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Cowlitz Co. Cause NO. 04-1-00819-8

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

KENNETH LEE KYLLO,

Appellant.

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**AMENDED ANSWER TO PETITION FOR
DISCRETIONARY REVIEW**

SUSAN I. BAUR
Prosecuting Attorney
MICHELLE SHAFFER/WSBA 29869
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. ANSWER TO ISSUES PRESENTED FOR REVIEW BY THE PETITIONER

1. No decision of the Court of Appeals pointed to in the petition is in conflict with a decision of the Supreme Court.
2. No decision of the Court of Appeals pointed to in the petition is in conflict with a decision of another decision of the Court of Appeals.
3. No significant question of law under the Constitution of the State of Washington or of the United States is involved regarding any decision pointed to in the petition.
4. The petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

II. ISSUE PRESENTED FOR REVIEW BY THE RESPONDENT

Does the decision of the Court of Appeals regarding the “appearance of fairness doctrine” conflict with a decision of the Court of Appeals or of the Supreme Court, and does this decision involve an issue of substantial public interest?

III. STATEMENT OF THE CASE

Robert Mickens and the appellant Kenneth Lee Kylo got into a fight while both men were in custody in the Cowlitz County jail. 13RP¹ 1-395. Kylo bit Mickens’ ear and ripped the ear off with his teeth. *Id.* Doctors were unable to permanently reattach Mickens’ ear. 13RP 240-43. The State charged Kylo with assault in the second degree alleging

¹ “13RP” refers to Verbatim Report of Proceedings on October 26-27, 2004.

that Kylo had intentionally assaulted Mickens and had recklessly inflicted substantial bodily harm on Mickens. CP 3.

Kylo testified Mickens was angry over Kylo's misquoting of the bible and began taunting him. 13RP 320. Kylo said Mickens started the fight. Kylo admitted he bit Mickens' ear but said he was not aware of it at the time. Mickens testified Kylo started the fight. Mickens said that when Kylo was holding him, Mickens' arms were down to his side. 13RP 211-12. Mickens attempted to pull away but was unable to so he tried in vain to throw punches. 13RP 212. Kylo screamed, "Stop," and bit Mickens' ear. *Id.* Mickens was then able to pull away from Kylo. When he did, Kylo, in Mickens' words, "slowly ripped off my ear." *Id.*

The many accounts of the fight from the inmates, including Kylo and Mickens, were inconsistent and varied. 13RP 1-395; *State v. Kylo*, at *2, noted at 141 Wn.App. 1037, 2007 WL 4111908 (2007). In one account, Kylo was bullying everyone in the unit and had attacked Mickens when he tried to call the jail staff. *Id.* Others claimed Mickens started the fight. *Id.*

Kylo requested and was granted a self-defense instruction. CP 33 (Jury Instruction 11). The trial court also gave an aggressor instruction.

CP 33 (Jury Instruction 14). The jury found Kylo guilty as charged. CP 42. The State asked that Kylo be sentenced as a persistent offender. 14RP² 3-32; 15RP³ 3-6; 16RP⁴ 3-4; 17RP⁵ 3-25. The State called several witnesses including fingerprint expert Ed Reeves and the Honorable Steven Warning. Reeves compared Kylo's fingerprints to those on the judgment and sentence from his prior indecent liberties conviction in Cowlitz County Superior Court cause #94-1-00561-5 and found that they were made by the same person. 14RP 16; Ex 5. A judgment and sentence from Kylo's prior assault in the second degree conviction in Cowlitz County Superior Court cause #88-1-00024-4 was admitted, and Warning testified that he represented Kylo in that case and that Kylo was the same Kenneth Kylo named in the judgment. 17RP 4-5; Ex. 3. Kylo did not testify or offer any other evidence. The trial court found that the State had proven by a preponderance of the evidence that Kylo was a persistent offender and sentenced Kylo to life in prison without the possibility of early release. CP 42; 17RP 17, 22. Kylo filed a timely notice of appeal. CP 44. In an unpublished opinion, the Court of

² "14RP" refers to Verbatim Report of Proceedings on November 16, 2004.

³ "15RP" refers to Verbatim Report of Proceedings on December 1, 2004.

