record cannot be produced, Mr. Chea requests an evidentiary hearing in order to develop facts which corroborate his declaration (i.e., that a timely objection

was made and the trial court failed to conduct a proper inquiry into the matter). RAP 16.11(b); State v. Larson, 62 Wn.2d 64, 67, 381 P.2d 120 (1963)("we must [provide for an indigent defendant] a "record of sufficient completeness" for a review of the errors raised by the defendant in a criminal case."); Draper v. Washington, 372 U.S. 497, 9 L.Ed.2d 899, 83 S.Ct. 1296 (1963)(same). When such a record corroborates Mr. Chea's declaration to this Court (or if the prosecutor stipulates to his facts), Mr. Chea requests a new trial based upon the trial court's knowing failure to evaluate the influence an obviously biased and prosecutorially compromised juror had on the outcome of the trial.

4. THE CONSTITUTIONAL PROHIBITION AGAINST MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE WAS VIOLATED WHEN THE STATE CONVICTED MR. CHEA FOR FIVE COUNTS OF AGGRAVATED FIRST DEGREE MURDER

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Washington's constitutional rule against double jeopardy, Const. Art. I, § 9, offers the same protection as the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The Double Jeopardy Clause provides three

separate constitutional protections, one of which protects against multiple punishments for the same offense. Gocken, 127 Wn.2d at 100. The double jeopardy bar applies regardless of whether the sentences for the offenses in question are concurrent or consecutive, or have any impact upon the amount of time spent in prison. Ball v. United States, 470 U.S. 856, 864-65, 84 L.Ed.2d 740, 105 S.Ct. 1668 (1985); State v. Calle, 125 Wn.2d 769, 773-75, 888 P.2d 155 (1995).

Traditionally, Washington courts apply the "same evidence" test to determine whether a defendant was punished multiple times for the same offense. Calle, 125 Wn.2d at 777. Under this test, the double jeopardy rights of a defendant are violated if he is convicted of offenses that are the same in law and in fact. Id., at 777-78. However, "[w]hen a defendant is convicted for violating one statute multiple times, the same evidence test will never be satisfied. . . . Two convictions for violating the same statute will always be the same in law, but they will never be the same in fact." State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998). Therefore, the same evidence test can only be applied if a defendant has multiple convictions for violating several statutory provisions. Id.;

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Thus, where a defendant is accused of violating one statute multiple times, "[t]he proper inquiry . . . is what 'unit of prosecution' has the legislature intended as the punishable act under the specific criminal statute." Adel, 136 Wn.2d at 643 (citing Bell, 349 U.S. at 83). "When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of crime. . . . If the legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the ambiguity should be construed in favor of lenity." Adel, 136 Wn.2d at 634-35; see also Bell, 349 U.S. at 84 ("[I]f congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.").

The courts "must be especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges." Adel, 136 Wn.2d at 635. Accordingly, the court of appeals has noted that

"the unit of prosecution analysis is designed in part to avoid overzealous charging by the prosecution." State v. Turner, 102 Wn.App. 202, 210, 6 P.3d 1226 (2000).

The "unit of prosecution" analysis begins with the statute in question. State v. Bobic, 140 Wn.2d 250, 263, 996 P.2d 610 (2000). Mr. Chea was charged with five counts of Aggravated First Degree Murder, the statutory definition of which is as follows:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist (as charged):
>
> (10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person."

RCW 10.95.020.

The statute expressly states an Aggravated First Degree Murder occurs when "more than victim" was murdered. It uses the plural "murders" to require that the additional "victims" be murder victims. Thus, the unit of prosecution under the clear terms of the statute is a single offense whenever multiple murders occur during the course of a first degree murder.

Support for this conclusion comes from the sentence imposed upon conviction: either death

or life without the possibility of parole (death-by-incarceration). Multiple convictions make absolutely no sense in the face of such sentencing. A person can only be subject to the death penalty or a lifetime of incarceration once. Considering the effect of the sentence imposed, it is highly unlikely that the legislature authorized multiple convictions for each and every victim under subsection (10).

If the state desired to charge Mr. Chea for the death of each individual victim, it should have done so under RCW 9A.32.030, which provides that a first degree murder occurs when:

> (a) with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person."

Absent the plural offense aggravating circumstance, this statute would authorize a separate conviction for each victim -- if the state could prove that Mr. Chea acted with knowledge that his conduct was furthering multiple murders. However, the state sought the higher degree murder, based upon subsection (10), that there was "more than one victim" to the "murders". Because this statute expressly authorizes a single offense for multiple murders, it was a violation of Mr. Chea's Double Jeopardy rights to convict him of multiple counts of Aggravated First Degree

Murder under subsection (10).

