

NO. 72376-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

FELIX VINCENT SITTHIVONG,

Petitioner.

FILED

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Court of Appeals

Division I

State of Washington

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

Felix Vincent Sitthivong is restrained pursuant to Judgment and Sentence in King County Superior Court No. 10-1-04298-5 SEA. App. A (Judgment and Sentence).

B. ISSUES PRESENTED

1. Are Sitthivong's claims of error barred because they already have been decided in the direct appeal?
2. Should this court deny consideration of the merits of both of Sitthivong's claimed grounds for relief because he has not established that actual prejudice resulted from the alleged errors?
3. If Sitthivong's first claim (related to the jury instructions on murder by extreme indifference) raises a separate issue regarding the prosecutor's charging discretion, has Sitthivong failed to present facts or legal analysis establishing a constitutional violation that caused him actual prejudice?
4. Has Sitthivong failed to establish that the trial court's decision not to instruct as to the lesser of manslaughter as to Count 5 was manifestly unreasonable and that this Court's holding on direct appeal, affirming that decision, was error?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Petitioner Sitthivong was convicted by a jury of murder in the first degree of Steve Sok (Count 5), attempted murder in the second degree of Landon Nguyen (Count 3), attempted murder in the second degree of Yousouf Ahmach (Count 4), and assault in the first degree of Phillip Thomas (Count 2), all with firearm enhancements. App. A at 1 (Judgment and Sentence); App. B (Second Amended Information). The jury also convicted Sitthivong of murder in the second degree of Steve Sok (Count 1); that conviction was vacated solely on double jeopardy grounds. 16RP 3-6.¹ As to a charge of unlawful possession of a firearm in the second degree (Count 6), the court, the Honorable Jean Reitschel, found him guilty after a bench trial. App. I (Findings and Conclusions as to Count 6). The court imposed standard range sentences on all counts. App. A.

Sitthivong appealed his convictions. One issue he raised on appeal was a claim that the trial court abused its discretion when it

¹ The Report of Proceedings is in sixteen volumes, referred to in this brief as in the Appellant's Brief, as follows: 1RP – 10/5/11; 2RP – 10/6/11; 3RP – 10/10/11; 4RP – 10/13/11; 5RP – 10/17/11; 6RP – 10/18/11; 7RP – 10/19/11; 8RP – 10/20/11; 9RP – 10/24/11; 10RP – 10/25/11; 11RP – 10/26/11; 12RP – 10/31/11; 13RP – 11/1/11; 14RP – 11/3/11; 15RP – 11/16/11; and 16RP – 12/2/11.

refused to instruct the jury on the lesser-included offense of first degree manslaughter on Count 5, the charge of first degree murder by extreme indifference. State v. Sitthivong, 175 Wn. App. 1021 (2013) (unpublished) (attached as App. C). Another claim on appeal was that the trial court violated Sitthivong's rights under the confrontation clause by excluding a recording of a 911 call. Id. The Court of Appeals affirmed. Id. The Supreme Court denied review of that decision. State v. Sitthivong, 179 Wn.2d 1002, 315 P.3d 531 (2013). The mandate on the direct appeal was issued January 15, 2014. App. D (mandate).

Sitthivong filed this personal restraint petition on July 3, 2014, and it was dismissed by the Court of Appeals (without calling for a response by the State) on the basis that both issues raised were previously litigated on direct appeal. App. E (Order of Dismissal). A panel of the Supreme Court granted Sitthivong's motion for discretionary review and remanded to this Court for reconsideration in light of State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015). App. F (Order). The State now has been directed to respond to the original petition.

2. SUBSTANTIVE FACTS

On June 6, 2010, Sitthivong fired eight shots down a busy sidewalk in downtown Seattle, killing one man, Steve Sok, and critically injuring another, Phillip Thomas. His shots did not hit the two men that he was targeting as they ran away down that sidewalk, Landon Nguyen² and Yousouf Ahmach. The charges in this case all relate to that single volley of shots and these four victims. The jury rejected Sitthivong's claim that he was acting in self defense.

a. The Crimes

On the night of June 5, 2010, Steve Sok went to Club Aura in the Pioneer Square neighborhood in Seattle, to celebrate a friend's birthday. 11RP 10 -11. There he met a group of friends comprised of Phillip Nguyen, Landon Nguyen, and Yousouf Ahmach. 5RP 186-88. About 1:30 a.m. on June 6, both groups went to V-Bar, a bar in the Belltown neighborhood, some 15 blocks away. 5RP 190-92; 11RP 15-17, 110.

² Three unrelated individuals in this case share the last name Nguyen; two unrelated individuals share the last name Thomas. All of these persons will be referred to by their full names throughout the brief, to avoid confusion.

About 30 minutes after Sok arrived at V-Bar, he went outside with Phillip Nguyen to smoke a cigarette. 5RP 193-94. As they were outside in front of the bar, Phillip was facing Sok and heard a series of gunshots. 5RP 196-97. Phillip reacted by the third or fourth shot, ducking into the entryway of the bar. 5RP 197, 208-09. When he got there, he turned around and saw that Sok was on the ground, at the spot where they had been smoking. 5RP 198. Phillip never saw anyone holding a gun, although he did look toward the parking lot from which the shots were coming, and thought he saw a muzzle flash. 5RP 198-200, 210.

Sok died of a gunshot wound to the head. 8RP 220. The bullet entered the right side of his head, just below his eyebrow, and went through his brain, including his brain stem. 8RP 207-12. The bullet was recovered from the back of his head. 8RP 212-13. Because the bullet passed through his brain stem, Sok would have literally died before he hit the sidewalk. 8RP 220.

Before the shooting, Landon Nguyen and Ahmach had left V-Bar together, walking away from the bar for a smoke. 5RP 93-94, 142-43. As the two walked toward the parking lot, they encountered petitioner Sitthivong, who was near the corner. 5RP 119, 178, 183. Sitthivong spoke: he asked the two if they knew a

man named "Sonny" or "Sundy" and when the men responded that they did, Sitthivong's gun came out. 7RP 54, 194-95; 8RP 195.

Landon Nguyen saw Sitthivong pull up his shirt and saw the handle of a gun – Landon turned and ran. 5 RP 101, 104. Ahmach heard someone yell "gun" and also turned and ran. 5RP 101, 156. Sitthivong's companions confirmed that when Sitthivong pulled out the gun, the two men he was talking to turned and ran the opposite way. 7RP 55, 194-95; 8RP 125.

Sitthivong pulled the gun from his waistband, and tried to fire it. 8RP 127-28. When the gun did not fire, he pulled back the slide to load a bullet into the chamber and fired toward the running men. 8RP 127-28; 9RP 175-79; 10RP 56. He fired eight rapid shots down the sidewalk.³ 9RP 83, 131-32. Sitthivong then turned and ran. 6RP 184; 12RP 75.

A cell phone recording by an apartment manager (Kevin Lessig) who was monitoring activity outside V-Bar from above includes nine seconds of silence before eight rapid-fire, evenly spaced gun shots. 5RP 42-43, 45-46; 9RP 127-32. Part way through the gunshots, the camera is directed toward the street

³ A crime scene detective described the location of eight shell casings at the corner where Sitthivong stood and described all bullet defects observed at the scene as showing shots coming from that direction. 10RP 137-70; 178-79.

outside V-Bar and two men are seen running through the picture; the running men are Landon Nguyen and Ahmach. 5RP 110-11, 121. This event occurred at about 2:45 a.m. 5RP 43. There were no other shots in the area that night. 5RP 47-48.

Seattle Police Officer Nicholas Evans was working an off-duty job a block from the shooting. 6RP 156-58. He was standing in the street and heard a rapid series of shots. 6RP 161-62. He saw a man at the corner by the V-Bar parking lot who was shooting a semi-automatic handgun; Evans saw the muzzle flashes. 6RP 163-66.

One of the shots Sitthivong fired struck Phillip Thomas, who happened to be walking along the sidewalk with his girlfriend. 9RP 162. Phillip Thomas was struck in the abdomen and immediately dropped to the ground. 9RP 162-63. His injury was life-threatening, and required immediate surgery, but he survived. 7RP 140-44, 156; 9RP 181-83. The bullet remains lodged in a bone in his pelvis. 7RP 153-55.

b. Sitthivong And His Companions

On June 5, 2010, Sitthivong went to three or four bars in Belltown with his friends Kenrique Thomas, Nam Nguyen, Ron

Battles, Jarvis Wesson, Jason Lee and Lee's girlfriend. 6RP 218; 7RP 165; 8RP 85; 12RP 42-44. At about 1:30 a.m. on June 6, Sitthivong got into Kenrique Thomas' Cadillac with Kenrique Thomas, Nam Nguyen, Battles and Wesson. 12RP 53-54. They decided to go to V-Bar; Kenrique Thomas drove there via Second Avenue, past the front of the bar, pulling into the parking lot at the corner. 7RP 37, 41, 81, 89-94; 12RP 55, 57. Sitthivong testified that as they drove by V-Bar, he saw some people that he recognized. 12RP 55. Nam Nguyen recalled that Sitthivong said that he recognized people outside V-Bar as people Sitthivong had issues with in the past. 8RP 155.