⁴ "16RP" refers to Verbatim Report of Proceedings on December 9, 2004.

⁵ "17RP" refers to Verbatim Report of Proceedings on December 16, 2004.

Appeals affirmed Kylo's conviction and remanded for a new sentencing hearing before a visiting judge. *State v. Kylo*, noted at 141 Wn.App. 1037, 2007 WL 4111908 (2007).

IV. ARGUMENT REGARDING ISSUES PRESENTED FOR REVIEW BY THE PETITIONER

A. Review of the Court of Appeals decision regarding alleged governmental misconduct should not be granted.

On direct appeal, Kylo argued that the trial court denied him his right to be present at a critical stage of the proceedings against him. Specifically, Kylo argued that he was not given notice of a hearing in which Kenny Stevens, a witness for both Kylo and the State, moved to be transported to the Shelton correction facility from the Cowlitz County jail while he awaited Kylo's trial. Kylo couched this argument in terms of "governmental misconduct". The Court of Appeals disagreed. Kylo does not argue that this decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. Nor does he argue that it involves an issue of substantial public interest that should be determined by the Supreme Court. He does state that a significant question of law under the Constitution of the United States is involved but fails to provide any argument or citation for this contention. The reviewing court need

not consider arguments that a party has not developed in the briefs and for which the party has cited no authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); see also RAP 10.3(a)(5).

Finally, *Kyllo* does not specifically state that this decision of the Court of Appeals is in conflict with a decision of the Supreme Court. However, he does mention one United States Supreme Court case in support of his contention that he “had a fundamental right to be present at any hearing that involved this case” -- *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482 (1985). PETITION AT 25. However, the Court of Appeals decision is not in conflict with *Gagnon*. *Gagnon* and his codefendants argued that the trial court improperly questioned a juror *in camera* outside the defendants’ presence. The trial court had announced to the defendants its intention to conduct the hearing in chambers. The Supreme Court held that defendants’ “total failure to assert their rights to attend the conference with the juror sufficed to waive their rights....” *Gagnon*, 470 U.S. at 529, 105 S.Ct. 1482. Furthermore, the Supreme Court reiterated that “a defendant has a due process right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.... [T]he

presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *Gagnon*, 470 U.S. at 526, 105 S.Ct. 1482 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

In Kylo’s case, he and his attorney were given notice of the hearing involving Stevens, Stevens’ attorney and the State, at which Stevens would be formally arguing that he be allowed to return to prison pending Kylo’s trial. 7RP⁶ 4-5. For whatever reason, Kylo and his attorney chose not to attend. It cannot be said that the State or the trial court denied Kylo his right to be present at any stage of the proceedings. As such, Kylo fails to show how the decision of the Court of Appeals is in conflict with the decision of the Supreme Court in *Gagnon*. Discretionary review of this issue should not be granted.

B. Review of the Court of Appeals decision regarding the aggressor instruction should not be granted.

Kylo does not argue that this decision of the Court of Appeals is in conflict with a decision of the Supreme Court or the Court of Appeals. However, he does mention two Court of Appeals cases when rearguing

⁶ “7RP” refers to Verbatim Report of Proceedings on September 2, 2004.

this issue on the merits: *State v. Heath*, 35 Wn.App. 269, 666 P.2d 922 (1983), and *State v. Kidd*, 57 Wn.App. 95, 786 P.2d 847 (1990). Kylo cites *Heath* for the contention that it is “error to give the aggressor instruction where it is not supported by substantial evidence.” PETITION 12. The State agrees with this contention. The Court of Appeals held that the instruction was proper in Kylo’s case since it “... accurately states the law and, although who started the fight was disputed, on this record there is evidence the jury could have found credible that Kylo provoked the use of force by blocking Mickens’s access to the call box to call for help.” *Kylo*, at *5. As the record reflects, the Court of Appeals properly found that there was sufficient evidence to give the aggressor instruction. As such, this Court of Appeals decision is not in conflict with that in *Heath*.