Such a holding must be sustained even if ambiguity exists over whether individual Aggravated First Degree Murder convictions can be imposed under section (10). To authorize such cumulative punishment, the legislature must clearly specify it. See State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999). When the legislature fails to specifically delineate the applicable unit of prosecution, or authorize a multiplicity of offenses, the rule of lenity requires the imposition of only a single punishment. Bell, 349 U.S. at 84; United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952)(where the offense is a course of conduct, the court should treat as one offense all violations that arise from that singleness of thought, purpose, or action).

5. MR. CHEA'S DOUBLE JEOPARDY RIGHTS WERE VIOLATED WHEN THE STATE CONVICTED HIM AS AN ACCOMPLICE TO FIVE COUNTS OF ASSAULT IN THE FIRST DEGREE BASED UPON HIS KNOWLEDGE OF ONLY A SINGLE OFFENSE

For purposes of this argumnet, Mr. Chea incorporates the authorities set forth above. As with that Double Jeopardy argument, analysis of this claim starts with the statute charged. Mr. Chea was charged as an accomplice to five counts of assault in the first degree under RCW

9A.36.011(1) provides:

> A person is guilty of assault in the first degree if he or she, with the intent to inflict great bodily harm;
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.

The accomplice statute, RCW 9A.08.020(3), provides that:

> "A person is an accomplice of another person in the commission of a crime if:
>
> (a) with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it."

The Washington State Supreme Court has previously explained that the accomplice liability statute does not authorize the charging of every crime which the principle commits:

> "in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged."

State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).

The question Mr. Chea presents is whether the interplay of these statutes authorized multiple convictions for first degree assault based upon an accomplice's intent to harm only a single person? Put another way, when an accomplice acts with the knowledge of perpetrating a single

assault, may the state convict him for multiple offenses when the principle independently exceeds such knowledge and assaults numerous people?

Mr. Chea asserts that the answer is no. In State v. Cronin, 142 Wn.2d 568 (2000) and State v. Roberts, 142 Wn.2d 471, (2000), the Supreme Court clarified that the accomplice statute does not authorize vicarious liability against an accomplice for every act of the principle See Cronin, 142 Wn.2d at 579 ("the fact that a purported accomplice knows that the principle intends to commit 'a crime' does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principle."). Those cases addressed jury instructions which relieved the state of its burden of proof. Now, the same in-for-a-dime in-for-a-dollar theory of vicarious accomplice liability is advanced by the state through the charging of multiple offenses based upon the accomplice's knowledge of the principles intent to commit only a single offense against a specific person.

While courts have held that multiple offenses can be charged against **the principle** when **the principle** exceeds the scope of **his** original intent, State v. Wilson, 125 Wn.2d 212, 883 P.2d 320

(1994), no Washington court has extended that theory to an accomplice. Mr. Chea was alleged to have acted with the knowledge of only harming a single person, Son Kim. Based upon this limited evidentiary foundation, the state may not charge him for the multiple offenses independently committed by the principle. Rather, the state may only seek a single conviction against him -- the one alleging Son Kim as the victim.

6. THE STATE FAILED TO PROVE EVERY ESSENTIAL ELEMENT OF THE CRIMES BEYOND A REASONABLE DOUBT

The Fifth Amendment to the United States Constitution requires the state to prove essential element of the crimes charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 365, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). If the government fails to meet its burden of proof, the defendant must be acquitted. Winship, 397 U.S. at 363. When a defendant challenges the sufficiency of evidence, the reviewing court must determine whether any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); Jackson v. Virginia, 443 U.S. 307 (1979). A claim of insufficient evidence admits the truth of the state's evidence, and a reviewing court must draw

all reasonable inferences from the evidence in a light most favorable to the state. Id; State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the prosecutor admitted that there was no evidence that Mr. Chea acted with knowledge to kill five people in an aggravated fashion and/or to shoot five others:

> "Did the participants in the crime go to the cafe with the intent to kill the five people who were killed? Probably not. Because there's no evidence that they knew that those individuals were even going to be there or that they even cared about them being there."

RP 6569.

With this concession in mind, lets look at the state's case. The state showed that in the early morning hours of July 5, 1998, five people were killed and five others wounded by gunfire at the Trang Dai Cafe, a Vietnamese restaurant and karaoke bar in Tacoma, Washington. RP 2523-2535, 3393-3396. The surviving victims and other patrons were unable to identify or describe the persons who shot from the alcove at the front door of the restaurant or to say with certainty how many assailant there were. RP 2630, 2637-39, 2779-83, 2788, 2808-09, 2907, 2949, 3097, 3103, 3180. They describe the shooters generally as dressed in dark clothing and silent while in

the Trang Dai. RP 2777, 2788, 3079, 3098, 3295-98, 3305, 3308, 3760. Ballistics experts determined that at least five different weapons were fired inside and outside the cafe. RP 2680-81, 2822, 3411-12, 5404-09, 5413, 5418, 5420.