In the Cadillac, the men argued about a handgun that Battles had in the car, a 9mm semi-automatic pistol. 7RP 41-45, 192; 8RP 112-14; 10RP 48-51. Sitthivong eventually took the gun. 8RP 114; 10RP 50-51; 12RP 61. Sitthivong seemed angry and others in the car told him not to do anything stupid. 10RP 50-51. Sitthivong put the gun in his waistband and got out of the car, then immediately went to the corner of the buildings on Second Avenue and looked up the sidewalk toward V-Bar. 7RP 47; 8RP 116-17; 10RP 50-54.

Sitthivong's companions all also got out of the car and moved up behind him.⁴ 7RP 50, 57, 192, 196-97; 8RP 116, 119. After his verbal confrontation with Landon Nguyen and Ahmach, his companions saw Sitthivong pull the gun out. 7RP 54-55, 195; 8RP 124. Battles saw the two men turn and run, then saw that Sitthivong had the gun out and saw him try to fire it. 7RP 195-196. Battles ran as Sitthivong tried to cock the gun. 7RP 253-54.

Kenrique Thomas saw the two men approach and talk to Sitthivong. 7RP 46, 50-54. Thomas testified that the two men were not aggressive and did not display any kind of weapon before Sitthivong pulled his gun out and started to fire (when Thomas turned and ran back to his car). 7RP 50-55.

Nam Nguyen saw Sitthivong exchange words with the two men. 8RP 124. Nguyen said the two men looked like they wanted to fight but displayed no weapon before Sitthivong pulled out his gun and the two turned and ran. 8RP 125-26, 130. Then Sitthivong started shooting. 8RP 125-26. Nguyen saw the entire interaction. 8RP 133. There were about thirty people on the sidewalk in the area. 8RP 127.

⁴ Wesson testified that he returned to the car before the shooting began because he felt ill. 10RP 55-56.

Kenrique drove the group to the home of Lee's girlfriend. 7RP 61. Sitthivong was "amped up," saying things like "that's how we get down." 7RP 61. He told the others in the car not to say anything about the shooting. 8RP 132. Nam Nguyen fled with Sitthivong to California, where Sitthivong was soon arrested. 8RP 137-39; 10RP 9, 15; 12 RP 78.

Sitthivong testified that just before they drove to V-Bar, everyone in his own group was present when he and Jason had a confrontation at a different bar in Belltown, with a group that included Sok, Landon Nguyen, Ahmach, and possibly Phillip Nguyen. 12RP 48, 55, 93-96. Sitthivong testified that someone in the group said that if he did not shut up, they were going to "fuck him up and kill him." 12RP 50. No weapons were mentioned or displayed and he did not take it too seriously. 12RP 50, 101.

Sitthivong's companions testified that a confrontation very similar to that had occurred, but it was earlier in the evening, at the first bar they visited. 6RP 218-25; 7RP 27-32, 166-71; 8RP 90-95; 10RP 32-39. They all testified that they had not seen the two men that Sitthivong confronted at the corner at any point earlier in the evening. 7RP 51, 189-91; 8RP 119; 10RP 55. Sok's companions were not involved in and did not see any confrontations that

evening, before the shooting. 5RP 91, 139; 11RP 13-15, 45. They were celebrating only at Club Aura in Pioneer Square before they went to V-Bar. 5RP 90-93, 137-38; 11RP 10-13, 15, 41-46.

Sitthivong testified that he was not familiar with guns. 12RP 143-45. He said he had armed himself that night because he was afraid, having just seen Sok and the others who had been involved in the recent confrontation. 12RP 55-56, 60-61. He said that he got out looking for Sok, went to the corner and saw Sok and Landon Nguyen walking toward him. 12RP 63. Sitthivong claimed that the two gave him a hard time verbally. 12RP 64. He said that when his own companions came up behind him, the other two men started walking back toward V-Bar. 12RP 65-67.

Sitthivong claimed that he then looked down and when he looked up the two men had pulled out guns. 12RP 69. The men were 30 or 40 yards away. 12RP 70-72. When one of the men went into an alcove, Sitthivong said he pulled out his own gun and started shooting at the man still on the sidewalk pointing a gun. 12RP 72-74. Sitthivong testified that he was not trying to hit anybody but did shoot toward the area where he saw the gun. 12RP 151-52. He said he was not a marksman, that he was not

really aiming and had his eyes closed during part of the time that he was shooting. 12RP 152-53.

D. ARGUMENT

A personal restraint petition is not a substitute for a direct appeal, and the availability of collateral relief is limited. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." In re Pers. Restraint of Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual and substantial prejudice or nonconstitutional error which constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. St. Pierre, 118 Wn.2d at 328-29; In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner bears the burden of establishing these threshold showings by a preponderance of the evidence. In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013).

**1. THIS PETITION SHOULD BE DISMISSED
BECAUSE BOTH CLAIMS WERE PREVIOUSLY
DECIDED ON DIRECT APPEAL.**

Sitthivong's petition should be dismissed because both claims were raised in Sitthivong's direct appeal and were rejected on their merits. A petitioner may not renew an issue that was raised and rejected on direct appeal unless the petitioner shows that the interests of justice require relitigation of the issue. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 719, 16 P.3d 1 (2001). An intervening change in the law may establish that the interests of justice warrant reconsideration of an issue. Id. at 720. Sitthivong has not demonstrated that the interests of justice require relitigation of either issue.

Ground One of the petition is framed as a challenge to the State's charging decision – to charge first degree murder by extreme indifference and premeditated first degree murder in separate counts instead of in one count. Petition at 2-4. Sitthivong claims that this charging decision was error because it resulted in the trial court's refusal to instruct the jury on a lesser included offense of manslaughter and the defense theory of self defense. Id.

Sitthivong's broad claim that the jury was not instructed on self defense as to Count 5 (first degree murder by extreme

indifference) is incorrect. The jury was instructed that “it is a defense to the charges in Counts One through Five that the homicide was justifiable” on the basis that it was “committed in the lawful defense of the slayer,” as defined in the court’s instructions. App. G (Court’s Instructions, No. 17-21, 31). Thus, this claim must refer to the failure to instruct on a lesser included offense. Because the jury was instructed that manslaughter could be considered as a lesser as to Count 1 (premeditated murder), this claim must refer to the failure to instruct on a lesser included offense of manslaughter as to the charge of murder by extreme indifference (Count 5). App. G (Court’s Instructions, No. 9-14).

No part of Sitthivong’s argument cites to any legal theory that limits the prosecutor’s charging discretion. The crux of his argument is that the failure to instruct on the lesser included offense as to Count 5 was error – this is the argument rejected by this Court in the direct appeal. App. C. Nominally presenting the same grounds for relief in terms of a different legal theory does not warrant reconsideration of the issue. In re Pers. Restraint of Benn, 134 Wn.2d 868, 905-06, 952 P.2d 116 (1998). Recasting this argument as a challenge to the method of charging does not

establish good cause for reconsidering the previously rejected claim.

The Supreme Court's remand of this Court's dismissal of this petition directs consideration of the effect of State v. Henderson, supra, decided February 26, 2015. App. F. Henderson does not represent a change in the law, however, and does not warrant relitigation of the issue of failure to instruct on the lesser offense as to Count 5. The court in Henderson reviewed de novo the trial court's decision to refuse to instruct as to the lesser of manslaughter, because it concluded that the trial court did not apply the correct legal definition of manslaughter in making its decision. 182 Wn.2d at 743. The Supreme Court noted that the trial court apparently based its decision on the premise that manslaughter required only disregard of a risk that a wrongful act would occur, but that under State v. Gamble,⁵ the Supreme Court had clarified that the risk at issue in a manslaughter case is the risk of a wrongful death. Henderson, 182 Wn.2d at 740-41, 743.

In contrast, in this case it is clear that both the trial court and the Court of Appeals were aware that the risk at issue as to manslaughter is a risk of death. Gamble was decided in 2005, six

⁵ 154 Wn.2d 457, 114 P.3d 646 (2005).

years before the trial in this case. The trial court in Sitthivong's case was well aware that the risk at issue in a manslaughter case is the risk of death – this is established by the court's instructions on manslaughter, which specified that the risk that is disregarded is a risk of death. App. G (Instruction 15, 16). On appeal, this Court's opinion specified that "Sitthivong's actions demonstrated not mere recklessness *regarding human life* but extreme indifference, an aggravated form of recklessness." App. C (slip opin. at 4) (emphasis added). Thus, this Court also applied the correct legal standard. The decision in Henderson does not represent a change in the law and does not compel reconsideration of the decisions below, where both courts applied the correct legal standard.

The evidentiary claim now raised as Ground Two, that the trial court erred in excluding a recording of a 911 call made by a witness who testified at trial, was raised and rejected in Sitthivong's direct appeal. App. C. Sitthivong refers to no new facts or change in the law that would warrant relitigation of the issue.

**2. SITTHIVONG HAS NOT ESTABLISHED
PREJUDICE DUE TO EITHER CLAIMED ERROR.**

If this Court concludes that the claims raised should be considered, both should be rejected because Siththivong has not established actual and substantial prejudice resulting from either alleged constitutional error. If a petitioner has not established that he was prejudiced by an alleged error, the claim may be dismissed without reaching the merits of the claim. Hagler, 97 Wn.2d at 827.