Kylo cites *Kidd* for the contention that the “provoking act cannot be the assault itself.” PETITION 12. Again, the Court of Appeals found that “... on this record there is evidence the jury could have found credible that Kylo provoked the use of force by blocking Mickens’s access to the call box to call for help.” *Kylo*, at *5. Although Kylo argues a different view of the facts of this case, the Court of Appeals notes that there was

conflicting testimony regarding who the aggressor was: “With conflicting evidence regarding the identity of the aggressor, an aggressor instruction is ‘particularly appropriate’” *Id.* (citing *State v. Cyrus*, 66 Wn.App. 502, 508-09, 832 P.2d 142 (1992), *review denied*, 120 Wn.2d 1031 (1993)).

As such, this Court of Appeals decision is not in conflict with that in *Kidd*.

Kyllo does state that a significant question of law under the Constitution of the United States is involved and that this decision involves an issue of substantial public interest that should be determined by the Supreme Court but fails to provide any argument or citation for these contentions. Again, the reviewing court need not consider arguments that a party has not developed in the briefs and for which the party has cited no authority. As such, the court should deny review of this issue.

C. If this Court agrees that there is a violation of the “appearance of fairness doctrine”, review of the Court of Appeals decision to remand the case for resentencing before a visiting judge should not be granted.

Kyllo agrees his sentencing hearing violated the “appearance of fairness doctrine”. PETITION 26. However, he argues the Court of Appeals decision to remand the case for resentencing before a visiting

judge conflicts with a decision of the Supreme Court -- *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002). In *Lopez*, at issue was whether Lopez was to be sentenced as a persistent offender. *Lopez*, 147 Wn.2d at 519-20. Lopez admitted to one prior strike conviction at trial. *Id.* At sentencing, the State alleged an additional prior strike, a conviction for assault in the second degree. *Id.* at 520. However, the State failed to provide any supporting evidence of the assault conviction. The Court of Appeals found (and the State conceded) that the trial court erred when it considered the assault conviction and then sentenced Lopez as a persistent offender. *Id.*

The State argued that it should be entitled to submit evidence of Lopez's prior convictions on remand because Lopez did not provide a specific objection. *Id.* The *Lopez* court found that Lopez's objection was sufficient and held that a remand for an evidentiary hearing is only appropriate when the defendant has failed to specifically object to the State's evidence of the existence or classification of a prior conviction.

Id. The *Lopez* court further held as follows:

Where the defendant raises a specific objection and "the disputed issues have been fully argued to the sentencing court, we ... hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further

evidence to be adduced.”

Id. at 520-21. In *Kyllo*’s case, there was a full sentencing hearing and no finding that the evidence was unlawful or should be stricken. *Kyllo* also argues the Court of Appeals decision to remand the case for resentencing involves an issue of substantial public interest that should be determined by the Supreme Court but fails to provide any argument or citation for this contention as well. Again, the reviewing court need not consider arguments that a party has not developed in the briefs and for which the party has cited no authority. As such, the court should deny review of this issue.

D. Review of the Court of Appeals decision regarding the “great bodily harm” instruction should not be granted.

The Court of Appeals properly held that *Kyllo* was precluded from arguing on appeal that the great bodily harm instruction requested by both *Kyllo* and the State was improper and that the use of the phrase “great bodily harm” was improper. *Kyllo* does not argue that this decision involves an issue of substantial public interest that should be determined by the Supreme Court. He does state that a significant question of law under the Constitutions of the State of Washington and the United States is

involved but fails to provide any argument or citation for this contention. He does cite a Court of Appeals case and a Supreme Court case when rearguing this issue on the merits: *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004), and *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997).

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999). However, our Supreme Court subjects self-defense instructions to more rigorous scrutiny. *Rodriguez*, 121 Wn.App. at 185. Instructions on self-defense must more than adequately convey the law. *Walden*, 131 Wn.2d at 473. Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial. *Id.*

Self-defense requires only a subjective, reasonable belief of imminent harm from the victim. *State v. LaFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The jury need not find actual imminent harm. *Id.*

The instructions should allow the jury to put themselves in the defendant's shoes and from that perspective determine the reasonableness from all surrounding facts and circumstances as they appeared to the defendant.

Id. at 900. Again, in *Kyllo's* case, the court instructed the jury as follows:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of *great bodily harm*, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 33 (Instruction 13) (emphasis added); *see* 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.04, at 203 (2d ed. 1994) (WPIC).