One of the victims to the shooting, Son Kim, ultimately provided what the police believed was the motive for the shooting. RP 3063-67, 3081-83. Kim initially told police that he was not the target of the shooting, because the shooting was not directed at him. RP 3092. He also said he had a problem with members of the "OLB" Bloods gang. RP 3082-83, 3089-90. He later told police about a fight he had with a man named Ri Le and Le's brother Khanh Trinh three months earlier. RP 3058-59, 3063-66, 3287-90. Kim testified at trial that weeks or even months before the shooting he had raised his hand in anger at Chea as Chea drove by him. RP 3067. He denied that he ever "stared hard" at Chea or had any problem with him. RP 3096. Kim recognized Chea, but did not know him by name. RP 3059

A poor-quality surveillance tape showed two cars driving through the alley behind the Trang Dai and returning a short time later. RP 2999-3002, 3014, 3018, 3217, 3371, 3393, 3396. The cars left after the shooting. RP 3396. Police

later located a car similar to one in the video being driven by Veasna Sok. RP 3206, 3211-12. Police believed that the other car was a silver or gray Honda, consistent with a 1983 model, that resembled a car belonging to Jimmee Chea. RP 3209, 3222, 3437. Thereafter, police opined that because Chea was of Cambodian decent and a "LOC" gang member, that he and the LOC's might be involved. RP 3438. The police then rounded up and arrested twenty people whom they believed were associated with Chea and the LOC's. RP 3452-53, 2462. Nine people, including Chea, were later charged with five counts of aggravated first degree murder and five counts of assault in the first degree for the Trang Dai shootings. fn[2]

Of these individuals, John Chak and Veasna Sok, in exchange for plea deals to first degree manslaughter, were the state's star witnesses

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[2] In addition to Chea, the state charged John Phet, Ri Le, amath Mom, Khanh Trinh, Sarun Ngeth, Marvin Leo, Veasna Sok and ohn Chak with five counts each of aggravated first degree murder and assault in the first degree. Samath Mom committed suicide. Le shot Khanh Trinh and then killed himself when the police attempted to arrest them. Marvin Leo pleaded guilty as charged. Veasna Sok, Sarun Ngeth and John Chak plead guilty to a single count of manslaughter in exchange for their testimony implicating Chea. State v. Chea, Opinion at 4 n.10.

against Chea. RP 3978-88. Chak testified that Chea called him and picked him up at his house on July 4, and took him to Ri Le's House. RP 3899. He, Chea, Ri, Khanh Trinh, Sam Mom and John Phet, went in Chea's car to meet with friends in two other cars at Sarun Ngeth's. RP 3950-07. Marvin Leo and Ngeth were in Veasna Sok's car and Ganhaa and Ko were in Dang's car. RP 3906-09. Ri got in Sok's car. RP 3909-10.

Chak said that Chea was dressed in red, which he thought was a little unusual, and Ri Le and Khanh went and purchased red clothing before they met with Sok and Dang. RP 3901, 3904 (none of the patrons of the Trang Dai reported that the shooters were dressed in red. RP 3079, 3098, 3295-98). Chak said that Chea spoke of Son Kim having "mean mugged" or stared hard at him which was disrespectful and not to be tolerated. RP 3901-02. He assumed that he and the others were going to do a drive-by shooting, but no one actually said anything was going to happen. RP 3910, 4063-64. He thought they would go to the front of the cafe and shoot; no one said that they would open the door and fire. RP 4076.

Sok testified that he did not know what was going to happen until he saw the others in the breezeway of the Trang Dai with guns; he assumed

they were going to do a drive-by, but no one said they were. RP 4650. Both Chak and Sok testified that Chea remained in his car and did not take part in the shooting. RP 3918, 4423-30; see also State v. Chea, Opinion at 2-8 for the Court's statement of the evidence against Chea.

This evidence is insufficient to support each of the five convictions for aggravated first degree murder and each of the five counts of first degree assault. The state's evidence, at best, showed that Chea drove a car to the Trang Dai accompanied by others who actually killed and wounded the patrons of the Trang Dai. The shooters themselves testified that **they didn't even know** what was going to happen until they entered the Cafe. RP 4076, 4650. Aside from the allegation that Chea commented upon Son Kim "mean mugging" him, there is no proof that Mr. Chea acted with knowledge to kill five unknown people and wound five others. As the prosecutor even conceded, there wasn't any proof that Chea even knew others were in the Cafe.