In Ground One of the petition, Siththivong asserts that because of the separate charges of murder (in Count 1 and Count 5), the jury was not instructed as to the defense theory of the case, which was self defense. But the jury was instructed that the defense of justifiable homicide (defense of self or others) applied to all the charges, including Counts 1 and 5. App. G (Instruction 17).

Siththivong challenges the failure to give a lesser included instruction as to Count 5, but he has not established actual prejudice because the jury explicitly rejected the theory of self defense in its verdict on Count 1, the alternative charge of intentional murder. The lesser could be relevant to a theory of self defense: if a person acts in self defense, but uses excessive force in reckless disregard of the risk of death, he is guilty of

manslaughter. Sitthivong, 175 Wn. App. 1021, slip opin. at 4. The jury was given self defense instructions and the option of the lesser offense of manslaughter on Count 1. App. G (Instructions 14-19). Count 1 was a charge of first degree premeditated murder as to the same victim as Count 5 (Steve Sok). App. B. The jury was instructed that second degree murder was a lesser included offense of that crime, and that first degree manslaughter was a lesser included offense of second degree murder. App. G (Instructions 10-14, 38). The jury rejected the defense theory that Sitthivong acted in self defense but used excessive force; that is evidenced by their verdict on Count 1, finding Sitthivong guilty of second degree murder, rejecting self defense and the lesser of manslaughter. App. H (Verdict Form, Count 1). Because Count 1 was premised on the same act and same victim as Count 5, there can be no question that the jury would have rejected the same self-defense theory if it had been instructed as to manslaughter on Count 5. It is Sitthivong's burden to establish that the jury would have come to a different conclusion as to Count 5; he has not presented any argument to satisfy that burden.

In Ground Two of the petition, Sitthivong has not indicated what relevant information that was on the 911 call at issue was not

introduced at trial during the testimony of the caller, Kevin Lessig, who testified and was cross-examined as to all of the contents of the call. 5RP 47-52, 71-85; 12RP 17-38. Sitthivong's description of the content of the 911 call is by reference to the caller's testimony at trial. Petition at 5-9. Sitthivong objects to exclusion of the caller's statement that the shooter had gone into the bar, but the caller testified repeatedly at trial that he had made that statement in the 911 call (but that he never saw a gun, or any person firing a gun). 5RP 49-51; 12RP 28-31, 34. Sitthivong appears to concede that there were no additional statements on the recording.⁶ Sitthivong has not established how exclusion of the recording of that statement caused him actual prejudice. If the court reaches the merits of this claim, Sitthivong has presented no legal authority for the proposition that it is constitutional error to exclude a recording of a statement when the witness who made the statement testifies to the contents of the recording at trial; on its merits, this claim is unsupported by authority and should be rejected.

⁶ He states: "Here, we offer no statements that's not part of the record." Petition at 9.

3. AS TO THE CHALLENGE TO THE CHARGING DISCRETION OF THE PROSECUTOR, SITTHIVONG HAS NOT PRESENTED GROUNDS FOR RELIEF.

Sitthivong argues that the prosecutor's decision to charge premeditated murder and murder by extreme indifference in separate counts violated his constitutional rights to due process, to a fair trial, and to present a defense, but his argument consists of conclusory statements and is not supported by analysis or authority. Conclusory arguments are "not sufficient to command judicial consideration or discussion." State v. Blilie, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997) (quoting In re Pers. Restraint of Rosier, 105 Wn.2d 606, 616, 717 P.3d 1353 (1986)).

A prosecutor has broad charging discretion, as to whether to file criminal charges, and as to the number and nature of the charges filed. State v. Rice, 174 Wn.2d 884, 901-04, 279 P.3d 849 (2012). Prosecutorial charging discretion is essential to the operation of the criminal justice system. Id. at 903.

The single case cited by Sitthivong that is related to charging was a challenge to a prosecutor's decision to charge two alternative means of committing a crime in one count – the court held simply that it was permissible to charge in that manner. State v. Scott, 64

Wn.2d 992, 993, 395 P.2d 377 (1964). That case does not prohibit charging alternative means in separate counts of an information, and the practice of charging alternatives in separate counts is acknowledged in other cases. For example, in State v. Thompson, 60 Wn. App. 662, 806 P.2d 1251 (1991), the prosecutor charged first degree premeditated murder and first degree felony murder in separate counts. See also, State v. Strandy, 171 Wn.2d 817, 256 P.3d 1159 (2011) (aggravated murder and felony murder charged as separate counts). That method of charging was not identified as error in that case and Sitthivong cites no case in which separate charging of alternatives has been identified as error.

Sitthivong has not presented any legal authority or analysis supporting the proposition that a prosecutor's charging discretion is limited by the defense that a defendant would like to present and this argument should be dismissed on that basis.

4. THIS COURT CORRECTLY REJECTED SITTHIVONG'S CLAIM THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT ON MANSLAUGHTER AS TO COUNT 5.

If this Court concludes that the claim raised by Sitthivong is that the trial court erred in refusing to instruct on the lesser included offense of manslaughter as to Count 5, and that the issue will be

reconsidered in this petition, this Court should conclude that the claim is without merit. This Court properly concluded in the direct appeal that the evidence at trial did not support an inference that only manslaughter was committed, to the exclusion of the crime charged in Count 5, first degree murder by extreme indifference. If this Court concludes that it was error to refuse the instruction and that Sitthivong has established that the error caused him substantial prejudice, the remedy is to vacate only the conviction on Count 5 and to remand to the trial court to reinstate the conviction of second degree murder as to Count 1, and for retrial on Count 5.

On direct appeal, the court unanimously concluded that this claim was without merit, holding:

This is not a case of recklessness or negligence in the use of force. Rather, it is a case of extreme indifference to the consequences to human life exhibited by firing repeatedly into a crowded area. The trial court properly exercised its discretion in denying the requested instruction.

Sitthivong, 175 Wn. App. 1021, slip opin. at 4. The trial court and the court of appeals applied the correct legal standards, and there is no reason to disturb the trial court's decision or the appellate court's affirmance.

A court must give an instruction on a lesser offense if all of the elements of that lesser offense are necessarily included in the

charged crime and the evidence supports an inference that the lesser offense was committed to the exclusion of the charged offense. State v. Gamble, 168 Wn.2d 161, 181, 225 P.2d 973 (2010) (Gamble II) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). As the State agreed in the trial court, the legal prong of the Workman test is satisfied in this instance because the elements of first degree manslaughter are necessarily included in the elements of first degree murder by extreme indifference. Henderson, 182 Wn.2d at 742; 12RP 188.

The issue presented is whether there was substantial evidence at trial that affirmatively established that Sitthivong was guilty of first degree manslaughter but not guilty of first degree murder by extreme indifference. In order to satisfy the factual component of the Workman test, "there must be substantial evidence that affirmatively indicated that manslaughter was committed to the exclusion of first ... degree murder." State v. Perez-Cervantes, 141 Wn.2d 468, 480-82, 6 P.3d 1160 (2000). It is not enough that the jury might disbelieve the State's evidence; some evidence must be presented that affirmatively establishes the defendant's theory on the lesser offense. Id. The Henderson

decision does not modify the Workman analysis. 182 Wn.2d at 742-43.

The standard of review applied to the trial court's ruling as to the factual prong of Workman is abuse of discretion. Henderson, *supra*, 182 Wn.2d at 743 (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). As the Supreme Court has observed, it is the trial judge who has heard all of the testimony, observed the demeanor of the witnesses, and reviewed all the evidence, and who is in the best position to hear and weigh the evidence to determine if it supported the instruction requested. Walker, 136 Wn.2d at 777. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable, or its discretion is exercised on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The court in Henderson reviewed de novo the trial court's decision to refuse to instruct as to the lesser of manslaughter, because it concluded that the trial court did not apply the correct legal definition of manslaughter and a court abuses its discretion when its decision is based on an incorrect legal standard. 182 Wn.2d at 743. The Supreme Court noted that the trial court apparently based its decision on the premise that manslaughter

required only disregard of a risk that a wrongful act would occur, but the risk at issue in a manslaughter case is the risk of a wrongful death. Henderson, 182 Wn.2d at 740-41, 743.

The trial court in Sitthivong's case was well aware that the risk at issue in a manslaughter case is the risk of death – this is established by the court's instructions on manslaughter, which specified that the risk that is disregarded is a risk of death. App. G (Instruction 15, 16). On appeal, this Court's opinion specified that "Sitthivong's actions demonstrated not mere recklessness *regarding human life* but extreme indifference, an aggravated form of recklessness." App. C (slip opin. at 4) (emphasis added). Thus, it is clear that this Court also applied the correct legal standard. Sitthivong has not established that the trial court's decision was manifestly unreasonable.