Despite having proposed that instruction, *Kyllo* now argues that the instruction interjected an impermissible objective standard into the instructions by the use of the phrase "great bodily harm".

In *Rodriguez*, Division Three considered the propriety of this instruction in a case similar to *Kyllo's*. *Rodriguez* was charged with assault in the first degree after an incident in which the victim shoved him. *Rodriguez*, 121 Wn.App. at 183. *Rodriguez* pulled a knife, and a scuffle ensued. During the scuffle, *Rodriguez* stabbed the victim in the side. *Rodriguez* testified at trial that he had armed himself with a knife because he was afraid of the victim, with whom there had been a history of

acrimony. Rodriguez testified that he pulled out the knife as he was being pushed to try to keep the victim at bay. Rodriguez testified that he did not stab the victim deliberately but rather that it happened as he was trying to catch his balance and the victim leaned into him. *Id.*

In *Rodriguez*, the trial court gave an instruction identical to the one Kyllö proposed and is now challenging. *Id.* at 185. Unlike Kyllö who was charged with assault in the second degree, Rodriguez was charged with assault in the first degree. As part of the trial court's instructions on assault in the first degree, it gave a definition of the term "great bodily harm". *Id.* at 186. The court instructed the jury that:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Id. This was the only definition of "great bodily harm" given to the jury. On review, Division Three held that, based on this definition of great bodily harm, the jury easily could have found that in order to act in self-defense, Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or a loss of a body part or function. *Id.* The court held that the instruction reduced the State's burden to disprove self-defense. *Id.* at 188.

However, Kylo's case is distinguishable from *Rodriguez*. Kylo was charged with assault in the second degree, instructions on which did not include any definition of great bodily harm. CP 33. Division Three briefly contemplated the propriety of this self-defense instruction in cases that did not involve a crime that included an element of "great bodily harm". The *Rodriguez* court said, "... standing alone or with other instructions to the jury on the question of self-defense, this statement would at least be innocuous and perhaps even an accurate statement of the law." *Id.* Because the jurors in Kylo's case were not given a definition of great bodily harm, the instruction given did not exclude ordinary batteries or prohibit the jury's consideration of the Kylo's subjective impressions of all the facts and circumstances.⁷ The instruction requested

⁷ Division Two addressed the same issue in *State v. Marquez*, 131 Wn.App. 566, 127 P.3d 786 (2006). Marquez was also charged with first-degree assault but was found guilty of second-degree assault. On appeal, he challenged the use of the term "great bodily harm" in a defense-of-others instruction similar to the self-defense instruction used in *Rodriguez* and in Kylo's case. As Division Three had done in *Rodriguez*, Division Two held that the "great bodily harm" instruction given as part of the first-degree assault instructions could have misled the jury to believe that Marquez was justified in defending another only if he reasonably believed the person he was defending was in danger of being killed or would have suffered from serious permanent disfigurement or impairment. *Marquez*, 131 Wn.App. at 566. As it was with *Rodriguez*, Kylo's case is distinguishable from *Marquez*. In Kylo's case, the jury was not given a definition for great bodily harm. Especially in light of the other self-defense instructions given in Kylo's case, the challenged instruction did not exclude ordinary batteries or prohibit the jury's consideration of the Kylo's subjective impressions of all the facts and circumstances.

by Kylo and given by the court was proper. Therefore, the performance of Kylo's attorney was not deficient, and this decision of the Court of Appeals was not in conflict with *Rodriguez* or *Walden*. As such, this issue should not be accepted for review.

E. Review of the Court of Appeals decision regarding the "specific intent" instruction should not be granted.

In his SAG to the Court of Appeals, Kylo argued that the trial court erred by not giving Kylo's requested "specific intent instruction". STATEMENT OF ADDITIONAL GROUNDS 13. The Court of Appeals ruled that the trial court did give Kylo's requested instruction. *Kylo*, at *8-9. The Court of Appeals referred to Kylo's Proposed Instruction 7. *Id.*; CP 75. Kylo contends that his assignment of error was regarding his Proposed Instruction 6 rather than Proposed Instruction 7. CP 74. He argues that the Court of Appeals failed to make a decision regarding this assignment of error.