Even if we assume that the proof was sufficient to establish that Chea acted with knowledge to shoot Son Kim, that is as far as liability may attach to him; one count of first degree assault. Seated in his car behind the

Cafe with such knowledge, Mr. Chea cannot be held responsible for the independent actions of others who exceeded the scope of the intended offense. See Cronin and Roberts, supra.

This is especially true with the five charges of Aggravated First Degree Murder under subsection (10). Under this statute, the state was required to prove that Mr. Chea acted with knowledge that a first degree murder would be committed, **and that more than one victim would be murdered** as part of a common scheme or plan.

The state's entire premise for charging Mr. Chea in the manner it did was based upon the **conduct** of his co-defendants. But Chea cannot be held responsible for the conduct of another unless the state proves that he acted with the knowledge to commit the actual crime perpetrated by the principle. Such proof is not there. It is not enough to say that, because Chea intended to commit one crime, he is guilty of any and all crimes the principle eventually committed. The state was required to prove that Mr. Chea knowlingly acted with a premeditated intent to murder numerous patrons of the Trang Dai as part of a common scheme or plan. Of this, there is simply no proof whatsoever, as the state conceded in closing arguments.

7. NEITHER THE ACCOMPLICE LIABILITY STATUTE OR AGGRAVATED FIRST DEGREE MURDER STATUTE AUTHORIZE THE CONVICTION OF AN ACCOMPLICE FOR AGGRAVATED FIRST DEGREE MURDER

Mr. Chea asserts that neither the aggravated murder statute or the accomplice liability statute allows his convictions as an accomplice for aggravated first degree murder. The issue is one of statutory construction. A court's primary objective in construing a statute is to ascertain and give effect to the legislature's intent. Personal Restraint of Smith, 139 Wn.2d 199, 203, 986 P.2d 131 (1999)(citations omitted). The legislative intent is to be deduced from what the statute says. Smith, 139 Wn.2d at 204. Court's must avoid interpretations that are forced, unlikely or strained. Id.

When statutory language is clear, its plain meaning controls and may not be subject to any form of construction or interpretation. State v. J.M.., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). If a statute is ambiguous, courts may apply rules of statutory construction to deduce the legislature's intent. Post Sentencing Review of Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). A statute is ambiguous if it is susceptible to more than one reasonable interpretation and legislative history does not

resolve the ambiguity. Charles, 135 Wn.2d at 250 n.4. If a statute is ambiguous, the rule of lenity requires the statute to be construed against any increase in punishment. Id.

The first statute at issue is RCW 10.95.020, which provides in relevant part that:

> "A person is guilty of aggravated first degree murder . . . if **he or she commits** first degree murder . . . and one or more . . . aggravating circumstances exist."

The highlighted language is critical. It clearly limits the statutes reach to **the person** who **commits** the first degree murder. The Supreme Court of Washington has itself recognized this limitation:

> "The statute narrowly specifies that only those who commit 'first degree murder as defined by RCW 9A.32.030(1)(a) are subject to the death penalty. No mention is made of committing first degree murder by way of the accomplice liability statute."

Roberts, 142 Wn.2d 471, ___ (DOC's computorized "Law Library" does not provide a page cite for this case)(internal citation and emphasis omitted).

Unfortunately, this language is only dicta from a case addressing the constitutionality of applying the death penalty to an accomplice. Roberts, did not ask the question here: whether the statutory language authorizes charging an accomplice. Nevertheless, the dicta was supported by persuasive reasoning regarding the elements

of the offense:

> "RCW 9A.32.030(1)(a) requires a mens rea of premeditated intent to kill **and an actus reus that causes the death of the victim**. The accomplice liability statute requires only a mens rea of knowledge, and an actus reus of soliciting, commanding, encouraging, or requesting the commission of the crime, or aiding or agreeing to aid in the planning of the crime. RCW 9A.08.020(3)(a)."

Id. (emphasis added). From this reasoning and language it is apparent that the person who "commits" a first degree murder under RCW 10.95.020 is the one who "causes the death of the victim"; in this case the shooters.

Support for this conclusion comes from other statutory aggravating factors. For instance, the statute which authorizes firearm enhancements expressly authorizes its reach to an accomplice. RCW 9.94A.533(3) applies "if the offender **or an accomplice** was armed with a firearm." (Emphasis added). No such clarity is found in the aggravated murder statute. RCW 10.95.020's silence upon its reach to accomplices is similar to the non-exclusive list of statutory aggravating factors listed in the Sentencing Reform Act. See RCW 9.94A.535. Mr. Chea knows of no case where an accomplice was given an exceptional sentenced based upon the SRA's aggravating circumstance because of the conduct of a principle. Absent such clarity on the statutes reach, RCW 10.95.020

cannot be applied to an accomplice.

The position is even clearer when we examine the aggravating factor alleged:

> "There was more than one victim and the murders were part of a common scheme or plan or the result of a single act **of the person**."

RCW 10.95.020(10)(emphasis added).

When the statute and subsection are read together, they limit application of the statute to "the person" who "commits first degree murder" and kills "more than one victim" as "part of a common scheme or plan or . . . a single act". It is noteworthy that the statute does not separate the language "common scheme or plan" from "the person" who committed the offense through the use of a coma or other grammatical structure. See Smith, 139 Wn.2d at 133-34 (applying "last antecedent" rule of statutory construction to reach identical conclusion). Therefore, under the clear terms of the statute, only "the person" who "commits" a first degree murder and kills more than one person with the required mental state can be charged under the aggravated murder statute.

Analysis of the accomplice liability statute yields the same result. The statute states that:

> "A person is an accomplice of another in the commission of a **crime** if:

> (a) with knowledge that it will promote or facilitate the commission of the **crime**, he
>
> (i) solicits, commands, encourages, or requests **such other person to commit it**; or
>
> (ii) aids or agrees to aid **such other person** in planning or **committing it**."

RCW 9A.08.020(3).

The first two highlighted words clearly limit the reach of accomplice liability to a, or the, "crime". But, as the Supreme Court has recognized, RCW 10.95.020 is not a "crime". Rather, it is an aggravating factor which, when applied to the premeditated first degree murder statute, makes a defendant eligible for the death penalty or a lifetime of incarceration without the possibility of parole. Because RCW 9A.08.020(3) only applies to "crimes", it cannot be applied to the statutory aggravating factors set for in RCW 10.95.020.

The third highlighted phrase supports the above referenced argument addressing the fact that only "the person" who "commits" a premeditated first degree murder with aggravating circumstances is liable under RCW 10.95.020. The section suports the conclusion that an accomplice can never be determined to have "commited" the crime because the statute states that "a person is an accomplice . . . if . . . he (i) solicits, commands, encourages, or requests such **other person** to commit

it." Thus, only the principle can be determined to have actually "committed" the crime as required under RCW 10.95.020.

If accomplice liability extend to the aggravated murder statute at all, it would have to be in the limited circumstance of the fourth highlighted section; where a person "(ii) aids . . . such other person in . . . committing [the crime] (i.e., where, for example, an accomplice restrains a victim (aids) and the principle stabbs the victim (commits the crime)). This may be the "limited circumstance" that the Supreme Court referred to in passing that accomplice may be found to have actually "committed" the crime and for which the the aggravated murder statute may attach. Cf. Roberts, 142 Wn.2d at ___. But again, the Supreme Court was not asked to construe the statute in that case, and the state did not specifically charge Mr. Chea with "aiding" in the commission of "the crimes" in such a specific manner. If it did, it would have to include the other qualifying language of the accomplice liability statute -- that a person is only an accomplice "in the commission of a crime". Because RCW 10.95.020 only sets forth aggravating factors -- not a "crime" -- the clear language of the statute precludes any judicial construction or

interpretation.

Even if ambiguity exists over the accomplice liability aggravated first degree murder statutes authorize the conviction of an accomplce, such ambiguity must be resolved in Mr. Chea's favor. If the legislature sought to impose the ultimate punishments known to American criminal law of death or life without the possibility of parole to an accomplice it is required to clearly say so. In the face of such harsh and ultimate punishments, courts, defendants and attorneys should not be left guessing over whether such penalties apply to an accomplice.

IV. REQUEST FOR RELIEF.

Mr. Chea requests this Court to either vacate and dismiss his convictions, reverse his convictions and remand for a new trial, or take any other action necessary to remedy the violations of his rights as alleged herein.

V. STATEMENT OF FINANCES.

1. I ask the court to file this petition without making me pay the filing fee because I am so poor that I cannot pay the fee.

2. I have less than $10.00 in my prison account.

3. I request the court to appoint a lawyer to represent me.

4. I work as a Unit Porter for the Clallam Bay Corrections Center. I receive a gratuity in the amount of approximately $50.00 a month for this service.

5. During the past 12 months I did not receive any money from a business, profession or other form of self employment.

6. During the past 12 months, I: Did not receive any rent payments, interest or dividends; Did receive approximately $70.00 in other money; Do not have any cash except as said in answer 2; Do not have any savings or checking accounts; Do not own any stocks, bonds or notes; and Do not own or have any interest in any real estate or other valuable property.

VI. OATH OF PETITIONER.

STATE OF WASHINGTON)
) ss.
County of Clallam)

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

Jimmee Chea
#843065 C-B-11
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, Wa 98326

SUBSCRIBED AND SWORN to before me

this 7 day of January, 2007.

Notary Public in and for
the state of Washington,
residing at Clallam County
exp 6-6-10.

DEPARTMENT OF CORRECTIONS
CLALLAM BAY CORRECTIONS CENTER

PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD : 05/01/2006 TO 10/31/2006

DOC : 0000843065 NAME : CHEA JIMMEE ADMIT DATE :07/02/2002

DOB : 11/04/1979 ADMIT TIME :00:00

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
76.53	15.31	23.12	4.62

Affidavit of Felisa Kamtansy

I, Felisa Kamtansy, declares under penalty of perjury under the laws of the State of Washington that the following statements are true, correct, and based upon personal knowledge.

I am Jimmee Chea's younger sister. Around the month of June, 1998, to the best of my recollection, my brother, Jimmee Chea, left his apartment to temporarily stay at my mother's home which was located at 2218 S. 25th St., Tacoma, Washington until the day of his arrest which was on July 18, 1998. I too was present at the time and seen of his arrest, I was 13 years old at the time. Other people who lived there also were my family members Seak Heang Chea, Bouaphan Tansy, and Jesse Chea.

On July 5, 1998 I had woken up ten minutes before 2:00 A.M. like I always did everyday during that time. I made it a habit to wake up during that time to let the dogs, which belong to my brother Jimmee Chea, out of the house to relieve themselves. The dogs belonged to my brother Jimmee Chea, he was unable to keep them at his apartment so he kept them at my mother's house and I ended

up taking care of them. We kept 2 dogs inside the house and a third outside in the back yard. I am usually the only one who let them out after midnight, I started doing this since the 2 dogs were little puppies. The 2 dogs were a little bit over a year old when my brother was arrested, the police also took his dogs. In this early morning it was the same as any other early morning, I went out to the living room I notice my brother, Jimmee Chea who didn't have a room, asleep on one of the couches. I then called the 2 dogs and let them out the front door and waited about five minutes and called them back in the house. I then went back to my bed room and went back to sleep.

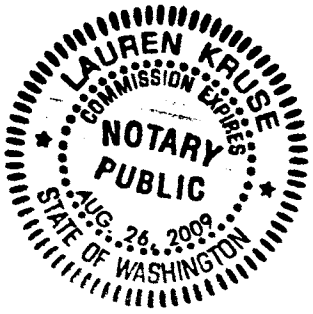
During the course of my brother's, Jimmee Chea, court proceedings I had mentioned to a member of his legal team of the above said mentioned they did not come interview me or anything.

I am willing to testify to all of the above said mentioned.

Affidavit of Felisa Kamtansy

Felisa Kamtansy
9325 Snow Creek Cir.
Stockton, CA. 95212

SUBSCRIBED AND SWORN TO before me this 27 day of Dec, 2006.



Notary Public in and for the STATE of WASHINGTON, residing at Tacoma, WA
08-26-09

Affidavit of Bouaphan Tansy

I, Bouaphan Tansy, declares under penalty of perjury under the laws of the State of Washington that the following statements are true, correct, and based upon personal knowledge.

I am Jimmee Chea's biological mother. My son Jimmee Chea was temporarily staying at my house sometime in the middle of June, 1998 until he was arrested in July 18, 1998. The location of the residence was 2218 S. 25th St., Tacoma, Washington. My other members of the family lived there also there names are Seak Heang Chea, Jesse Chea, and Felisa Chea.

On July 5, 1998 I was awoken from my sleep when my husband woke up and went to the living room. I had also gotten up and followed him. My husband said it was just the t.v. and my son must have left on. I looked over at one of my sofas and seen my son Jimmee Chea sleeping. I also seen my clock on the wall and it was around 1:05 A.M. or 1:10 A.M., my husband then turned off the t.v. and went back to our bedroom to go sleep I also followed and did the same.

Affidavit of Bouaphan Tansy

I am willing to testify to the above mentioned at court.

I also mentioned at one point in time to either my son's attorneys or his legal investigator they did nothing about it.

Bouaphan Tansy
Bouaphan Tansy
2218 S. 25th St.
Tacoma, WA. 98405

SUBSCRIBED AND SWORN TO before me this 27 day of Dec, 2006.