In the case at bar, Sitthivong shot a 9mm handgun eight times down a sidewalk with many people present. 9RP 83, 131-32; 8RP 127. Sitthivong testified that he paid no attention to whether people were standing and walking in the area into which he shot. 12RP 70-71, 143. One of the shots killed a man (Sok) having a cigarette outside the bar; another struck a man (Phillip Thomas) who was walking along the sidewalk with his girlfriend, causing him

life-threatening injuries. 5RP 196-98; 8RP 220; 9RP 162, 181-83. Although it was very late at night, the area he shot toward was outside a bar that was still open (serving food), and the evidence was uncontested that many people uninvolved in the confrontation were in the area and on the sidewalk. 5RP 141; 8RP 127. The evidence at trial included a video recording of the shooting, Exhibit 5, which illustrated the timing of the shots and showed the area targeted as people fled the shots. 5RP 53, 58-62. The Court of Appeals described Sitthivong's actions as "firing repeatedly into a crowded area." Sitthivong, 175 Wn. App. 1021, slip opin. at 4. Thus, this case is not similar to the facts in Henderson, where there was significant dispute about how many people were in the area toward which the defendant shot. 182 Wn.2d at 738.

Sitthivong has failed to establish that the trial court's decision not to instruct as to the lesser of manslaughter as to Count 5 was manifestly unreasonable. If this Court concludes that it was error to refuse the instruction and that Sitthivong has established that the error caused him substantial prejudice, the remedy is to vacate only the conviction on Count 5 and reinstate the conviction of second degree murder as to Count 1, and remand to the trial court for retrial on Count 5. State v. Turner, 169 Wn.2d 448, 458-61, 466,

238 P.3d 461 (2010) (A lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant's conviction for a more serious offense based on the same act is subsequently overturned on appeal.)

E. CONCLUSION

For the reasons stated above, this personal restraint petition should be dismissed. If the merits are entertained, this Court should concluded that Sitthivong has not established a basis for relief. The petition should be dismissed.

DATED this 3rd day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix A

Appendix A

FILED
KING COUNTY, WASHINGTON
DEC - 2 2011
SUPERIOR COURT CLERK

~~GOPT 10 COUNTY JAIL~~ DEC - 5 2011

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	No. 10-C-04298-5 SEA
Plaintiff,)	
	)	JUDGMENT AND SENTENCE
Vs.	)	FELONY (FJS)
)	
FELIX VINCENT SITTHIVONG)	
)	
Defendant,)	

I. HEARING

I.1 The defendant, the defendant's lawyer, JOHN CROWLEY, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Helen Brown; Assistant Attorney General; District
Prosecutor.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:
2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11/03/2011 by jury verdict (COUNTS II-V) and on 11/16/2011 by bench trial (COUNT VI) of:

Count No.: II Crime: ASSAULT IN THE FIRST DEGREE
RCW 9A.36.011(1)(a) Crime Code: 01010
Date of Crime: 06/06/2010 Incident No. _____

Count No.: III Crime: ATTEMPTED MURDER IN THE SECOND DEGREE
RCW 9A.28.020 AND 9A.32.050(1)(a) Crime Code: 10142
Date of Crime: 06/06/2010 Incident No. _____

Count No.: IV Crime: ATTEMPTED MURDER IN THE SECOND DEGREE
RCW 9A.28.020 AND 9A.32.050(1)(a) Crime Code: 10142
Date of Crime: 06/06/2010 Incident No. _____

Count No.: V Crime: MURDER IN THE FIRST DEGREE
RCW 9A.32.030(1)(b) Crime Code: 00126
Date of Crime: 06/06/2010 Incident No. _____

[X] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) II, III, IV, V RCW 9.94A.533(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.533(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h) Domestic violence as defined in RCW 10.99.020 was pled and proved for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).
- (j) Aggravating circumstances as to count(s) _____:

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count II	0	XII	93 TO 123	+60 MONTHS	153 TO 183 MONTHS	LIFE AND/OR \$50,000
Count III, IV	0	XIV	123 TO 220	75% OF STANDARD +60 MONTHS	152.25 TO 225 MONTHS	LIFE AND/OR \$50,000
Count V	3	XV	271 TO 361	+60 MONTHS	331 TO 421 MONTHS	LIFE AND/OR \$50,000
Count VI	6	III	22 TO 29		22 TO 29 MONTHS	5 YEARS AND/OR \$10,000

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE

Findings of Fact and Conclusions of Law as to sentence above the standard range:

Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.

Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State did did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 - Date to be set.
 - Defendant waives presence at future restitution hearing(s).
 - Restitution is not ordered.
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); Court costs are waived;
- (b) \$100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); Recoupment is waived;
- (d) \$ _____, Fine ; \$1,000, Fine for VUCSA \$2,000, Fine for subsequent VUCSA (RCW 69.50.430); VUCSA fine waived;
- (e) \$ _____, King County Interlocal Drug Fund (RCW 9.94A.030); Drug Fund payment is waived;
- (f) \$ _____, \$100 State Crime Laboratory Fee (RCW 43.43.690); Laboratory fee waived;
- (g) \$ _____, Incarceration costs (RCW 9.94A.760(2)); Incarceration costs waived;
- (h) \$ _____, Other costs for: _____.

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ _____. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; [] (Date): _____ by _____ m.

93 (months) days on count II ; 92.25 (months) days on count IV ; 22 (months) day on count VI
92.25 (months) days on count III ; 271 (months) days on count V ; _____ months/day on count _____

The above terms for counts II - V are consecutive / concurrent. Count VI concurrent to

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) Counts II - V

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: 60 months each for Counts II - V

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 788.5 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): [] _____ day(s) or days determined by the King County Jail.

[] For nonviolent, nonsex offense, credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number.

[] For nonviolent, nonsex offense, the court authorizes earned early release credit consistent with the local correctional facility standards for days spent in the King County Supervised Community Option (Enhanced CCAP).

4.5 NO CONTACT: For the maximum term of Life years, defendant shall have no contact with Sok Sanaly; Phillip Troner; London Nguyen; Giovanni Alameda

4.6 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

[] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [] COMMUNITY CUSTODY for qualifying crimes committed before 7-1-2000, is ordered for [] one year (for a drug offense, assault 2, assault of a child 2, or any crime against a person where there is a finding that defendant or an accomplice was armed with a deadly weapon); [] 18 months (for any vehicular homicide or for a vehicular assault by being under the influence or by operation of a vehicle in a reckless manner); [] two years (for a serious violent offense).

(b) [] COMMUNITY CUSTODY for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months.

(c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:

- Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
- Serious Violent Offense, RCW 9.94A.030 - 36 months
 - If crime committed prior to 8-1-09, a range of 24 to 36 months.
- Violent Offense, RCW 9.94A.030 - 18 months
- Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
 - If crime committed prior to 8-1-09, a range of 9 to 12 months.

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court. APPENDIX H for Community Custody conditions is attached and incorporated herein. APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement, subject to the conditions set out in Appendix H.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 12/2/11

J. Rietchel
JUDGE
Print Name: J Rietchel

Presented by [Signature]
Deputy Prosecuting Attorney, WSBA# 29441
Print Name: John Castellan

Approved as to form. [Signature]
Attorney for Defendant, WSBA # 19868
Print Name: J. Craven

FINGERPRINTS

BEST AVAILABLE IMAGE POSSIBLE



RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE:

DEFENDANT'S ADDRESS: P.O.C.

FELIX VINCENT SITTHIVONG

DATED: 12.02.11

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT

BY: [Signature]
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

S.I.D. NO. WA21398101
DOB: JUNE 19, 1985
SEX: M
RACE: A

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FELIX VINCENT SITTHIVONG

Defendant,

No. 10-C-04298-5 SEA

JUDGMENT AND SENTENCE
(FELONY) - APPENDIX A

ADDITIONAL CURRENT OFFENSES

2.1 The defendant is also convicted of these additional current offenses:

Count No.: VI Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE
SECOND DEGREE

RCW 9A1.040(2)(a)(i)

Crime Code 00532

Date Of Crime 06/06/2010

Incident No. _____

Date: _____

12/2/11

J. Rutschky
JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FELIX VINCENT SITTHIVONG

Defendant,

No. 10-C-04298-5 SEA

JUDGMENT AND SENTENCE,
(FELONY) - APPENDIX B,
CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
FIREARM POSSESSION UNL-2	05/30/2008	ADULT	081033275	KING CO
RESIDENTIAL BURGLARY	09/11/2002	JUVENILE	028022938	KING CO
THEFT-1	09/11/2002	JUVENILE	028022938	KING CO
TAKING VEHICLE W/O PERMISSION	09/11/2002	JUVENILE	028022938	KING CO

[] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date:

12/2/11

J. Rutschel
JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 10-C-04298-5 SEA
)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
FELIX VINCENT SITTHIVONG	)	AND COUNSELING
)	
Defendant,)	

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 12/2/11

J. Rutschel
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,) No. 10-C-04298-5 SEA
)
 vs.) JUDGMENT AND SENTENCE
) APPENDIX H
 FELIX VINCENT SITTHIVONG) COMMUNITY CUSTODY
)
 Defendant,)

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community restitution;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location; and
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)
- 7) Notify community corrections officer of any change in address or employment;
- 8) Upon request of the Department of Corrections, notify the Department of court-ordered treatment;
- 9) Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

The defendant shall not consume any alcohol.
 Defendant shall have no contact with: Sole Family; Phillip Thomas; Leelan Deynes; Joseph Alameda

Defendant shall remain within outside of a specified geographical boundary, to wit:

The defendant shall participate in the following crime-related treatment or counseling services:

The defendant shall comply with the following crime-related prohibitions:

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 12/2/11

J. Rutschel
JUDGE

Appendix B

Appendix B

FILED
KING COUNTY, WASHINGTON

OCT 05 2011

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 FELIX VINCENT SITTHIVONG,)
)
)
)
 Defendant.)

No. 10-C-04298-5 SEA

SECOND AMENDED INFORMATION

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse FELIX VINCENT SITTHIVONG of the crime of **Murder in the First Degree**, committed as follows:

That the defendant FELIX VINCENT SITTHIVONG in King County, Washington, on or about June 6, 2010, with premeditated intent to cause the death of another person, did cause the death of Thearra Steve Sok, a human being, who died on or about June 6, 2010;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant FELIX VINCENT SITTHIVONG at said time of being armed with a 9mm semi-automatic handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

COUNT II

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse FELIX VINCENT SITTHIVONG of the crime of **Assault in the First Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes

SECOND AMENDED INFORMATION - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955



1 were part of a common scheme or plan and which crimes were so closely connected in respect to
2 time, place and occasion that it would be difficult to separate proof of one charge from proof of
the other, committed as follows:

3 That the defendant FELIX VINCENT SITTHIVONG in King County, Washington, on or
4 about June 6, 2010, with intent to inflict great bodily harm, did assault Phillip Thomas with a
5 firearm and force and means likely to produce great bodily harm or death, to-wit: a 9mm semi-
automatic handgun;

6 Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of
Washington.

7 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by
8 the authority of the State of Washington further do accuse the defendant FELIX VINCENT
9 SITTHIVONG at said time of being armed with a 9mm semi-automatic handgun, a firearm as
defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

10 COUNT III

11 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse FELIX
12 VINCENT SITTHIVONG of the crime of **Attempted Murder in the First Degree**, a crime of
13 the same or similar character and based on the same conduct as another crime charged herein,
which crimes were part of a common scheme or plan and which crimes were so closely
connected in respect to time, place and occasion that it would be difficult to separate proof of one
charge from proof of the other, committed as follows:

14 That the defendant FELIX VINCENT SITTHIVONG in King County, Washington, on or
15 about June 6, 2010, with premeditated intent to cause the death of another person, did attempt to
16 cause the death of Landon Nguyen, a human being; attempt as used in the above charge means
that the defendant committed an act which was a substantial step towards the commission of the
above described crime with the ~~intent~~ to commit that crime;

17 Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and
18 dignity of the State of Washington.

19 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by
20 the authority of the State of Washington further do accuse the defendant FELIX VINCENT
SITTHIVONG at said time of being armed with a 9mm handgun, a firearm as defined in RCW
9.41.010, under the authority of RCW 9.94A.533(3).

21 COUNT IV

22 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse FELIX
23 VINCENT SITTHIVONG of the crime of **Attempted Murder in the First Degree**, a crime of
the same or similar character and based on the same conduct as another crime charged herein,

24

1 which crimes were part of a common scheme or plan and which crimes were so closely
2 connected in respect to time, place and occasion that it would be difficult to separate proof of one
charge from proof of the other, committed as follows:

3 That the defendant FELIX VINCENT SITTHIVONG in King County, Washington, on or
4 about June 6, 2010, with premeditated intent to cause the death of another person, did attempt to
5 cause the death of Yousouf Ahmach, a human being; attempt as used in the above charge means
that the defendant committed an act which was a substantial step towards the commission of the
above described crime with the intent to commit that crime;

6 Contrary to RCW 9A.28.020 and RCW 9A.32.030(1)(a), and against the peace and
7 dignity of the State of Washington.

8 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by
9 the authority of the State of Washington further do accuse the defendant FELIX VINCENT
SITTHIVONG at said time of being armed with a 9mm semi-automatic handgun, a firearm as
defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

10 **COUNT V**

11 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse FELIX
12 VINCENT SITTHIVONG of the crime of **Murder in the First Degree**, a crime of the same or
13 similar character and based on the same conduct as another crime charged herein, which crimes
were part of a common scheme or plan and which crimes were so closely connected in respect to
14 time, place and occasion that it would be difficult to separate proof of one charge from proof of
the other, committed as follows:

15 That the defendant FELIX VINCENT SITTHIVONG in King County, Washington, on or
16 about June 6, 2010, under circumstances manifesting an extreme indifference to human life, did
engage in conduct which created a grave risk of death, thereby causing the death of Thearra
Steve Sok, a human being, who died on or about June 6, 2010;

17 Contrary to RCW 9A.32.030(1)(b), and against the peace and dignity of the State of
18 Washington.

19 And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by
20 the authority of the State of Washington further do accuse the defendant FELIX VINCENT
SITTHIVONG at said time of being armed with a 9mm semi-automatic handgun, a firearm as
defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

21 **COUNT VI**

22 And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse FELIX
23 VINCENT SITTHIVONG of the crime of **Unlawful Possession of a Firearm in the Second
Degree**, a crime of the same or similar character and based on the same conduct as another crime

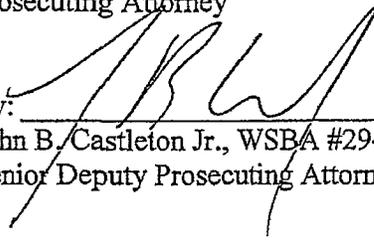
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charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant FELIX VINCENT SITTHIVONG in King County, Washington, on or about June 6, 2010, previously having been convicted in King County Superior Court of Unlawful Possession of a Firearm in the Second Degree, a felony, knowingly did own, have in his possession, or have in his control, a 9mm semi-automatic handgun, a firearm as defined in RCW 9.41.010;

Contrary to RCW 9.41.040(2)(a)(i), and against the peace and dignity of the State of Washington.

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
John B. Castleton Jr., WSBA #29445
Senior Deputy Prosecuting Attorney

Appendix C

Appendix C

175 Wash.App. 1021

NOTE: UNPUBLISHED OPINION, SEE WA
R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Felix Vincent SITTHIVONG, Appellant.

No. 68030-7-I. | June 17, 2013.

Appeal from King County Superior Court;
Honorable Jean Z. Judicial Officer Rietschel.

Attorneys and Law Firms

Nielsen, Broman Koch, PLLC, Attorney at
Law, Christopher Gibson, Nielsen, Broman &
Koch, PLLC, Seattle, WA, for Appellant.

Prosecuting Atty King County, King Co Pros/
App Unit Supervisor, Donna Lynn Wise,
Attorney at Law, Seattle, WA, for Respondent.

UNPUBLISHED

COX, J.

*1 Felix Sitthivong appeals his judgment and sentence, claiming that the trial court abused its discretion when it refused to instruct the jury on the lesser-included instruction of first degree manslaughter. Sitthivong also argues that he received ineffective assistance of counsel at trial because his attorney failed to request a self defense instruction for the charge of first degree assault. In his Statement of Additional Grounds for Review, Sitthivong contends that

the trial court abused its discretion and violated his Sixth Amendment right to confrontation when it ruled that a 911 tape recording relevant to this case was inadmissible. We affirm.

On a Saturday night in 2010, Sitthivong was in the Belltown neighborhood with six friends. They visited several bars during the course of the night. At one of these bars in Belltown, Sitthivong argued with another group of men.

Around 1:30 a.m., Sitthivong's group headed towards V-Bar, a late-night establishment in Belltown. Sitthivong testified that as they drove past V-Bar to park, he saw the same group of individuals with whom he had previously argued. Sitthivong testified that he made eye contact with these individuals and believed they recognized him. No other witness reported that they saw this group, or that any individuals in front of V-Bar were those with whom Sitthivong had argued earlier that night.

At some point during the drive to V-Bar, Sitthivong took a gun from another individual in the car. He then put it in his waistband. Sitthivong testified that he did this because he felt afraid of the individuals in front of V-Bar.

Once they parked in a lot close to V-Bar, Sitthivong and his friends got out of the car. Steve Sok, Phillip Nguyen, and Yousouf Ahmach, who had spent the earlier part of the night in Pioneer Square, not Belltown, were standing on the sidewalk near V-Bar.

At trial, there was conflicting testimony about the interaction between Sitthivong, Sok, Nguyen, and Ahmach. Sitthivong claims Sok and Nguyen confronted him and then turned

and started walking back to V-bar with Ahmach. Sitthivong testified he then saw Sok and Nguyen turn around and point guns at him. All other witnesses testified that Sok, Nguyen, and Sitthivong argued outside V-bar but that they had not seen Nguyen or Sok with guns. All agree that Sitthivong pulled out a gun and started shooting.

Sitthivong fired eight shots into a crowded street. Sok was killed and Phillip Thomas, a bystander, was shot in the stomach. Another individual who lived across the street from the V-Bar, recorded a video of the shooting from his apartment and also called 911 after the incident.

By amended information, the State charged Sitthivong with first degree premeditated murder of Sok (count I) and, in the alternative, first degree murder by extreme indifference for Sok's death (count V). The State also charged Sitthivong with first degree assault of Thomas, the innocent bystander, (count II) and two counts of first degree attempted murder of Ahmach and Nguyen (count III and IV). All charges carried firearm allegations. Finally, the State charged Sitthivong with unlawful possession of a firearm in the second degree, a charge for which Sitthivong agreed to a bench trial.