RAP 10.10 allows a defendant in a review of a criminal case to file a pro se statement of additional grounds for review to identify and discuss those matters that the defendant believes may not have been adequately addressed by the defendant's counsel. RAP 10.10(a). The appellate

court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant's pro se statement. RAP 10.10(f). The current RAP 10.10 was a result of a change in several rules in 2002. Prior to the change, defendants were given blanket permission to file a prose brief in every criminal appeal. The current RAP 10.10 allows defendants to explain to the reviewing court in their own words why the trial was unfair:

If the statement is sufficiently specific and raises sufficiently meritorious issues, the court may, in its discretion, pursue the matter by resolving the issue, asking counsel to brief it, asking the State to respond, ordering production of the necessary record on its own initiative, etc. But the court would have no obligation whatsoever to respond to the statement point-by-point or to review the issues identified.

See 3 Karl B. Tegland, *Washington Practice: Rules Practice* RAP 10.10 at 118 (6th ed. 2004) (citing Drafter's Comment 2002 Amendment).

In *Kyllo's* case, the Court of Appeals did ask the parties to brief one of the issues *Kyllo* raised in his SAG. The Court of Appeals requested additional briefing on the question of whether the jury was provided with faulty self-defense instructions lowering the State's burden of proof and thereby denying *Kyllo* his right to due process. ORDER REQUIRING ADDITIONAL BRIEFING 1, filed February 8, 2008.

However, the Court of Appeals was under no obligation to decide the issue regarding Defense Proposed Instruction 6, raised by Kylo in his SAG. Furthermore, Kylo has not demonstrated why one or more of the considerations listed in RAP 13.4 support acceptance for review. Kylo does not argue that this decision of (or lack of decision by) the Court of Appeals is in conflict with another decision of the Court of Appeals or with a decision of the Supreme Court. He also does not argue that a significant question of law under the Constitution of the State of Washington or of the United States is involved, nor does he argue that it involves an issue of substantial public interest that should be determined by the Supreme Court. Therefore, discretionary review of this issue should not be granted.

V. ARGUMENT REGARDING ISSUE PRESENTED FOR REVIEW BY THE RESPONDENT

The Court of Appeals found that the “appearance of fairness doctrine” was violated at Kylo’s sentencing hearing before the Honorable James Stonier. Regarding Kylo’s first strike offense, the State presented a certified copy of a judgment and sentence reflecting that a person with the same name as Kylo was convicted of assault in the second degree.

Ex. 3. Kylo presented no statement on oath that he was not the person named in the judgment and sentence. 14RP 3-32; 17RP 3-25. The State also presented evidence regarding the existence of the first strike offense by eliciting testimony from Kylo's defense counsel in the assault case that the Kylo currently being sentenced was the same Kylo who was sentenced for the prior assault in the second degree. The former defense counsel is another local Superior Court judge – the Honorable Stephen Warning. Judge Warning presided over a number of pretrial hearings in Kylo's current case, although none concerned the existence or any other issue involving any of Kylo's prior strike offenses.

The Court of Appeals specified that it did “not doubt the integrity of either the witness or the sentencing trier of fact”. However, the Court of Appeals agreed with Kylo that “this procedure violates the appearance of fairness doctrine, citing *Bilal, infra*. The Court of Appeals remanded Kylo's case for resentencing in front of a visiting judge.

A. The decision of the Court of Appeals is in conflict with *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992) and *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007).

In *Post*, this Court rejected Post's argument that the procedures used to prepare his pre-sentence report violated the appearance of fairness

doctrine because Post had filed a civil lawsuit against the corrections officer who prepared the report. *Post*, 118 Wn.2d at 618. This Court held that the appearance of fairness doctrine does not extend to the preparer of a pre-sentence report and that, even if the doctrine were to apply in Post's case, "the appearance of fairness doctrine is directed at the evil of a biased or potentially interested judge or quasi-judicial decisionmaker." *Id.* at 619. This Court noted that Post had not shown how the judge at his sentencing hearing was biased. *Id.* It held, "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit. *Id.* In a footnote, this Court states that the threshold that must be met before the doctrine is applied is "evidence of a judge's or decisionmaker's actual or potential bias." *Id.* at fn. 8. The Court of Appeals decision in *Kyllo's* case regarding the appearance of fairness is in conflict with this court's decision in *Post*. *Kyllo* has not shown how the sentencing judge – Judge Stonier – was biased. In fact, the Court of Appeals went to great lengths to state that it did not doubt the integrity of Judge Stonier. Because under *Post* an appearance of fairness claim cannot succeed without evidence of actual or potential bias, the Court of Appeals decision is in conflict with the *Post*

decision.