Lauren Kruse
Notary Public in and for the STATE of WASHINGTON, residing at
Tacoma, WA
08-26-09

LAUREN KRUSE
COMMISSION EXPIRES
NOTARY
PUBLIC
AUG. 26, 2009
STATE OF WASHINGTON

Affidavit of Seak Heang Chea

I, Seak Heang Chea, declares under penalty of perjury under the laws of the State of Washington that the following statements are true, correct, and based upon personal knowledge.

I am Jimmee Chea's biological father. From approximately mid-June, 1998 through July 18, 1998 my son Jimmee Chea lived at my home located at 2218 S. 25th St., Tacoma, Washington along with me and my other family members Bouaphan Tansy, Jesse Chea, and Felisa Chea.

In and on the early morning hours of July 5, 1998 I had awoken from sleep from sounds coming from the living room. I had gotten out of bed looked at my watch which had shown it was around 1:00 A.M., I then left my bedroom I shared with my wife and went towards the living room. The sounds I heard were coming from the television, I noticed my son, Jimmee Chea, asleep on one of the couches. I then turned off the television and told my wife who had followed me to the living room that it was just the television my son had left on. I then went back to bed to go back to sleep.

Affidavit of Seak Heang Chea

I had at one point in time mention this incident to one of my son's legal representatives and they did nothing about it.

I am willing to testify in court to all the above mentioned with the aid of a language translator.

Seak Heang Chea
2218 S. 25th St.
Tacoma, WA. 98405

SUBSCRIBED AND SWORN TO before me this 27 day of Dec, 2006.

Notary Public in and for the STATE of WASHINGTON, residing at Tacoma, WA

08-26-09

LAUREN KRUSE
COMMISSION EXPIRES
NOTARY PUBLIC
AUG. 26, 2009
STATE OF WASHINGTON

Affidavit of Jesse Chea

I, Jesse Chea, declares under penalty of perjury under the laws of the State of Washington that the following statements are true, correct, and based upon personal knowledge.

I am Jimmee Chea's younger brother. My brother was staying at my mother's house, which was located at 2218 S. 25th St., Tacoma, Washington, around June, 1998 until he got locked up in July 18, 1998. At the time of his arrest I was 15 years of age turning 16 years old in September 5, 1998. I was living at my mother's house along with other family members their names are Seak Heang Chea, Bouaphan Tansy, and Felisa Chea.

On the early morning hours of July 5, 1998 I was awake and alert. I was planning on sneaking out taking one of my brother's cars with out his permission or him knowing, at that time my brother had owned between 8 or 9 cars which he kept at my mothers house. My plans had changed as soon as my brother came home which was around the time between 12:00 A.M. and 12:30 A.M. . So I tried to stay up until he left, to occupy my time I went on my computer. The time I was on my computer, from

my room, I heard my brother watching t.v., walking around the living room area, playing with his 2 pitbull dogs, and at one point in time talking to someone either on the phone or at the front door. I ended up falling asleep and woke up at around 2:10 A.M. or 2:15 A.M., I went out to the living room to see if my brother left or not but he didn't, he was asleep on one of the couches, so I went to the kitchen, which was right next to the living room, and got something to drink and went to sleep.

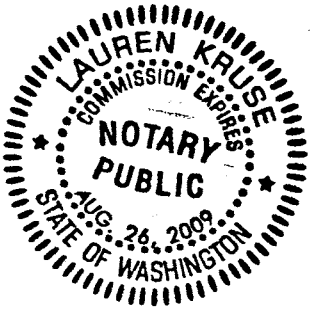
I am willing to testify in court to the above mentioned.

I remember telling one of my brother's, Jimmee Chea, legal counsel members about this when I attended one of his court hearings but no one came to question me any further.

Affidavit of Jesse Chea

Jesse Chea
2218 S. 25th St.
Tacoma, WA. 98405

SUBSCRIBED AND SWORN TO before me this 27 day of Dec, 2006.



Notary Public in and for the STATE of WASHINGTON, residing at Tacoma, WA
08-26-09

Affidavit of Jimmee Chea.

I, Jimmee Chea, declares under the penalty of perjury under the laws of the State of Washington that the following statements are true, correct, and based upon personal knowledge.

I, Jimmee Chea, was temporarily living at the residence of my mother's which was located at 2218 S. 25th. St., Tacoma, WA., between the months of June and July 18th, in the year of 1998. Several of my other family members also lived there as well and there names are Bouaphan Tansy (who is my mother), Seak Heang Chea (who is my father), Jesse Chea (who is my brother), and Felisa Kamtansy (who is my sister).

I was arrested and charged with 5 counts of Aggravated Murder in the First Degree and 5 counts of Assault in the First Degree which I am currently convicted of in a jury trial.