*2 After a lengthy jury trial, the trial court provided instructions to the jury regarding Sitthivong's justifiable homicide self defense as to all five counts. It also provided a lesser included offense instruction for count I (premeditated first degree murder), instructing the jury on second degree murder and first degree manslaughter. The trial court denied

Sitthivong's request to instruct the jury on the lesser included offense of first degree manslaughter for count V (first degree murder by extreme indifference).

A jury convicted Sitthivong of count V (first degree murder by extreme indifference), counts III and IV (two counts of second degree attempted murder), and count II (first degree assault). The jury also convicted him of the lesser included offense of second degree intentional murder for count I. Finally, they found these crimes were committed while Sitthivong was armed with a firearm.

The trial court found Sitthivong guilty of the firearm possession charge in the bench trial to which he agreed.

The trial court sentenced Sitthivong to standard range sentences for all counts and vacated the second degree murder conviction on double jeopardy grounds.

Sitthivong appeals.

LESSER INCLUDED INSTRUCTION

Sitthivong argues that the trial court abused its discretion when it denied his request for a lesser included first degree manslaughter jury instruction on count V, first degree murder of Sok by extreme indifference. We disagree.

The right to instruct the jury on a lesser included offense is a statutory right.¹ Under the test enunciated by the supreme court in *State v. Workman*, a defendant is entitled to a lesser included offense instruction "if two

conditions are met.”² First, under the legal prong of the test, each element of the lesser offense must be a necessary element of the charged offense.³ Second, under the factual prong, “the evidence must support an inference that the lesser crime was committed.”⁴ “[T]he factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, ... the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.”⁵

¹ State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); RCW 10.61.003, 10.61.006.

² 90 Wn.2d 443, 447, 584 P.2d 382 (1978).

³ State v. Sublett, 176 Wn.2d 58, 83, 292 P.3d 715 (2012).

⁴ *Id.*

⁵ State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (some emphasis added).

An appellate court views the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial.⁶

⁶ *Id.* at 455–56.

This court reviews de novo the legal prong of a request for a jury instruction on a lesser included offense.⁷ Where a trial court's refusal to give instructions is based on the facts of the case, an appellate court reviews this factual determination for abuse of discretion.⁸

⁷ State v. LaPlant, 157 Wn.App. 685, 687, 239 P.3d 366 (2010) (citing State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)).

⁸ *Id.*; State v. Hunter, 152 Wn.App. 30, 43, 216 P.3d 421 (2009) (citing State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 547–49, 947 P.2d 700 (1997)).

Here, the legal prong of the *Workman* test is satisfied. “The elements of first degree manslaughter are necessarily included in first degree murder by extreme indifference...”⁹

⁹ State v. Pettus, 89 Wn.App. 688, 700, 951 P.2d 284 (1998).

*3 Thus, the only question is whether the trial court abused its discretion in deciding that the factual prong was not satisfied. Specifically, did the evidence raise an inference that Sitthivong only committed first degree manslaughter, not first degree murder by extreme indifference?

Under RCW 9A.32.060, first degree manslaughter requires proof that the defendant recklessly caused the death of another.¹⁰ In contrast under RCW 9A.32.030(1)(b), first degree murder by extreme indifference requires proof that the defendant “acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person.”¹¹ There is no dispute here that the firing of shots created a grave risk of death to others and that the shots caused the death of Sok. Thus, the question is whether Sitthivong can point to any evidence in this record that shows his acts were merely reckless.¹²

¹⁰ RCW 9A.32.060(1)(a).

¹¹ State v. Pastrana, 94 Wn.App. 463, 470, 972 P.2d 557 (1999).

¹² *Id.* at 471.

Two opinions addressing the question of whether a lesser included instruction was warranted are instructive: *State v. Pastrana*¹³ and *State v. Pettus*.¹⁴ In both of these cases, the defendant was charged with first degree murder by extreme indifference.¹⁵ Division Two of this court held in both cases that the factual prong of the *Workman* test was not satisfied.¹⁶ Thus, neither defendant was entitled to a lesser included instruction on first degree manslaughter.¹⁷

¹³ 94 Wn.App. 463, 972 P.2d 557 (1999).

¹⁴ 89 Wn.App. 688, 951 P.2d 284 (1998).

¹⁵ *Id.* at 691; *Pastrana*, 94 Wn.App. at 467.

¹⁶ *Pastrana*, 94 Wn.App. at 471–72; *Pettus*, 89 Wn.App. at 700.

¹⁷ *Id.*

In *Pettus*, the defendant was convicted of first degree murder by extreme indifference after driving alongside the car of his victim and firing at it.¹⁸ “The first shot hit the [victim's car] in front of the rear tire. The second shot hit [the victim] in the left arm and penetrated his chest. Two other shots passed nearby or through the windshield and exited through the plastic rear window.”¹⁹ The court concluded that:

¹⁸ *Pettus*, 89 Wn.App. at 691–92.

¹⁹ *Id.* at 692.

[t]he evidence of the force of a .357 magnum, the time of day, the residential neighborhood, and Pettus's admitted inability to control the deadly weapon, particularly from a moving vehicle, does not

support an inference that Pettus's conduct presented a substantial risk of some wrongful act instead of a “grave risk of death.” [20]

²⁰ *Id.* at 700.

In *Pastrana*, the defendant was driving on the interstate when another car cut in front of him.²¹

²¹ *Pastrana*, 94 Wn.App. at 469.

Pastrana retrieved a gun from behind the seat[,] ... rolled down the passenger window and fired one shot out the window, directly in front of [the passenger's] face.

....

After he fired the gun, [the passenger] asked Pastrana what he was thinking. Pastrana replied that he was aiming for a tire. [The passenger] mentioned that “it's kind of hard to be aiming at anything when you are going down the freeway that fast.” [22]

²² *Id.*

Division Two then held that “indiscriminately shooting a gun from a moving vehicle is precisely the type of conduct proscribed by RCW 9A.32.030(1)(b).”²³

²³ *Id.* at 471.

*4 Here, as in *Pastrana* and *Pettus*, Sitthivong's actions demonstrated not mere recklessness regarding human life but extreme indifference, an aggravated form of recklessness. He fired eight shots indiscriminately into a crowded street. He testified that he “wasn't really aiming. I was just—I just pointed and I shot and I just wanted

to get the heck out of there....” When asked whether his eyes were open or closed when he fired, Sitthivong stated that they were a “[l]ittle bit of both.” And Sitthivong himself agreed that “there were a lot of people out there that night ... on the street.” This conduct, when measured against *Pettus* and *Pastrana*, shows that the trial court was well within its discretion to deny the requested instruction.

Sitthivong argues that because the court instructed on his theory of self defense as to count V, he was also entitled to a lesser included instruction as to that count. He relies principally on *State v. Schaffer*.²⁴ That case is distinguishable.

²⁴ 135 Wn.2d 355, 957 P.2d 214 (1998).

In *Schaffer*, the supreme court held that the trial court erred when it failed to instruct the jury on the lesser included offense of first degree manslaughter.²⁵ There, Schaffer argued with another patron of a nightclub, John Magee.²⁶ According to the supreme court's opinion:

²⁵ *Id.* at 358.

²⁶ *Id.* at 357.

When they left the club, Schaffer approached Magee, who shook his fist, swore at Schaffer, and threatened to kill him. When Magee moved his arm toward his back, Schaffer thought he was reaching for a gun. Schaffer drew his own gun and fired several shots. Two bullets struck Magee in the back and three in the legs. One bullet struck ... a passerby in the foot. Magee died at the scene. He was not armed. [27]

²⁷ *Id.*

Schaffer was charged with first degree premeditated murder.²⁸ He argued self defense and requested a lesser included instruction as to first degree manslaughter.²⁹ The supreme court held that the trial court abused its discretion by declining to give the lesser included instruction.³⁰ It reasoned that “a defendant who reasonably believes he is in imminent danger and needs to act in self-defense, ‘but recklessly or negligently used more force than was necessary to repel the attack,’ is entitled to an instruction on manslaughter.”³¹

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 358.

³¹ *Id.* at 358 (quoting *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)).

Despite the seemingly broad language on which Sitthivong relies, *Schaffer* does not support the argued proposition here: that a self-defense theory *always* entitles one to the giving of a lesser included instruction. This is not a case of recklessness or negligence in the use of force. Rather, it is a case of extreme indifference to the consequences to human life exhibited by firing repeatedly into a crowded area. The trial court properly exercised its discretion in denying the requested instruction. *Schaffer* does not command a different result.

INEFFECTIVE ASSISTANCE OF COUNSEL

Sitthivong argues that his attorney's decision not to demand a self defense instruction as to the first degree assault charge deprived him of his right to effective assistance of counsel. We disagree.

*5 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.³² The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.³³ Failure on either prong defeats a claim of ineffective assistance of counsel.³⁴

³² *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

³³ *McFarland*, 127 Wn.2d at 336.

³⁴ *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726 (2007).

Here, Sitthivong claims his counsel's performance was not objectively reasonable because, though charged with first degree assault, the court only instructed the jury as to justifiable homicide, not self defense as to assault. This decision was not objectively unreasonable.

Sitthivong's theory of self defense was that he used lawful self defense in shooting at Sok, Ahmach, and Nguyen. The evidence clearly indicated that the only reason for Thomas's injuries was a result of the shots fired by Sitthivong's at Sok, Ahmach, and Nguyen. Sitthivong had no alternative theory

of self defense for the assault of Thomas. Nor was there evidence to support such a theory. Sitthivong could only argue that, if the use of force as to Sok, Ahmach, and Nguyen was lawful, it was also lawful as to Thomas.

The jury was provided with the justifiable homicide self defense instruction, which mirrors WPIC 16.02. This instruction requires that the slayer reasonably believe that the person slain intended to commit a felony or to inflict death or great personal injury. The instruction reads as follows:

It is a defense to the charges in Counts One through Five that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to commit a felony or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident. [35]

³⁵ Clerk's Papers at 94.

Under this justifiable homicide instruction, if the jury found Sitthivong was justified in using force in self defense against Sok, Nguyen, and Ahmach, then the force was lawful. In that case, Sitthivong's conduct towards Thomas also would have been lawful. This was Sitthivong's theory of defense. His attorney was able to argue it fully without a separate self defense instruction on the assault charges. Because the only intent that Sitthivong had was directed at Sok, Ahmach, and Nguyen, his self defense had to be related to this intent as well. Thus, Sitthivong's attorney's performance was not deficient.

*6 Sitthivong argues that “where self defense is asserted against both homicide and non-homicide offenses, the jury should have received Washington Pattern Jury Instructions (WPIC) 16.02 ... and WPIC 17.02” instructions.³⁶ WPIC 17.02 requires that the defendant “reasonably believes that he is about to be injured.”³⁷ To support his argument, Sitthivong relies on *State v. Cowen*.³⁸

³⁶ Brief of Appellant at 19.

³⁷ WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 253 (3d ed. 2008) (WPIC).

³⁸ 87 Wn.App. 45, 939 P.2d 1249 (1997).

In *Cowen*, this court concluded that the justifiable homicide self defense instruction was properly given, rather than the lesser instruction, in a charge of attempted murder.³⁹ The court noted the difference between these two instructions:

³⁹ *Id.* at 53.

The distinction between the two instructions, WPIC 16.02 and WPIC 17.02, is in the degree of harm that the defendant must perceive. Under WPIC 16.02, the defendant must have ‘reasonably believed that the victim intended to *inflict death or great personal injury* to justify homicide. By contrast, under WPIC 17.02, the defendant need only have reasonably believed that ‘he [was] about to be *injured* to justify acts of force.’^[40]

⁴⁰ *Id.* (some emphasis added) (quoting WPIC 17.02 and WPIC 16.02).

The *Cowen* court went on to note that “the important issue is the defendant's mental state in committing the crime, not whether the victim in fact died.”⁴¹

⁴¹ *Id.*

Here, the only belief that Sitthivong argued he had to explain his actions, was that Ahmach, Sok and Nguyen were intending to inflict death or great personal injury against him. There was no evidence that Thomas intended anything toward Sitthivong, nor did Sitthivong argue that this was the case. In response to the alleged actions of Ahmach, Sok, and Nguyen, Sitthivong shot at them, accidentally hitting Thomas. On these facts, under *Cowen*, only the justifiable homicide instruction was warranted. Counsel's performance was not deficient.

Because Sitthivong's attorney's performance was not deficient, we need not reach the prejudice prong of the test.

In sum, Sitthivong has failed in his burden to show his attorney was ineffective at trial.

STATEMENT OF ADDITIONAL GROUNDS

Sitthivong submitted a statement of additional grounds for review in which he argues that the trial court abused its discretion when it refused to admit the 911 tape recording of a neighbor, who witnessed the shooting. Sitthivong also argues that the trial court violated his Sixth Amendment right to confrontation when it failed to admit the 911 tape recording for impeachment purposes. We disagree with both arguments.

Sixth Amendment Right to Confrontation

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”⁴² An objection based on this Sixth Amendment right must be made at trial to preserve the error for appeal.⁴³

⁴² U.S. CONST. amend. VI.

⁴³ *State v. O’Cain*, 169 Wn.App. 228, 235, 279 P.3d 926 (2012).

Here, while Sitthivong's attorney objected to the court's denial of his request to admit the 911 tape recording for impeachment purposes,

he did not base this objection on an alleged Sixth Amendment violation. Thus, Sitthivong's argument is not preserved for appeal. And there is no explanation provided why we should consider this argument further under RAP 2.5(a).

Excited Utterance

*7 Sitthivong also argues that the trial court abused its discretion by failing to admit the 911 tape recording as an excited utterance exception to the prohibition against hearsay. We do not reach the merits of this argument.

We note that the 911 tape recording is not a part of the record. It does not appear that Sitthivong requested it be made a part of the record on appeal. We will not review a claim without an adequate record to do so. Because the record here is inadequate, we do not reach the merits of this claim.

We affirm the judgment and sentence.

WE CONCUR: VERELLEN and LAU, JJ.

All Citations

Not Reported in P.3d, 175 Wash.App. 1021, 2013 WL 3091054

Appendix D

Appendix D

COMMITMENT ISSUED JAN 24 2014

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,	)	No. 68030-7-1
)	
v.	)	MANDATE
)	
FELIX VINCENT SITTHIVONG,	)	King County
)	
Appellant.	)	Superior Court No. 10-1-04298-5 SEA

FILED
KING COUNTY, WASHINGTON
JAN 24 2014
SUPERIOR COURT CLERK

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on June 17, 2013, became the decision terminating review of this court in the above entitled case on January 15, 2014. An order denying a petition for review was entered in the Supreme Court on December 11, 2013. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Christopher Gibson
Donna Wise
Hon. Jean Rietschell



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 15th day of January, 2014.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

Appendix E

Appendix E

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

In the Matter of the	)	No. 72376-6-1
Personal Restraint of:)	
	)	ORDER OF DISMISSAL
FELIX VINCENT SITTHIVONG,)	
)	
_____ Petitioner.)	

Felix Sitthivong challenges his convictions in King County Superior Court No. 10-1-04298-5 SEA. In order to obtain collateral relief by means of a personal restraint petition, Sitthivong must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Bare assertions and conclusory allegations do not warrant relief in a personal restraint proceeding. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Sitthivong claims the trial court denied him a fair trial by denying his request for 1) a lesser included instruction on one of his charges, and 2) admission of a 911 tape into evidence. Although he casts his arguments differently here, this court rejected these claims in his direct appeal. See State v. Sitthivong, No. 68030-7-1. "A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby." In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 487, 789 P.2d 731 (1990). Nor may a petitioner simply revise a previously rejected argument by alleging different facts or by asserting different legal theories. In re Pers. Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835

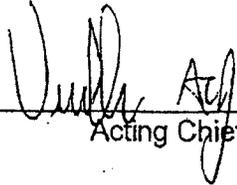
No. 72376-6-1/2

(1994). Sithivong fails to argue or demonstrate that the ends of justice require relitigation of these claims.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 24th day of September, 2014.



Acting Chief Judge

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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Appendix F

Appendix F

RECEIVED
By KC PAO/Appellate Unit at 2:39 pm, Sep 25, 2015

Filed
Washington State Supreme Court

SEP 02 2015
MT

Ronald R. Carpenter
Clerk

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of)
FELIX VINCENT SITTHIVONG,)
Petitioner.)

NO. 90919-9

ORDER

C/A NO. 72376-6-1

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst, Wiggins, and Gordon McCloud, considered this matter at its September 1, 2015, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion for Discretionary Review is granted and the matter is remanded to the Court of Appeals Division One for reconsideration in light of *State v. Henderson*, 182 Wn.2d 734, 344 P.3d 1207 (2015).

DATED at Olympia, Washington this 2nd day of September, 2015.

For the Court

Madsen, C.J.
CHIEF JUSTICE

FILED
Sep 02, 2015
Court of Appeals
Division I
State of Washington

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Appendix G

Appendix G

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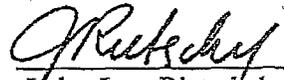
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 FELIX SITTHIVONG,)
)
 Defendant,)
 _____)

NO. 10-1-04298-5 SEA

COURT'S INSTRUCTIONS TO THE JURY

November 1, 2011



Judge Jean Rietschel

ORIGINAL

No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors

that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not

consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

~~A reasonable doubt is one for which a reason exists and may arise from the evidence~~
or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence

No. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

No. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

No. 1

A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he causes the death of such person or of a third person.

No. 8

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

No. 9

To convict the defendant of the crime of Murder in the First Degree, as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 6, 2010, the defendant acted with intent to cause the death of another person;
- (2) That the intent to cause the death was premeditated;
- (3) That Thearra Steve Sok died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count One.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count One.

No. 10

The defendant is charged in Count One with Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

No. 11

A person commits the crime of Murder in the Second Degree when with intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person.

No. 12

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant acted with intent to cause the death of another person;

(2) That Thearra Steve Sok died as a result of defendant's acts; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

The defendant is charged in Count I with Murder in the Second Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Manslaughter in the First Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees or crimes that person is guilty, he or she shall be convicted only of the lowest degree of that crime or the lowest crime of the crimes, or both.

INSTRUCTION NO. 14

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person unless the killing is justifiable.

INSTRUCTION NO. 15

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that death may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

INSTRUCTION NO. 14

To convict the defendant of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 6, 2010, the defendant engaged in reckless conduct;
- (2) That Steve Sok died as a result of defendant's reckless acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

~~On the other hand, if, after weighing all of the evidence, you have a reasonable doubt~~
as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 17

It is a defense to the charges in Counts One through Five that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to commit a felony or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

Murder, Assault in the First Degree, and Assault in the Second Degree are felonies.

No. 19

"Great personal injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

INSTRUCTION NO. 20

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 personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

INSTRUCTION NO. 21

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

No. 22

A person commits the crime of Assault in the First Degree when, with intent to inflict great bodily harm, he assaults another with a firearm or by any force or means likely to produce great bodily harm or death.

No. 23

If a person acts with intent to kill or assault another, but the act harms a third person, the actor is also deemed to have acted with intent to kill or assault the third person.

No. 24

An assault is an intentional touching or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or shooting is offensive if the touching or shooting would offend an ordinary person who is not unduly sensitive.

No. 26

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.

No. 26

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

No. 27

To convict the defendant of the crime of Assault in the First Degree, as charged in Count Two, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant assaulted Phillip Thomas;

(2) That the assault was committed with a firearm or by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count Two.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count Two.

No. 24

A person commits the crime of Attempted Murder in the First Degree when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime.

No. 29

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

No. 31

To convict the defendant of the crime of Attempted Murder in the First Degree as charged in Count Three, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant did an act that was a substantial step toward the commission of murder in the first degree of Landon Nguyen;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count Three.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count Three.

No. 31

The defendant is charged in Count Three with Attempted Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Attempted Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

No. 32

To convict the defendant of the crime of Attempted Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of Landon Nguyen;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 33

To convict the defendant of the crime of Attempted Murder in the First Degree as charged in Count Four, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant did an act that was a substantial step toward the commission of murder in the first degree of Yousouf Ahmach;

(2) That the act was done with the intent to commit Murder in the First Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count Four.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count Four.

No. 79

The defendant is charged in Count Four with Attempted Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Attempted Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

No. 35

To convict the defendant of the crime of Attempted Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of Yousouf Ahmach;

(2) That the act was done with the intent to commit Murder in the Second Degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 34

A person commits the crime of Murder in the First Degree when, under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person and thereby causes the death of a person.

No. 41

To convict the defendant of the crime of Murder in the First Degree, as charged in Count Five, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 6, 2010, the defendant created a grave risk of death to another person;

(2) That the defendant knew of and disregarded the grave risk of death;

(3) That the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life;

(4) That Thearra Steve Sok died as a result of defendant's acts; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count Five.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count Five.

No. 3A

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and nine verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Murder in the First Degree as charged in Count One. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A1 the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A1.

If you find the defendant guilty on verdict form A1, do not use verdict form A2. If you find the defendant not guilty of the crime of Murder in the First Degree as charged in Count One, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A2 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A2.

If you find the defendant guilty on verdict form A2, do not use verdict form A3. If you find the defendant not guilty of the

crime of Murder in the Second Degree as charged in Count One, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A3 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A3.

You will next consider the crime of Assault in the First Degree as charged in Count Two. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You will next consider the crime of Attempted Murder in the First Degree as charged in Count Three. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C1 the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C1.

If you find the defendant guilty on verdict form C1, do not use verdict form C2. If you find the defendant not guilty of the crime of Attempted Murder in the First Degree as charged in Count Three, or if after full and careful consideration of the evidence

you cannot agree on that crime, you will consider the lesser crime of Attempted Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C2 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C2.

You will next consider the crime of Attempted Murder in the First Degree as charged in Count Four. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form D1 the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form D1.

If you find the defendant guilty on verdict form D1, do not use verdict form D2. If you find the defendant not guilty of the crime of Attempted Murder in the First Degree as charged in Count Four, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Attempted Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form D2 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form D2.

You will next consider the crime of Murder in the First Degree as charged in Count Five. If you unanimously agree on a

verdict, you must fill in the blank provided in verdict form E the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form E.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict

No. 29

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Counts One through Five.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

No. 40

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Appendix H

Appendix H

FILED
KING COUNTY, WASHINGTON

NOV 03 2011

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
	)	No. 10-1-04298-5 SEA
Plaintiff,)	
	)	VERDICT FORM A2
vs.)	
)	
FELIX V. SITTHIVONG)	
)	
Defendant.)	

We, the jury, having found the defendant FELIX V. SITTHIVONG not guilty of the crime of Murder in the First Degree in count one as charged, or being unable to unanimously agree as to that charge, find the defendant guilty (write in "not guilty" or "guilty") of the crime of the lesser included crime of Murder in the Second Degree.

11/03/11
Date

[Signature]
Presiding Juror

Appendix I

Appendix I

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FILED
KING COUNTY, WASHINGTON
JAN 04 2012
SUPERIOR COURT CLERK
BY Leah Fontanez
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
	)	No. 10-1-04298-5 SEA
vs.)	
)	
FELIX V. SITTHIVONG,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	PURSUANT TO CrR 6.1(d) AS TO
	)	COUNT SIX ONLY
)	
)	
)	

THE ABOVE-ENTITLED CAUSE having come on for trial between October 5 and November 1, 2011, before the undersigned judge, the Honorable Jean Rietschel, in the above-entitled court; the State of Washington having been represented by Deputy Prosecuting Attorneys John Castleton and Steven Herschkowitz; the defendant appearing in person and having been represented by his attorney, John Crowley; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law as they pertain to Count Six only.¹

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

- (1) On the evening of June 5, 2010; into the early-morning hours of June 6, 2010, the defendant was with some friends in the Belltown neighborhood of Seattle, Washington.

¹ Counts One through Five were tried to a jury concurrently with Count Six. The trial court considered all testimony, evidence, and exhibits offered during the jury trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) AS TO COUNT SIX
ONLY - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

- 1 (2) At approximately 2:40 am on June 6, 2010, the defendant exited a car belonging
2 to Kenrique Thomas and walked to the corner of a building near the corner of 2nd
and Lenora.
- 3 (3) Prior to walking to the corner, the defendant armed himself with a 9mm handgun
4 belonging to Ron Battles, another person inside Thomas's vehicle.
- 5 (4) After arriving at the corner, the defendant came into contact with two men:
Landon Nguyen and Yousouf Ahmach.
- 6 (5) The defendant proceeded to engage Nguyen and Ahmach in conversation, at one
7 point asking them if they knew "Sonny."
- 8 (6) When Nguyen acknowledged knowing Sonny, the defendant pulled out the
handgun from his waistband and tried to fire at Nguyen and Ahmach.
- 9 (7) As Nguyen and Ahmach ran away from the defendant, he fired the gun eight
10 times, hitting Phillip Thomas in the stomach and Steve Sok in the head. Thomas
survived his injuries, but Sok died at the scene.
- 11 (8) Battles, Thomas, Nam Nguyen, and Jarvis Wesson all saw the defendant fire the
12 gun.
- 13 (9) During the defendant's testimony, he admitted to arming himself with the
handgun and to firing the handgun several time.
- 14 (10) On May 30, 2008, the defendant was convicted of Unlawful Possession of a
15 Firearm in the Second Degree, a felony. State's Exhibit 1 for Bench Trial Count
VI.
- 16 (11) The identifying information on State's Exhibit 1 for Bench Trial Count Six is the
17 same as that contained in the certified Department of Licensing abstract admitted
at State's Exhibit 2 for Bench Trial Count VI.

18 And having made those Findings of Fact, the Court also now enters the following:

19 CONCLUSIONS OF LAW

20 I.

21 The above-entitled court has jurisdiction of the subject matter and of the defendant Felix
22 V. Sithivong in the above-entitled cause.

24 FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) AS TO COUNT SIX
ONLY - 2

Daniel T. Satterberg, Prosecuting Attorney
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II.

The following elements of the crime charged have been proven by the State beyond a reasonable doubt:

- (1) That on or about June 6, 2010, Felix V. Sithivong knowingly had a firearm in his possession or control;
- (2) That Felix V. Sithivong had previously been convicted of Unlawful Possession of a Firearm in the Second Degree, a felony;
- (3) That the possession or control of the firearm occurred in the State of Washington.

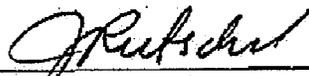
III.

The defendant is guilty of the crime of Unlawful Possession of a Firearm in the Second Degree, pursuant to RCW 9A.10.040(1)(b)(i).

IV.

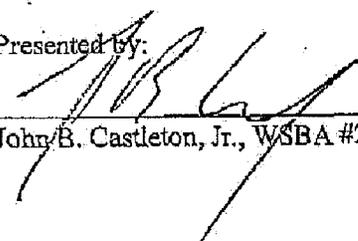
Judgment should be entered in accordance with Conclusion of Law III.

DONE IN OPEN COURT this 3 day of 1, 2012



Judge Jean Rietschel

Presented by:



John B. Castleton, Jr., WSBA #29445

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) AS TO COUNT SIX
ONLY - 3

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(206) 296-9000, FAX (206) 296-0955

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Felix Vincent Sitthivong, the petitioner, at Felix Vincent Sitthivong, #354579, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, containing a copy of the State's Response to Personal Restraint Petition, in IN RE PERSONAL RESTRAINT OF FELIX VINCENT SITTHIVONG, Cause No. 72376-6-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of December, 2015


Name
Done in Seattle, Washington