In *Chamberlin*, this court rejected a claim of violation of the appearance of fairness doctrine. Officers presented to a judge an affidavit in support of a request for warrant to search Chamberlin's home.

Chamberlin, 161 Wn.2d at 34-35. The judge issued the search warrant, and Chamberlin was later charged with drug-related charges, based in large part on evidence found in his home upon execution of the search warrant. *Id.* at 35. Defense counsel filed a motion to suppress in which legality of the finding of probable cause to support issuance of the warrant was challenged. *Id.* At a readiness hearing, defense counsel expressed concern about whether the same judge could be impartial in hearing the suppression motion. *Id.* The judge stated he did not remember issuing the warrant but believed he could decide the suppression issue fairly and impartially. *Id.* at 35-36. At the suppression hearing, defense counsel asked the judge to recuse himself. The judge denied the request and later denied the suppression motion. Chamberlin was later found guilty of one of the drug charges. *Id.* On appeal, Chamberlin argued the judge should have recused himself based on the appearance of fairness doctrine. *Id.* at 37. This Court reiterated that “[e]vidence of a judge’s actual or potential

bias must be shown before an appearance of fairness claim will succeed.”

Id., citing *Post, supra*. Chamberlin argued that the potential bias is inherent in the scenario in his case. *Id.* at 37. This Court discussed actual and potential bias:

The right to a fair hearing under the federal due process clause prohibits actual bias and “ ‘the probability of unfairness.’ ” In certain instances the duty to recuse is nondiscretionary because the “probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” These instances include where the adjudicator has a pecuniary interest in the outcome or where the judge has been the target of personal abuse or criticism from the party before him. An assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges.

Id. at 38 (citations omitted). There is a presumption that judges perform functions regularly and properly and without bias or prejudice. *Id.* This Court found no actual bias in Chamberlin’s case. *Id.* at 40. This Court further noted that even where actual bias is not apparent, a party is not without protection against prejudice or error, because independent appellate review reduces the risk of error. *Id.* “Appellate courts review de novo the legal conclusion of law whether probable cause is established ... In determining whether probable cause is established, the appellate courts review the same evidence presented below. What this means is where the probable cause finding was error, appellate review cures the

error.” *Id.* at 40-41 (citations omitted). The Court of Appeals decision is in conflict with this Court’s decision in *Chamberlin* because the Court of Appeals has vacated the sentence on the basis of a violation of the appearance of fairness doctrine despite the fact that *Kyllo* has shown no evidence of any actual or potential bias by Judge Stonier, the sentencing judge. Such evidence must be shown before an appearance of fairness claim will succeed.

B. The decision of the Court of Appeals is in conflict with Court of Appeals decisions in *State v. Bolton*⁸, *State v. Hoff*⁹, *State v. Carter*¹⁰, *State v. Bilal*¹¹, *State v. Dominguez*¹², *State v. Worl*¹³, and *State v. Newbern*¹⁴.

In *Bolton*, the sentencing judge disregarded a pre-sentence recommendation in a negligent homicide case by denying Bolton probation and sentencing him to the maximum term provided by statute. *Bolton*, 23 Wn.App. at 709. Bolton argued that, unbeknownst to him or

⁸ *State v. Bolton*, 23 Wn.App. 708, 598 P.2d 734 (1979), review denied 93 Wn.2d 1014 (1980).

⁹ *State v. Hoff*, 31 Wn.App. 809, 644 P.2d 763 (1982).

¹⁰ *State v. Carter*, 77 Wn.App. 8, 888 P.2d 1230 (1995).