From the moment of my arrest I have always maintained my innocence of these charges. I have informed each and every one of my attorneys from the day of my arraignment until the day of my conviction that I was at home and was not involved with the shooting deaths and assaults

which occurred and took place at the Trang Dai Cafe on July 5th, 1998. I was always told by my attorneys no matter what I said or what alibi's I provided it would not help me in any way at all. Even though I provided information to each and every one of my attorneys and their defense investigators about my family members informing me they had witnessed me being asleep at their residence during the hours of 1:00 A.M. and 2:00 A.M. on July 5th, 1998 none of my attorneys looked into the matter, even when I told my attorneys that my family members are willing to testify on the stand on what they witnessed.

At one point in time during a trial recess, I brought to the attention of my attorneys that if they wish to talk with my family members they are present in the courtroom and are willing to testify in court to what they had witnessed, my attorneys told me it would not help my situation at all, it would make me look more involved in the crime, and the jury would not believe anything my family members would have to say. No one on my defense counsel even attempted to look or investigate into this matter.

During the start of my trial and from the

day the State gave its opening statement I noticed one of the jury members , number 11, coming into the courtroom waving, smiling, winking, and making greeting gestures to members of the prosecutions table and during trial the same jury member scowling and making faces of disapproval at me, my attorneys, and my co-defendant along with his attorney. This behavior from jury number 11 happened daily throughout the whole course of trial. The whole defense table started taking notice of her behaviors and actions towards the defense table and the flirtatious winking, smiling and greeting gestures towards members of the prosecutions table.

The issue with juror number 11 had gotten more alarming when one of my attorneys had personally informed me she had witnessed one of the prosecutors giving juror number 11 a hug in the hallway during one of the trial breaks. That same day, my other attorney had brought up the issue with juror number 11, to the Court's attention to which the Court stated it would hear it under advisement.

From my personal knowledge and from what I can recall about the hearing which supposedly

took place about the issue concerning juror number 11, to which I do not know if it was on record or not because during the discussion of the issue all the counsel members, the state, the defense, the judge along with her court reporter were joking about the matter. They all were making remarks about how juror number 11 "had a old lady's crush" on the prosecutor. I was very concerned when I witnessed these behaviors coming from the officers of the court, the only people who were not laughing or joking about this issue about juror number 11 were myself and my co-defendant, John Phet, to which the trial judge took noticed and mentioned that she would "keep an eye" and "watch" juror number 11 every time she came into the courtroom and during the trial procedure. Juror number 11 still did the same things she was doing until my conviction.

After the jury convicted me of these charges my attorneys along with the defense investigator had informed me they had the chance to interview the jury members who presided over my trial and one of the jury members who granted a interview, juror number 11, stated to them that

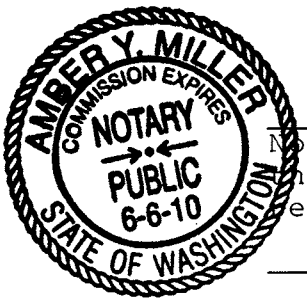
she wanted to convict us the day she came in the courtroom and notice the defendants and after she had heard the prosecutors opening statements.

I have also tried to obtain affidavits from my trial attorneys but to no availability, one of my attorneys basically suggested she would not help me with the necessary documentations unless I give her authorization to write a book about my case.

I am willing to testify to all the above mentioned.

Jimmee Chea
843065 , C-B-11
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326

SUBSCRIBED AND SWORN to before me this 7 day of January, 2007.



Notary Public in and for the state of Washington, residing at Clallam County.

exp 6-6-10.

STENBERG LAW OFFICE

P.O. BOX 23729
FEDERAL WAY, WA 98093-0729
(253)952-2912 FAX(253)952-2609

ANN STENBERG

September 15, 2006

Jimmee Chea
DOC # 843065, CB 11
Clallam Bay Correction Center
Clallam Bay, WA 98326

Your correspondence of 9/5/06

Dear Mr. Chea:

I am happy to help with the issue of juror misconduct. Without reviewing the file and carefully reviewing the issue, my general recollection is that this juror is the same one who scowled at us every time she entered the courtroom and smiled brightly at the prosecutors. We made a motion to excuse her, if I recall. In any event, I will certainly assist you. Please ask your counselor to set up a phone conference for us on a private line, or send me the name and phone number of your counselor and I will make arrangements.

In a previous letter to you, I inquired about your willingness to participate in my writing a book about your case. I have not heard back from you on that issue. Would you be willing to assist and authorize me in this project? Please respond.
Thank you for your time and attention.

Very Truly Yours,

Ann Stenberg

Ann Stenberg