Supreme Court No. 101810-0

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DARRY DAQUAN SMALLEY,

Petitioner.

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# SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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On Appeal From Pierce County Superior Court
The Hon. Jerry Costello, Presiding

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### *Washington Cases*



### ***Statutes, Constitutional Provisions, Rules and Other Authority***

## 1. INTRODUCTION

In *State v. Avington*, ___ Wn.3d. ___, ___ P.3d ___ (No. 101398-1, Sept. 28, 2023), this Court rejected Darry Smalley's co-defendant's argument that the trial court erred when declining to give the jury lesser-included manslaughter instructions for Count I, the murder count. The *Avington* opinion, though, is not dispositive regarding Mr. Smalley's case.

The Court's opinion left open one key issue that Mr. Smalley explicitly raises, but Avington did not raise in his petition for review – that manslaughter instructions were appropriate under *State v. Schaffer*, 135 Wn.2d 355, 957 P.2d 214 (1998), because there was evidence that Smalley reasonably believed he was in imminent danger and needed to act in self-defense, but recklessly or negligently used more force than was necessary to repel the attack. *See Avington*, Slip Op. at 21 n.2.

The *Schaffer* issue is important because the *Avington* opinion was necessarily focused on *Mr. Avington's* actions and *his* role as an accomplice. The opinion did not explore the evidence from Mr. Smalley's perspective and the propriety of his use of force, including its arguable excessiveness under *Schaffer*.

In light of *Avington*, this Court should grant review in Mr. Smalley's case. With regard to the lesser-included instruction issues, the Court can retain this case for full consideration on the merits or it can remand the case back to Division Two to address the *Schaffer* issue. Furthermore, Mr. Smalley raised a number of other issues in his petition that are not impacted by *Avington*, and this Court should still grant review of those issues.

## B. SUPPLEMENTAL ARGUMENT IN SUPPORT OF PETITION FOR REVIEW

### 1. *Avington's Narrow Holding*

In *Avington*, this Court reaffirmed its earlier holding in *State v. Coryell*, 197 Wn.2d 397, 483 P.3d 98 (2021) that:

> giving juries the option to convict on a lesser included offense "is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts."

*Avington*, Slip Op. at 10 (quoting *Coryell*, 197 Wn.2d at 418) (internal quotes and citation omitted).

Despite this principle, the trial court declined to give manslaughter instructions for both Avington and Smalley. Based on its own review of the evidence and its own credibility determinations about the differences between the testimony and some surveillance videos, the trial court ruled that a jury could not "rationally conclude that any of these defendants committed Manslaughter in the First Degree *to the exclusion* of extreme indifference murder." 17-RP-2629 (emphasis added).

This Court considered the trial court's language to be "inartful." *Avington*, Slip Op. at 22, 24. Nonetheless, rather than

looking at the precise language the trial court *used*, the Court held that the correct analysis was to look at whether the trial court *applied* the proper test. *Avington*, Slip Op. at 18.

The Court then upheld the failure to give manslaughter instructions because Avington was convicted, not as a principal, but only as an accomplice. *See Avington*, Slip Op. at 13 n.1. The Court noted that Mr. Smalley – the principal -- would not be eligible to receive manslaughter instructions because of his testimony that "he was the one who shot and killed King. Smalley further testified that he fired over a dozen shots while aiming at three specific people, including King. This evidence cannot support a lesser included offense instruction for manslaughter." *Avington*, Slip Op. at 24.

The Court concluded that there was no dispute as to Avington's credibility as to a "genuine question of fact that should have been decided by the jury." *Avington*, Slip Op. at 24. Given Avington's role as an accomplice and Smalley's testimony,

there was no harm caused by the failure to give the requested manslaughter instructions:

> The undisputed evidence at trial showed that the bullet that killed King did not come from Avington's gun. As a result, Avington's testimony about the direction of his aim did not create a question of fact for the jury as to whether he participated in King's death under circumstances manifesting an extreme indifference to human life. In other words, contrary to Avington's argument, it simply did not matter whether Avington was aiming directly at anyone or not.

*Avington*, Slip Op. at 2.

### 2. *Smalley's Situation Is Different Than Avington's, and Smalley Raises an Issue that Avington Did Not Properly Raise*

In contrast to Mr. Avington, who claimed he did not aim at anyone in particular, Mr. Smalley readily admitted at trial that he was the one who intentionally and actually shot Mr. King (Mr. Walls and Mr. McIntyre).[1] Mr. Smalley testified he shot King

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[1] The Court's statement in *Avington* regarding Mr. Smalley's testimony, *Avington*, Slip Op. at 24, supports (continued...)

because of Smalley's perception that King and Mr. McIntyre were associated with Mr. Walls and that Walls, King and McIntyre were advancing while Walls was threatening to kill Avington and others while flashing a gun. Smalley's fear of Walls, King and McIntyre was also based on recent events inside the bar where one of Walls' associates had just broken Smalley's tooth, a second degree assault. *See Opening Brief of Appellant* ("*OBA*") at 5-7.[2]

Mr. Smalley did not know who shot Ms. Hendricks, but there were multiple other shooters other than Avington and

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[1](...continued)
Smalley's alternative argument that there was insufficient evidence for murder by extreme indifference. Mr. Smalley's actions were either justified as self-defense or were manslaughter (based on excessive force), but do not support a murder by extreme indifference conviction. *Petition for Review* at 15-18. This sufficiency argument was not raised by Avington.

[2] *See* RCW 9A.36.021(1)(a) (assault based on substantial bodily harm); RCW 9A.04.010(4)(b) (substantial bodily harm includes "fracture of any bodily part").

Smalley, so it is unknown whether Hendricks was struck by bullets fired by people who were not accomplices of Smalley and Avington. *See OBA* at 8-9.[3]

In *Avington*, the Court assumed that Mr. Smalley would not be entitled to manslaughter instructions, and that Avington, since he was convicted as an accomplice, was also not entitled to them. What was missing from the Court's analysis was whether Mr. Smalley was entitled to manslaughter instructions because of the conclusion that he may have had a right to use force to defend

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[3] The *Avington* opinion contains a factual inaccuracy. The Court noted that "[t]he identity of the shooters was undisputed" because prior to trial the three defendants stipulated to their identity. *Avington*, Slip Op. at 7. However, Mr. Davis (as compared to Avington and Smalley) did not stipulate he was a shooter or even held a gun, just that he was depicted in certain photographs as being present. CP 25-30; 8-RP-1139. His acquittal, combined with the evidence of a number of *other* shooters (*OBA* at 8-9), supports the conclusion that Ms. Hendricks may have been shot by those who were not on the same "side" as Avington and Smalley.

himself, but recklessly or negligently used more force than necessary.

This argument is based on this Court's holding in *State v. Schaffer*, *supra*: "[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." *Id*. at 358 (cleaned up).[4]

Mr. Avington explicitly did not raise the negligent or reckless use of force issue in his petition for review, never citing *Schaffer* at all. *See State v. Avington*, No. 101398-1, *Petition for Review* (10/24/22) at 18-30. Thus, this Court specifically declined to address the issue:

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[4] *See also State v. Chambers*, 197 Wn. App. 96, 121-22, 387 P.3d 1108 (2016) (under *Schaffer*, not error to instruct on manslaughter as a lesser: "A jury could reasonably find Chambers acted recklessly or negligently by firing the two fatal shots directly into Hood's back after he turned away and could no longer hold the shovel.").

> In his supplemental brief, Avington argues in the alternative that he was "entitled to manslaughter instructions" because he "need[ed] to act in self-defense, but recklessly or negligently used more force than was necessary to repel the attack." Pet'r's Suppl. Br. at 22 (citing *State v. Schaffer*, 135 Wn.2d 355, 358, 957 P.2d 214 (1998)). However, Avington's petition for review argued only that the trial court relied on an incorrect legal standard for the factual prong of the [*State v.*] *Workman*[, 90 Wn.2d 443, 584 P.2d 382 (1978)] test and improperly "weighed the evidence and engaged in its own determination of credibility." Pet. for Rev. at 19. Therefore, Avington's alternative argument regarding self-defense is not properly before us and we decline to consider it. *See* RAP 13.7(b).

*Avington*, Slip Op. at 21 n.2.

In contrast, Mr. Smalley explicitly seeks review based upon the *Schaffer* issue, discussing *Schaffer* in his *Petition for Review* ("*PFR*") and in this supplemental pleading. *Schaffer* controls this case, and the Court of Appeals erred when not applying its holding to reverse the murder conviction.

As noted, Smalley had just been the victim of a felony assault (suffering a broken tooth) from someone Smalley thought

was associated with Walls. Both he and Avington testified that Walls, King and McIntyre were advancing, while Walls threatened more violence and flashed a gun. *OBA* at 5-9.

The jury was entitled to conclude that even if Mr. Smalley was entitled to use self-defense, like the defendant in *Schaffer*, he was reckless or negligent in his use of force, using excessive force under the circumstances. As Mr. Smalley argued in his petition, "if he used excessive force under the circumstances as under *Schaffer* [] this would meet the definition of manslaughter." *PFR* at 14.[5] The trial court therefore erred when denying manslaughter instructions to Smalley under the tests clarified in *Coryell* and *Avington*.

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[5] *See also State v. Rodriguez*, COA No. 84205-6-I (10/23/23) (unpub.) (post-*Avington* reversal where, despite defendant's testimony, evidence supported that he was so psychotic that he was negligent by failing to be aware of a substantial risk that a wrongful act may occur.).

In contrast to *Avington*, the issue here is properly considered under RAP 13.7(b), and the Court should grant review under RAP 13.4(b)(1), (2), and (3).[6]

### 3. *This Court's Rejection of a Hyper-Technical Analysis of the Trial Court's Ruling Below Supports Review of the Schaffer Issue*

Mr. Smalley raised the *Schaffer* issue in his opening brief. *OBA* at 18-19. The State replied substantively and never objected that the issue was not preserved. *Brief of Respondent* ("*BOR*") at 20-27. Nonetheless, Division Two *sua sponte* refused to consider the issue because it concluded it was not raised below. *Smalley*, Slip Op. at 19 n.4

As argued in Smalley's petition, Division Two's refusal to consider the *Schaffer* issue conflicts with RAP 12.1 and denied

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[6] The conflict with *Schaffer* justifies review under RAP 13.4(b)(1); the conflict with *Chambers* (*see supra* n.4), justifies relief under (b)(2); the constitutional right to a defense (*PFR* at 11) justifies relief under (b)(3).

him due process of law. Const. art. I, § 3; U.S. Const. amend. XIV. Review is proper under RAP 13.4(b)(1)-(4).

Had the State objected to consideration of the *Schaffer* issue, Mr. Smalley could have (1) sought a remand for completion of the record since there was an unreported instructions conference before formal exceptions were taken,17-RP-2603-11,[7] or (2) Mr. Smalley could have raised ineffective assistance of counsel in a supplemental brief because his lawyer did not make a full exception on the record if that was required.[8]

*State v. Avington*, *supra*, supports Mr. Smalley's argument here. The trial court's on-the-record statements at the time of exceptions were arguably legally incorrect – its use of the "to the

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[7] *See State v. Waits*, 200 Wn.2d 507, 517-24, 520 P.3d 49 (2022).

[8] U.S. Const. amend. VI & XIV; Const. art. I, § 22. It is ineffective to object but not make a full legal argument in support of that objection. *See In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 333-34, 945 P.2d 196 (1997) (plurality).

exclusion of" language later discredited in *Coryell* and its statements about making a credibility determination were all, as this Court concluded, "inartful." *Avington*, Slip Op. at 22, 24.

Yet, the Court reached the substantive issues at stake, preferring to look through the "inartful" language:

> Thus, to determine whether the trial court applied the correct legal standard, we cannot rely solely on the trial court's *use* of the "exclusion" language. Instead, we must determine whether the trial court *applied* the "exclusion" language in a manner that was inconsistent with *Coryell*. We hold that it did not.

*Avington*, Slip Op. at 18 (emphasis in original).

Given the trial court's "inartful" language, Smalley's attorney's failure at the very same hearing explicitly to state that his exception to not giving manslaughter instructions was based on *Schaffer* is not a basis to refuse consideration of the argument. Just as this Court "decline[d] to automatically reverse Avington's conviction based on the trial court's inartful wording," *Avington*, Slip Op. at 22, so too should this Court reject Division Two's

automatic affirmance of Mr. Smalley's conviction based on *counsel's* inartful wording at the same hearing. That result would certainly improperly elevate form over substance. *See* RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.").

Mr. Smalley's lawyer formally excepted to the failure to give manslaughter instructions, referencing other counsels' arguments that the evidence supported the giving of such instructions. 17-RP-2613-14, 2617. If the failure to give a more detailed analysis after the unreported instructions conference was "inartful," Mr. Smalley should not suffer the consequences.

This Court should accept review of the *Schaffer* issue under RAP 13.4(b)(1)-(4). This issue was not properly raised by Avington's petition. It is properly raised by Smalley and should lead to the reversal of the murder conviction.

Once review is granted, the Court can resolve the case and all of Smalley's other issues on their merits. Alternatively, the

Court can remand the case to Division Two to resolve the *Schaffer* issue, either with a possible remand for completion of the record of the unreported instructions conference or with supplemental briefing on ineffective assistance of counsel.

## C. CONCLUSION

For the foregoing reasons, and those set out in the *Petition for Review*, this Court should accept review and reverse Mr. Smalley's convictions or remand the case to Division Two for consideration of the lesser-included instruction issues. As explained in his Petition for Review, Mr. Smalley's state and federal constitutional rights under the Second, Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 3, 21, 22 & 24, of the Washington Constitution were violated.

DATED this 20th day of November 2023.

I certify that this brief contains 2496 words (as calculated with the WordPerfect Word Count function), excluding the categories set out in RAP 18.17.

Respectfully submitted,

NEIL M. FOX
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Attorney for Petitioner

# STATUTORY APPENDIX
## Supplementing Appendix Attached to Petition for Review

RAP 1.2 provides in part:

> (a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

RAP 13.7 provides in part:

> (b) Scope of Review. If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review, if review is sought of an interlocutory decision, or the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition. The Supreme Court may limit the issues to one or more of those raised by the parties. If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

RCW 9A.04.010 provides in part:

> (4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;
>
> (b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part . . .

RCW 9A.36.021 provides in part:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm . . . .

*Certificate of Service*

I, Alex Fast, certify that on November 20, 2023, I served the attached Supplemental Brief in Support of Petition for Review on counsel for the Respondent by filing it through the Portal.

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

DATED this 20th day of November 2023, at Seattle, Washington.

s/ Alex Fast
Legal Assistant
Law Office of Neil Fox PLLC

# LAW OFFICE OF NEIL FOX PLLC

## November 20, 2023 - 11:17 AM

## Transmittal Information

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