¹¹ *State v. Bilal*, 77 Wn.App. 720, 893 P.2d 674 (1995), review denied 127 Wn.2d 1013, 902 P.2d 163 (1995).

¹² *State v. Dominguez*, 81 Wn.App. 325, 914 P.2d 141 (1996).

¹³ *State v. Worl*, 91 Wn.App. 88, 955 P.2d 814 (1998), review denied 136 Wn.2d 1024, 969 P.2d 1064 (1998).

¹⁴ *State v. Newbern*, 95 Wn.App. 277, 975 P.2d 1041 (1999), review denied 138 Wn.2d 1018, 989 P.2d 1142 (1999)

his counsel, the judge had lost his son in a traffic accident eight years before. *Id.* at 714. Bolton claimed the judge must have been reminded of his personal tragedy or at least subconsciously took it into consideration at sentencing. Bolton based this claim on the judge's statement at sentencing that, "We have this boy's parents, and believe me gentleman, I know what those people are going through." *Id.* Division Two refused to address the merits of this issue because it was raised for the first time on appeal. *Id.* The court noted that Bolton sought an additional discretionary ruling from the very judge whom he was seeking to disqualify on appeal: "Obviously defendant was willing to take his chances, hope for a favorable decision and resort to the appearance of fairness argument only if he was unsuccessful. Clearly, in these circumstances defendant has waived any right to object to the qualifications of the judge or the fairness of the sentencing proceedings whether actual or apparent and cannot now raise such issue." *Id.* at 714-75. The Court of Appeals decision in *Kyllo's* case conflicts with its decision in *Bolton* because *Kyllo* failed to raise this issue at any time below, yet the Court of Appeals addressed the issue and vacated *Kyllo's* sentence.

In *Hoff*, the appearance of fairness doctrine was raised more than three months after the return of the jury verdict finding Hoff guilty of assault in the second degree. *Hoff*, 31 Wn.App. at 813. Hoff filed an affidavit stating that the trial judge had represented Hoff's wife (who was not involved in Hoff's criminal case) three years ago in a dissolution proceeding. *Id.* at 813-14. Division Two found that Hoff waived his right to make an appearance of fairness objection since it was made after trial. *Id.* at 814. The Court of Appeals decision in *Kyllo's* case conflicts with its decision in *Hoff* because *Kyllo* failed to raise this issue at any time below, yet the Court of Appeals addressed the issue and vacated *Kyllo's* sentence.

In *Carter*, Carter entered an *Alford*¹⁵ plea to unlawful drug possession. *Carter*, 77 Wn.App. at 10. The plea was later vacated and a trial set before the same judge who accepted the plea. *Id.* Defense counsel moved for recusal, arguing Carter could not get a fair trial because the judge expressed an opinion as to Carter's guilt during sentencing. *Id.* The judge denied the motion. *Id.* Carter claimed on appeal that by presiding over the sentencing the judge violated the appearance of fairness

¹⁵ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

doctrine. *Id.* at 11. Citing the threshold laid out in *Post, supra*, Division Three found that Carter's claim was without merit. *Carter, 77 Wn.App.* at 12. Applying the law to the facts of the case, Division III noted the following factors:

Here, the judge's comments during the original sentencing were relevant to his determining whether there were facts, in light of Mr. Carter's *Alford* plea, that would support a finding of guilt. We cannot say those comments evidenced actual or potential bias as required by *Post*. As the judge noted, "it was rather appropriate to get some basis of what had happened ... some basis of Mr. Carter's alleged involvement". In addition, there is no evidence of any prejudice or bias on the part of the judge during the course of Mr. Carter's jury trial or subsequent sentencing.

Carter, 77 Wn.App. at 12. The Court of Appeals decision is in conflict with Division Three's decision in *Carter* because the Court of Appeals has vacated the sentence on the basis of a violation of the appearance of fairness doctrine despite the fact that *Kyllo* has shown no evidence of any actual or potential bias by Judge Stonier, the sentencing judge. Such evidence must be shown before an appearance of fairness claim will succeed.

In *Bilal*, immediately after a jury found Bilal guilty of rape, Bilal assaulted the trial judge as he sat on the bench. *Bilal, 77 Wn.App.* at 721. Prior to sentencing, Bilal filed a motion and affidavits asking that the trial

judge recuse himself from the sentencing hearing. *Id.* The trial judge denied the motion. *Id.* Division Two again noted the threshold that must be met regarding the appearance of fairness doctrine: “Before we can find a violation of this doctrine..., there must be evidence of a judge’s actual or potential bias.” *Id.* The Court of Appeals decision is in conflict with its own decision in *Bilal* because the Court of Appeals has vacated the sentence on the basis of a violation of the appearance of fairness doctrine despite the fact that *Kyllo* has shown no evidence of any actual or potential bias by Judge Stonier, the sentencing judge. Such evidence must be shown before an appearance of fairness claim will succeed.

In *Dominguez*, the trial judge had once represented Dominguez as defense counsel, had been the subject of a complaint by Dominguez regarding that representation, and had once prosecuted Dominguez. *Dominguez*, 81 Wn.App. at 326, 914 P.2d 141 (1996). Two days before the trial (on a burglary charge), Dominguez moved for the removal of the trial judge based upon the prior representation, complaint and role as prosecutor. *Id.* at 327. The court denied the motion. On the day of trial, just before the trial commenced, Dominguez renewed his motion. Dominguez was eventually found guilty in a jury trial. *Id.* On appeal,

Dominguez contended that the judge violated the appearance of fairness doctrine. *Id.* at 328. Division Three noted that the appearance of fairness doctrine requires a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. *Id.* As Division Three further noted, however, a party claiming bias or prejudice must support the claim” “prejudice is not presumed.... Evidence of a judge’s actual or potential bias is required before the appearance of fairness doctrine will be applied.” *Id.* at 328-29. Division Three found that Dominguez received a fair, impartial and neutral trial and denied his claim because Dominguez did not produce any evidence of actual prejudice or bias. *Id.* at 329. The Court of Appeals decision is in conflict with Division Three’s decision in *Dominguez* because the Court of Appeals has vacated the sentence on the basis of a violation of the appearance of fairness doctrine despite the fact that Kylo has shown no evidence of any actual or potential bias by Judge Stonier, the sentencing judge. Such evidence must be shown before an appearance of fairness claim will succeed.

In *Worl*, the claim on appeal was that the sentencing judge was biased. *Worl*, 91 Wn.App. at 96. *Worl* was convicted of attempted

murder and malicious harassment. *Id.* at 91. This contention was based upon Worl's characterization of the judge's remarks at sentencing referring to personal experiences with racism. *Id.* at 96. Division Three again held that to succeed on a claim of violation of the appearance of fairness doctrine, "the party raising an appearance of bias claim must present evidence of actual or potential bias." *Id.* Division Three found that Worl presented no evidence of actual or potential bias and that the argument was without merit. *Id.* at 97. The Court of Appeals decision is in conflict with Division Three's decision in *Worl* because the Court of Appeals has vacated the sentence on the basis of a violation of the appearance of fairness doctrine despite the fact that *Kyllo* has shown no evidence of any actual or potential bias by Judge Stonier, the sentencing judge.

In *Newbern*, the trial judge expressed displeasure regarding a delay of trial caused by a defense expert. *Newbern*, 95 Wn.App. at 284-85. Division Two found that given the fact that the judge did not blame either party for the delay and that his remarks had no bearing on the merits of the case, *Newbern* failed to show any evidence of the judge's actual or potential bias. *Id.* at 297. The court noted that a "purpose of the

appearance of fairness doctrine is to prevent a person who is potentially interested or biased from participating in the decision making process.” *Id.* at 296. The Court of Appeals decision is in conflict with its own decision in *Newbern* because the Court of Appeals has vacated the sentence on the basis of a violation of the appearance of fairness doctrine despite the fact that Kylo has shown no evidence of any actual or potential bias by Judge Stonier, the sentencing judge.

VI. CONCLUSION

For the reasons stated above, Kylo’s petition for discretionary review should be denied, and the State’s issue should be accepted for review.

Respectfully submitted this 15th day of May, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By:


MICHELLE L. SHAFFER/WSBA # 29869
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent