NO. 92388-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH SCRIBNER,

Appellant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In an unpublished, unanimous decision, the Court of Appeals, Division III, affirmed the conviction of Keith Scribner on False Claims or Proof and Attempted Theft in the First Degree and dismissed a personal restraint petition that was consolidated with the direct appeal. *State v. Scribner,* No. 31792-7 consolidated with No. 32576-8 Slip Op (Wash. Ct. App. July 16, 2015). See Appendix A. The Respondent, State of Washington, opposes further review of the decision.

Scribner contends this Court should accept review to clarify alleged confusion regarding the harmless error rule applicable in multiple-act cases. To raise this issue to the fore, he mischaracterizes the record and the Court of Appeals opinion. In fact, the Court of Appeals recognized that because there was an election to prove a single act in this case, multiple-act jurisprudence does not apply here. Thus, even if Scribner is correct that there remains confusion about the harmless error analysis in multiple-act cases, this unpublished opinion that addresses the standard in dicta and in a cursory manner is not the case in which to clarify the rule. Moreover, Scribner overstates any claimed alleged confusion. This Court has already clearly stated the harmless error analysis in multiple-act cases, and there is no need for this Court's review here.

II. ISSUES FOR REVIEW

This case is an appeal of a jury verdict. The issues presented by the petition are not appropriate for review under the considerations of RAP 13.4(b). If review were accepted, the issues would be:

1. Whether this Court should grant Scribner's petition to review the jury unanimity harmless error test where Scribner's case did not involve multiple acts, and where the Court of Appeals found no error and affirmed his convictions on effective assistance of counsel grounds.

2. Whether Scribner received adequate assistance of counsel where defense counsel did not object to admissible factual testimony regarding why Scribner's insurance claim was denied, and where such testimony did not prejudice Scribner.

3. Whether Scribner's personal restraint petition was properly dismissed where he failed to establish that the results of an MRI performed two business days after he was sentenced constitutes "newly discovered evidence" that could not by due diligence have been discovered during the fifteen months his case was pending trial.

III. STATEMENT OF THE CASE

A. Facts Pertaining To Trial Testimony

In January 2009, a deck awning owned by Marilyn Warsinske collapsed under the weight of snow. RP 990, 1057-58. Petitioner, Keith

Scribner, is Warsinske's son. RP 935. Six months later, Warsinske called her insurance company, Liberty Northwest, to make a claim for the damaged awning. RP 376-77, 816. Thereafter, Scribner took over the handling of the claim. RP 299, 301, 716, 848.

The collapsed awning was hand-built by the prior homeowner at a cost of $300. RP 79-81. The deck was 356 square feet, and this awning covered less than half the deck. RP 144. The purchase of this home closed on September 1, 2008. RP 139. Four days after the home purchase closed and four months before the awning even collapsed, Scribner's architect drew up plans for a new awning covering the entire deck. RP 409-12.

On January 11, 2010, Scribner told insurance adjusters Trevor Evans and Ben Steele that the prior awning covered the entire deck. RP 281-82. Evans knew the home was recently purchased, and that if an appraisal was done it may include photos of the deck. In February 2010, Evans asked Scribner if an appraisal was done and Scribner said one was not done. RP 305-07; Ex. 73. A subsequent investigation revealed that Scribner scheduled an appraisal on August 19, 2008, and met the appraiser at the home to let him in on August 21, 2008. RP 131-34.

Scribner submitted a $203,000 construction bid to Liberty Northwest to build a replacement awning covering the entire deck. RP 856. Liberty Northwest located the prior homeowner who submitted

photos showing that the cheaply constructed $300 awning covered less than half the deck. RP 545-51. This awning is pictured in State's exhibit 7, attached as Appendix B. Based on Scribner's misrepresentation regarding the size of the prior awning, Liberty Northwest denied the claim. RP 740.

B. Facts Pertaining To Jury Instructions

Scribner was charged by Information with False Claims or Proof and Attempted Theft in the First Degree, each allegedly committed from July 31, 2009 (the date the insured made the claim) to October 13, 2010 (the date Liberty Northwest denied the claim). CP 1-3, 24-26.[1]

Before closing, defense counsel requested a jury unanimity instruction, arguing there were two acts which could form the basis of each crime. Slip Op. at 4; RP 116. The first was Scribner's misrepresentation to Evans and Steele on January 11, 2010 regarding the size of the prior awning. The second was Scribner's statement to Evans in February 2010 denying the existence of the appraisal. Slip Op. at 4; RP 1027-28. In response, the trial court modified the "to convict" instructions, instructions 8 and 12,[2] by replacing the charging period of July 31, 2009 through October 13, 2010, with the singular date of January 11, 2010. Slip. Op. at 4; CP 133, 137. Defense counsel withdrew his

[1] A Corrected Information corrected a scrivener's error, which changed the insurance claim number from "Y08882975" to "Y0882975." CP 24-26.

[2] Instructions 8 and 12 are instructions which outline the elements of the crimes and are commonly referred to as "to convict" instructions. CP 133, 137.

request for a unanimity instruction in light of the court's modifications specifying a singular date. RP 1142-43; CP 133, 137.

Defense counsel initially proposed instruction 15, a "to convict" instruction for the uncharged crime of Theft in the First Degree. CP 140; PR 1138-39. He later objected to instruction 15, on the ground that it contained the original expanded charging period. *Id.* The trial court gave instruction 15 over defense counsel's objection. CP 140; RP 1140-41.

The jury never expressed any confusion related to instruction 15. Instructions 8 and 12 correctly referenced the two charged crimes of False Claims or Proof and Attempted Theft in the First Degree, and specifically identified the alleged date of each crime as January 11, 2010. CP 133, 137.

The jury returned verdicts of "guilty" on each of the two verdict forms provided to them. RP 1245-46, Appendices *C, D.* These verdict forms specifically referenced the two charged crimes of False Claims or Proof in Count I and Attempted Theft in the First Degree in Count II, and each charge was listed on the verdict form in all capital letters. *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Scribner's Petition To Review The Jury Unanimity Harmless Error Test Should Be Denied Because His Case Did Not Involve Multiple Acts, The Court Of Appeals Found No Error And His Convictions Were Affirmed On The Basis Of Well-Established Effective Assistance Of Counsel Case Law

1. Scribner's case did not involve multiple acts

Scribner claims the Court of Appeals "acknowledged that there were multiple acts alleged to constitute the basis for each count, but held that any violation of the right to jury unanimity was harmless." Pet. for Rev. at 7. He further claims the Court of Appeals found that "the prosecutor explicitly argued that each of several acts constituted attempted theft first degree." *Id.* Scribner's petition misrepresents the basis of the Court of Appeals opinion, and his assertion regarding the prosecutor's actions are contrary to the record.

The Court of Appeals opinion does not support Scribner's claim that the court agreed with him that there were multiple acts. The Court of Appeals, in its fact section, simply reiterated what defense counsel argued at trial. Slip. Op. at 4. This mere recitation of facts does not suggest that the Court of Appeals accepted this argument. Further, the Court of Appeals never stated that the prosecutor "explicitly argued that each of several acts" constituted either crime. Pet. for Rev. at 7. The record shows that this claim too, falsely attributed to the Court of Appeals, is incorrect.

The prosecutor explained in closing argument how the crime of False Claims or Proof was committed.

> Count I is charged in jury instruction number 8. ... The heart of this case is elements one and two, which is that on January 11th, 2010, the defendant presented or caused to be

> presented a false or fraudulent claim or proof in support of such claim. And that's what he did here. He doesn't file the claim; his mother does. The proof in support of such a claim is a statement about the size of the deck that he makes to Mr. Evans and that he makes to Mr. Steele on January 11th, 2010. RP 1164-65.

Next, the prosecutor explained how the crime of Attempted Theft in the First Degree was committed.

> This is an attempted theft. So you have a definition in your jury instructions of substantial step. ... And here the substantial step is, again, this act on January of 2010 of misrepresenting the size of the prior awning. RP 1167-68.

Scribner's assertion that the prosecutor argued that more than one act constituted his crimes is contrary to the record.[3] All arguments stemming from that incorrect assertion are likewise unsubstantiated.

2. Scribner's case was affirmed on the basis that he received effective assistance of counsel

Scribner characterizes the issue on appeal as a multiple-act jury unanimity case in order to argue that his case involves "a significant question of law under the Constitution" that warrants review under

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[3] Defense counsel's closing also made it clear that the basis of the charges was Scribner's January 11, 2010 misrepresentation regarding the size of the prior awning. "If he's going to make a false claim, he's got to offer false proof, and I ask you use your collective experience and your collective minds to talk about, does it make sense he's going to make a false statement on January 11th after giving all this stuff to them? RP 1226.

RAP 13.4(b)(3). His argument fails, because the Court of Appeals found this was an ineffective assistance of counsel case, not a jury unanimity case. "The issue is whether Mr. Scribner was denied effective assistance of counsel based on instructional and evidentiary error."[4] Slip Op. at 5.

Scribner claimed instruction 15 prejudiced him, contending the jury could have misread it to say "theft" instead of "attempted theft," and thereby based its verdicts on an improper date range.[5] The Court of Appeals rejected his claim that the jury could have been confused, noting that the record showed the actual charges were mentioned repeatedly. Slip Op. at 7. "[N]o reasonable possibility exists the jury convicted Mr. Scriber of an uncharged crime; thus, Mr. Scribner cannot show prejudice. Without this prong of an ineffective assistance of counsel claim, Mr. Scribner's claim fails." Slip Op. at 7, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed 674 (1984).

The Court of Appeals rejected Scribner's claim that his case involved multiple acts, finding there was no error because an election of a specific act had occurred. Slip Op. at 9-10. The court added that even if an election of a specified act had not occurred any error was harmless. *Id.* The Court of Appeals' reference to harmless error is dicta used to

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[4] The evidentiary issues were two issues unrelated to the jury instruction issue.

[5] Scribner's argument pertains only to the attempted theft count as even he does not argue that a jury could have misread instruction 15 to say "false claims or proof."

emphasize that Scribner's jury unanimity argument lacks merit. Scribner's attempt to reframe his case from one decided on ineffective assistance of counsel grounds into a Constitutional claim worthy of review under RAP 13.4(b)(3) should be rejected.

3. The Court of Appeals addressed and rejected Scribner's claim that *Boyde v. California* entitles him to relief

Scribner also claims he is entitled to review because the Court of Appeals did not address his reference to *Boyde v. California,* 494 U.S. 370 (1990) which he states stands for the proposition that "jury instructions are constitutionally inadequate if 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that is unconstitutional." 494 U.S. 370 (1990). Scribner's challenge is without merit, because the Court of Appeals found there was no reasonable possibility the jury misapplied the jury instructions. Slip Op. at 7. In short, the lower court did not ignore Scribner's *Boyde v. California* argument, it simply rejected it.

4. There is no basis for this Court to review its jury unanimity harmless error standard

a. A single sentence in *State v. Camarillo,* does not merit this Court reviewing Scribner's case

Scribner states the harmless error rule for jury unanimity cases is "so hopelessly confused" that his petition for review meets all the criteria in RAP 13.4(b). Scribner inflates any alleged confusion. Scribner claims

there are two harmless error rules for jury unanimity claims, and that the Court of Appeals applied the wrong one. He claims "the first rule" was announced in *State v. Petrich*,[6] 101 Wn.2d 566, 683 P.2d 173 (1984), and that the Court announced "a second rule" in *State v. Kitchen*,[7] 110 Wn.2d 403, 756 P.2d 105 (1988). Scribner contends this second enunciation of the harmless error rule in *Kitchen* is the correct rule. He contends the rule enunciated in *Kitchen* replaced the rule announced in *Petrich*, and that any mention of the language used in *Petrich* leads to confusion. Scribner misapprehends these two cases. *Kitchen* did not announce a different rule. Instead, the *Kitchen* Court explicitly stated it was simply "clarifying" the harmless error standard applied in *Petrich*. *Kitchen*, 120 Wn.2d at 405-06. *Petrich* has never been overturned or abrogated.

Scribner further claims this Court, in *State v. Camarillo,* 115 Wn.2d 60, 794 P.2d 850 (1990) was "confused" by what he characterizes as two different harmless error rules. 115 Wn.2d 60, 794 P.2d 850 (1990). He notes that the *Camarillo* Court, at times, used different language to describe harmless error. Scribner's argument is unpersuasive because this Court explained that what Scribner claims are two different rules is in fact

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[6] "The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt." *Petrich*, 101 Wn.2d at 573.

[7] "[T]he error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." *Kitchen*, 110 Wn.2d at 406.

the same rule explained in two different ways. "Our task is to determine whether a rational trier of fact could have a reasonable doubt as to whether any of the incidents did not establish the crime. *In other words,* whether the evidence of each incident established the crime beyond a reasonable doubt." *Id.* at 71. (emphasis added). Scribner's semantic dissection of the *Camarillo* Court's decision does not warrant this Court revisiting the harmless error rule.

b. This Court's jury unanimity harmless error rule was clearly enunciated in *State v. Coleman*, a decision that was issued seventeen years after *State v. Camarillo* and which cured any alleged defect found in *Camarillo*

Even if this Court accepts Scribner's claim that the Court of Appeals misapprehended the harmless error rule by relying on this Court's 1990 opinion in *State v. Camarillo,* 115 Wn.2d 60, 794 P.2d 850 (1990), there is no basis upon which review should be accepted because this Court clearly enunciated the harmless error rule in its 2007 opinion in *State v. Coleman,* 159 Wn.2d 509, 150 P.3d 1126 (2007). This Court issued *State v. Camarillo* in 1990. 115 Wn.2d 60, 794 P.2d 850 (1990). In 2007, this Court again applied the harmless error standard to a jury unanimity challenge in *State v. Coleman.* 159 Wn.2d 509, 150 P.3d 1126 (2007). In *Coleman,* this Court stated:

> Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice. ... A conviction beset by this error will not be upheld unless the error is harmless beyond a reasonable doubt. The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Coleman*, 159 Wn.2d at 512, citing *Kitchen,* 110 Wn.2d at 411-12.

Coleman enunciated what Scribner characterizes as the "correct *Kitchen* rule." Scribner did not address *Coleman* in his petition.

Even if this Court accepts Scribner's claim that the *Camarillo* opinion was flawed any supposed confusion arising from that decision was cured by this Court's subsequent decision in *State v. Coleman.* 159 Wn.2d 509. Scribner's convictions were affirmed in an unpublished opinion that has no precedential authority. Any claimed misstatements by the Court of Appeals in no way impacts the clarity with which the harmless error rule was enunciated by this Court in *State. Coleman,* the controlling opinion for future courts addressing this issue. Scribner's petition to review an unpublished opinion with no precedential authority should be denied.

c. The Court of Appeals found no error and its passing reference to the harmless error rule does not effect Scribner's convictions

Scribner's claim that the Court of Appeal misstated the harmless error rule is irrelevant, because his case was not decided on harmless error grounds. His challenge also fails because any claimed error was harmless

no matter how he frames the harmless error analysis. Here, Scribner conceded in trial testimony that he told Evans and Steele the incorrect awning size and that he told Evans there was no appraisal. RP 1090. Scribner's defense was that he did not remember the true size of the prior awning, and did not remember that he was present when the appraiser he hired came to the home to conduct the appraisal. RP 1099-1100, 1108, 1112. If a defendant in a multiple- act case raises the same defense for each act and the jury convicts, any claimed unanimity error is harmless because if "the jury reasonably believed one incident occurred, all the incidents must have occurred." *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009) (citations omitted). Here, the Court of Appeals found any perceived error harmless because "[a] rational juror considering this evidence could solely conclude Mr. Scribner lied." Slip. Op. at 10. Scribner used the same defense for both acts so the jury's belief that he lied attaches to both acts. Therefore, any alleged error is harmless regardless of how Scribner describes the harmless error test. [8]

B. Scribner Received Adequate Assistance Of Counsel Where Defense Counsel Did Not Object To Admissible Factual Testimony Regarding Why Scribner's Insurance Claim Was Denied, And Where Such Testimony Did Not Prejudice Scribner

[8] Further, Scribner conviction for False Claims or Proof is not effected by his claim that the jury could have misread instruction 15 to say "attempted theft" instead of "theft."

Scribner contends the Court of Appeals erred when it found that his counsel was not ineffective for failing to object to testimony that Liberty Northwest denied the claim based on fraud. The Court of Appeals concluded there was no error, because the testimony did not constitute impermissible opinion testimony regarding guilt. Slip Op. at 13. Scribner claims this Court should review this holding because it allegedly conflicts with *Warren v. Hart*, 71 Wn.2d 512, 514, 429 P.2d 873 (1967) and *State v. Quaale*, 182 Wn.2d 191, 193-95, 200, 340 P.3d 213 (2014). Scribner's argument is without merit because these cases are inapplicable to his case.

In *Warren v. Hart* this Court held that a police officer's non-issuance of a traffic citation was inadmissible in an action for damages resulting from a car collision. *Warren*, 71 Wn.2d at 514. This Court also held that counsel committed misconduct in closing by referring to police officers at the scene as "a little baby court" that had already conducted an investigation and determined the defendant was not at fault. *Id.* at 517.

In *State v. Quaale,* this Court held inadmissible a trooper's testimony that based on the Horizontal Gaze Nystagmus (HGN) test alone he had "no doubt" the defendant was impaired. *Quaale*, 182 Wn.2d at 198-99. This Court explained that the HGN test shows that a person consumed intoxicants, but does not show how much was consumed. *Id.* By

testifying in absolute terms that the defendant was "impaired" the trooper imputed a level of scientific certainty to the HGN that does not exist. *Id.*

Both cases concerned a police officer declaring a person's guilt in absolute terms based on his or her investigation and assessment of the evidence. *Warren*, 71 Wn.2d at 517; *Quaale*, 182 Wn.2d at 198-99. Scribner's challenge fails because these cases about opinion testimony are inapplicable to the Court of Appeals' holding that Steele's testimony was a purely factual recitation of the chronology of events. Slip Op. at 13. Moreover, the Court of Appeals found that Scribner failed to establish the prejudice necessary to prevail on an ineffective assistance of counsel claim because the "State's overwhelming evidence showed Mr. Scribner filed a false claim for a nonexistent deck cover[.]" Slip. Op. at 13.

Review under RAP 13.4(b) may be granted when a petitioner shows that a lower court's decision conflicts with existing case law. The cases Scribner relies on are not in conflict with the Court of Appeals decision, because they are inapplicable to his case. Scribner's petition for review on this ground should be denied.

C. Petitioner's Personal Restraint Petition Was Properly Dismissed Where He Failed To Establish That The Results Of An MRI Performed Two Business Days After He Was Sentenced Constitutes "Newly Discovered Evidence" That Could Not By Due Diligence Have Been Discovered During The Fifteen Month His Case Was Pending Trial

1. Facts pertaining to personal restraint petition

In 2003, Scribner filed for disability benefits claiming he suffered from memory impairment due to carbon monoxide exposure. Appendices E, F. The Office of the Insurance Commissioner (OIC) conducted an investigation into Scribner's disability claim. This investigation concluded that Scribner was not impaired in any way, cognitively or otherwise. Appendix E, p. 4.[9] Scribner was not charged with a crime in that matter, but he agreed to terminate his disability benefits. Appendix F, pp. 1-2. The entire disability claim investigation was provided to Scribner as discovery in Scribner's criminal case. Appendix E, p. 4.

On November 11, 2011, Scribner was charged with False Claim or Proof and Attempted Theft in the First Degree. CP 1-3.[10]

On February 27, 2013, Scribner's case proceeded to trial. The parties entered a stipulation that Scribner would not offer evidence concerning purported cognitive deficits that allegedly resulted from Scribner's 2003 carbon monoxide exposure. Appendix F. Scribner entered the stipulation because he knew that if he claimed he was cognitively impaired due to carbon monoxide poisoning evidence of the past OIC investigation concluding he was not impaired could be admitted.

[9] The page numbers in Appendix E refer to the numbers at the bottom right-hand corner of the page, not to the sequential order of the pages.

[10] A Corrected Information was subsequently filed which changed the insurance claim number from "Y08882975" to "Y0882975." CP 24-26.

Appendices E, F. This carefully crafted stipulation allowed Scribner to present testimony regarding the effects of medications he was taking without risking that the prior OIC investigation documenting his history of feigned medical impairment would be admitted. Appendix F.

On March 13, 2013, Scribner was convicted of both charges.[11] CP 1245-46. On April 15, 2013, he filed a Motion For Arrest Of Judgment (CrR 7.8) and a Motion For A New Trial (CrR 7.5).[12] On June 14, 2013, the trial court denied Scribner's motions and proceeded to sentence him.

On June 18, 2013, two business days after he was sentenced, Scribner had magnetic resonance imaging ("MRI") done on his brain.[13] On June 12, 2014, he filed a "Motion For Relief From Judgment" arguing that the MRI was newly discovered evidence entitling him to a new trial. See CrR 7.8(b)(2).[14] Pursuant to CrR 7.8(c)(2). Scribner's motion was transferred to the Court of Appeals for consideration as a personal restraint petition. The petition was consolidated with Scribner's direct appeal.

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[11] Since Scribner's PRP was consolidated with the direct appeal the State is citing to the clerk's papers and trial transcripts designated for the appeal rather than attaching such documents as exhibits.

[12] Scribner raised three issues in his new trial motions. These three issues are different than what he raised in his personal restraint petition.

[13] Scribner was sentenced on Friday, June 14, 2013. He received the MRI he used in his Motion For Relief From Judgment on Tuesday, June 18, 2013.

[14] CrR 7.5(a)(3) provides: Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial.

2. Scribner's reference to *Orndorff v. Commonwealth*, an opinion from the Virginia Supreme Court which holds no authority in Washington State, does not meet the criteria for review set forth in RAP 13.4(b)

Scribner misapprehends the Court of Appeals opinion dismissing his personal restraint petition. He states the court dismissed his petition because it found he could have discovered evidence of memory impairment if he'd exercised due diligence. Scribner omits the court's key conclusion that he made a strategic decision not to introduce evidence of alleged impairment in order to keep out highly damaging evidence that he has a history of faking impairment. Slip Op. at 15. In light of this obvious strategic decision, the Court of Appeals rejected as inconsistent Scribner's claim that the alleged evidence of memory impairment he "discovered" two days after he was sentenced could not have been "discovered" during the fifteen months his case was pending trial. Slip Op. at 15-16.

Scribner is not entitled to further review because the facts belie his claim that evidence of cognitive impairment could not have been discovered before trial by the exercise of due diligence. Scribner first complained of memory problems in 2002. Appendix G, par. 10. These complaints continued intermittently for the next eleven years. Appendix G. Scribner was charged with these crimes on November 11, 2011. CP 103. His case proceeded to trial on February 27, 2013. He had fifteen

months between the charging date and trial to explore an impaired memory defense. Scribner could have obtained an MRI at any time during those fifteen months. Instead, he chose to proceed to trial with a carefully crafted stipulation designed to keep out damaging evidence that he has a history of misrepresenting his medical condition for profit.

Scribner's petition was dismissed because evidence that is readily obtainable but not pursued prior to or during trial does not entitle a petitioner to a new trial. *See In re the Personal Restraint of Copland*, 176 Wn. App. 432, 451, 309 P.3d 626 (2013) (post trial expert opinion that petitioner did not fire the gun that killed the victim does not constitute "newly discovered evidence" because opinion was based on facts available at trial). This is especially true when a petitioner chooses to not pursue ascertainable evidence in favor of a different trial strategy. See, *State v. Barry,* 25 Wn. App. 751, 760, 611 P.2d 1262 (1980)("Where the allegedly newly discovered evidence was known to the defense and obtainable by it before or during trial and the defense trial strategy was not to utilize such known or obtainable evidence during the trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence 'newly discovered.'")

Scribner claims that notwithstanding the Court of Appeals' sound application of Washington law, this Court should accept his petition so it

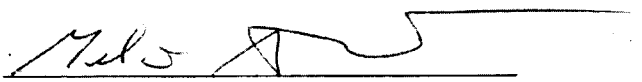
can review *Orndorff v. Commonwealth*, 271 Va. 486, 628 S.E.2d 344 (2006). Scribner claims that *Orndorff* requires courts to apply the "due diligence" standard for newly discovered evidence to medical providers. Scribner's claim that *Orndorff* entitles him to review is without merit. Scribner failed to obtain an MRI before trial because he made a strategic decision not to pursue an impaired memory defense, not because of any alleged failure on the part of any medical professional. More importantly, Scribner makes no attempt to explain how an opinion issued by a Virginia court entitles him to review under RAP 13.4(b). Because his petition on this ground does not meet any of criteria for review, it should be rejected.

V. CONCLUSION

The State asks this Court to deny the petition for review.

RESPECTFULLY SUBMITTED this 10th day of November, 2015.

ROBERT W. FERGUSON
Attorney General of Washington



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NO. 92388-4

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. KEITH SCRIBNER, Petitioner.	DECLARATION OF SERVICE

DAISY LOGO declares as follows:

On Tuesday, November 10, 2015, I deposited into the United States Mail, first-class postage prepaid and addressed as follows:

Chris A. Bugbee
1312 N. Monroe St
Spokane, WA 99201-2623

James Elliot Lobsenz
CARNEY BADLEY SPELLMAN
701 5th Avenue, Suite 3600
Seattle, WA 98104-7010

Copies of the following documents:

1) ANSWER TO PETITION FOR REVIEW
2) DECLARATION OF SERVICE

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

RESPECTFULLY SUBMITTED this 10th day of November, 2015.

DAISY LOGO

Appendix A

FILED
JULY 16, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. KEITH R. SCRIBNER, Appellant. In re Personal Restraint Petition of: KEITH R. SCRIBNER, Petitioner.	)	No. 31792-7-III Consolidated with No. 32576-8-III UNPUBLISHED OPINION

BROWN, J. — Keith Scribner appeals his convictions for (1) false claim or proof and (2) attempted first degree theft related to his filing an excessive insurance claim for his mother's damaged awning. He contends ineffective assistance of counsel and instructional error are reversible errors. In his consolidated personal restraint petition (PRP), Mr. Scribner alleges newly discovered evidence shows his medical condition caused him to be unable to recall events with specificity, warranting a new trial. We reject his contentions and decide his PRP lacks merit. Accordingly, we deny Mr. Scribner's PRP and affirm.

FACTS

The substantive facts supporting Mr. Scribner's convictions are not challenged for insufficiency. Generally, the evidence showed in 2008 Mr. Scribner arranged to purchase Scott Starkey's home (his next door neighbor) for his mother, Marilyn Warsinske. After a January 2009 snow storm damaged her deck awning, Ms. Warsinske, at Mr. Scribner's urging, reported the loss to Liberty Mutual Insurance. In August 2009, Mr. Scribner submitted a $203,000 insurance claim for loss, representing the awning as having covered the entire deck and more than twice the size of the pre-loss awning.

Critical to the outcome, on January 11, 2010 Mr. Scribner gave insurance adjusters Trevor Evans and Ben Steele building plans depicting a 320 square foot awning. He did not disclose the plans had been made four months before the loss to replace the existing smaller, and much less expensive awning that existed and was later damaged. Later, Mr. Scribner submitted $195,586 and $213,815 bids, apparently based on the plans.

Next in importance, in February 2010 while looking for photographs, Mr. Evans asked Mr. Scribner if any appraisal had been done for the home purchase. Mr. Scribner denied any existed, although he had indeed arranged for and received an appraisal. Mr. Steele later discovered an aerial photo in March 2010 showing the smaller awning. Then, special investigator Traci Johnson located Mr. Starkey for photographs and the insurance company located the denied appraisal done in Mr. Scribner's presence. In

October 2010, Liberty Northwest denied the claim based on its finding Mr. Scribner had misrepresented the awning size.

The State charged Mr. Scribner with submitting a false claim or proof to an insurance company and attempted first degree theft. The information specified Mr. Scribner committed each of the two charged crimes during the period of time "from July 31, 2009 to October 13, 2010." Clerk's Papers (CP) at 1-2. The charging period was from the date the insured made the claim (July 31, 2009) to the date Liberty Northwest denied the claim (October 13, 2010).

During trial, Ms. Johnson testified about her interview with Ms. Warsinke. Ms. Warsinke answered some of Ms. Johnson's questions, but she refused to answer others. When the prosecutor asked Ms. Johnson about this, Mr. Scribner's counsel unsuccessfully objected on hearsay grounds. On the next day of trial, the prosecutor asked Mr. Steele about an e-mail exchange that he had with Ms. Johnson about Ms. Warsinke's interview. Via e-mail, Ms. Johnson told Mr. Steele, "Yesterday did not go well. She hardly answered any questions. It was really a waste of time." Report of Proceedings (RP) at 811. Mr. Steele replied, "[D]id she really not know anything . . . was she evading?" RP at 811. Ms. Johnson responded, "[E]vading, definitely." RP at 812. Defense counsel did not object to the reading of this e-mail. The e-mail was admitted as a defense exhibit because it also contained a statement from Ms. Johnson to Mr. Steele, informing him she chose not to show Ms. Warsinske photographs the

insurance company obtained showing the prior awning. Mr. Steele responded, "Keep them guessing." RP at 781.

The prosecutor asked Mr. Steele the purpose of Liberty Northwest denying Ms. Warsinke's claim. He answered, without objection, "It was denied on four counts: really", Late reporting, lack of cooperation, concealment or misrepresentation, and lack of coverage." RP at 731. To clarify, the prosecutor asked, without objection, "[Y]ou had just testified before that the coverage was denied for lack of coverage, late reporting, lack of cooperation and concealment or fraud, correct?" RP at 735. Mr. Steele responded, "Correct." RP at 736.

At the conclusion of testimony, defense counsel requested a jury unanimity instruction for each count pursuant to *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In support, defense counsel argued two different acts could form the basis of false claims or proof and attempted first degree theft: Mr. Scribner's misrepresentation to Mr. Evans and Mr. Steele on January 11, 2010 regarding the size of the prior awning and Mr. Scribner's statement to Mr. Evans in February 2010 denying the existence of the appraisal. The State objected. The court instructed the parties to craft a *Petrich* instruction, but when they could not agree on the language, the court modified the to convict instructions by changing the charging period of July 31, 2009 through October 13, 2010 to specify the single date of January 11, 2010.

Defense counsel then objected to his own proposed instruction, instruction 15 (the to convict instruction on the underlying crime of first degree theft instead of

attempted first degree theft). This instruction contained the broader language of "July 31, 2009 to and including October 13, 2010" to convict Mr. Scribner of first degree theft. CP at 140. The court allowed the instruction because the "substantial step can be pinpointed at the [January 11, 2010] meeting, but your theft, the underlying crime, still has that range of dates that allows the state to argue this deception through these events." RP at 1134-35. Instruction 8 (to convict on false claims or proof) and instruction 12 (to convict on attempted first degree theft) both limit the occurrence date to January 11, 2010.

The jury found Mr. Scribner guilty as charged. He appealed and filed a PRP that this court consolidated with his appeal.

ANALYSIS

A. Ineffective Assistance of Counsel

The issue is whether Mr. Scribner was denied effective assistance of counsel based on instructional and evidentiary error. Many of Mr. Scribner's allegations are raised for the first time on appeal. Generally, we do not review instructional error allegations that were not presented to the trial court unless the alleged error involves a manifest error affecting a constitutional right. *State v. Scott,* 110 Wn.2d 682, 684, 757 P.2d 492 (1988). Ineffective assistance of counsel is a manifest error affecting a constitutional right and so we must review Mr. Scribner's claim even if it is raised for the first time on appeal. *State v. Brown,* 159 Wn. App. 1, 17, 248 P.3d 518 (2010) (citing RAP 2.5).

The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prevail on an ineffectiveness claim, the defendant must prove (1) counsel's performance was deficient and (2) the defendant was prejudiced by the deficient performance. *Id.* at 687. The deficient performance and prejudice showings are conjunctive, and this court may resolve an ineffective assistance claim against a defendant failing to make the necessary showing on either. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In deciding whether counsel's performance was deficient, we strongly presume counsel provided proper, professional assistance and "will not find deficient representation if counsel's actions were tied to a legitimate strategic or tactical rationale." *State v. Saunders*, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (citing *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 117 (1991)).

First, Mr. Scribner contends his defense counsel was deficient in proposing instruction 15 relating to first degree theft when the State did not charge him with first degree theft. Generally, review of such contention "is precluded under the invited error doctrine," however, "where the error is the result of ineffective assistance of counsel, review is not precluded." *In re Haghighi*, 178 Wn.2d 435, 446-47, 309 P.3d 459 (2013). The State concedes defense counsel's offering of a to-convict jury instruction on an uncharged crime may amount to deficient performance, but argues such error was not prejudicial.

The error of offering an uncharged means as a basis for conviction is prejudicial only if it is possible the jury might have convicted the defendant under the uncharged alternative. *State v. Doogan*, 82 Wn. App. 185, 189-190, 917 P.2d 155 (1996). Here, the jury did not convict Mr. Scribner of first degree theft. Rather, the guilty verdict forms explicitly show the jury found him guilty of false claim or proof and attempted first degree theft. While Mr. Scribner argues the jury may have been confused what offense the State charged him with, the record shows it was mentioned repeatedly during trial what were the exact charges. "One can always speculate about fanciful ways that an error might have affected the final verdict." *State v. Coristine*, 177 Wn.2d 370, 396, 300 P.3d 400 (2013) (Gonzalez, J., dissenting). But here, no reasonable possibility exists the jury convicted Mr. Scribner of an uncharged crime; thus, Mr. Scribner cannot show prejudice. Without this prong of an ineffective assistance of counsel claim, Mr. Scribner's claim fails. *See Strickland*, 466 U.S. at 687 (in order to prevail on an ineffectiveness claim, the defendant must show deficient performance and prejudice).

Mr. Scribner alternatively argues instruction 15 denied him his constitutional rights to jury unanimity and due process because it did not have the same specificity of dates as the other instructions. As discussed, the invited error doctrine generally precludes challenging a jury instruction proposed by the appellant. However, defense counsel proposed the instruction, then unsuccessfully challenged the instruction because it would implicate jury unanimity. In such cases, our Supreme Court has held, "we recognized an exception to [the] general doctrine of invited error . . . . '[t]he fact that

[the petitioner] proposed . . . the . . . instruction is no bar to his challenge to it, for he also proposed a curative instruction that was not given and, thus, did not invite the error that he complains of now.'" *State v. Vander Houwen*, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) (quoting *State v. Studd*, 137 Wn.2d 533, 552, 973 P.2d 1049 (1999)).

In Washington, a jury may convict a criminal defendant only if the members of the jury unanimously conclude that the defendant committed the criminal act with which he or she was charged. *Petrich*, 101 Wn.2d at 569. A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged with solely one count of criminal conduct, the jury must be unanimous as to which act or incident constitutes the charged crime. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *Petrich*, 101 Wn.2d at 572. The "jury must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct." *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007).

The determination of whether a unanimity instruction was required turns on whether the prosecution constituted a "multiple acts case." *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (emphasis omitted). A multiple acts prosecution occurs when "several acts are alleged and any one of them could constitute the crime charged." *Kitchen*, 110 Wn.2d at 411. For example, the prosecution for a single count

of rape based on evidence of multiple, separate acts, "each of which is capable of satisfying the material facts required to prove" the charged crime, constitutes a multiple acts case. *Bobenhouse*, 166 Wn.2d at 894; *see also Kitchen*, 110 Wn.2d at 405-06, 411. Thus, in multiple acts cases, either (1) the State must elect a specific act on which it will rely for conviction or (2) the trial court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. *Bobenhouse*, 166 Wn.2d at 893; *Noltie*, 116 Wn.2d at 843; *Petrich*, 101 Wn.2d at 572. The failure of the State to elect a specific act or the trial court's failure to issue a unanimity instruction in a multiple acts case "is constitutional error. 'The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.'" *Bobenhouse*, 166 Wn.2d at 893 (alteration in original) (quoting *Kitchen*, 110 Wn.2d at 411).

We review the failure to give a multiple acts unanimity instruction for constitutional harmless error. *Bobenhouse*, 166 Wn.2d at 893. Such an error is not harmless unless "'a rational trier of fact could find that each incident was proved beyond a reasonable doubt.'" *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (quoting *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985)).

Here, an election of a specific act exists. The instructions as a whole informed the jury that in order to find Mr. Scribner guilty of false claims or proof and attempted first degree theft, it had to conclude Mr. Scribner misrepresented the size of the awning

to Mr. Evans and Mr. Steele on January 11, 2010. This was clearly specified in the to convict instructions on these offenses (8 and 12). Instruction 15 did not conflict with instructions 8 or 12; rather, it was superfluous. The jury did not ask any questions, and when polled all agreed that the verdict forms represented their individual and unanimous verdicts. The remaining jury instructions and the corresponding verdict forms combine to show instruction 15 did not impact Instructions 8 and 12.

Moreover, any unanimity problem was harmless error. Substantial evidence established Mr. Scribner knowingly made a material misrepresentation when he told Liberty Northwest the awning destroyed was a large elaborate awning costing hundreds of thousands of dollars to adequately replace. Mr. Starkey, the prior homeowner, testified the awning was hand-built by him at a cost of approximately $300 and that it covered less than half the deck. The photographic exhibits, appraisal, and testimony established the prior awning did not cover the entire deck. A rational juror considering this evidence could solely conclude Mr. Scribner lied. Mr. Scribner lived next door to the awning for several years and visited his mother's home often. Mr. Scribner discovered the awning had collapsed in January 2009. Given all, we conclude Mr. Scribner was not prejudiced by any perceived deficiency when his counsel proposed a superfluous jury instruction. The jury instructions properly limited the jury to convict for each crime. Instruction 15 was unnecessary, but harmless and, therefore, not a manifest constitutional error.

Second, Mr. Scribner contends his counsel was ineffective by failing to object to testimony showing Ms. Warsinske was evasive and that Mr. Scribner engaged in fraud. Mr. Scribner raises these arguments for the first time on appeal in the context of his ineffective assistance of counsel argument, rather than in the context of a properly preserved challenge to the trial court's discretionary evidentiary ruling. Thus, Mr. Scribner must show not only that his counsel's performance was deficient but also that this deficient performance prejudiced the trial's outcome. *Strickland*, 466 U.S. at 686. Mr. Scribner fails to establish resulting prejudice.

"'Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury].'" *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (internal quotation marks omitted) (alterations in original) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because it violates a defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. *Demery*, 144 Wn.2d at 759. Thus, witnesses may not offer opinions on the defendant's guilt, either directly or by inference. *King*, 167 Wn.2d at 331 (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Whether testimony is an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific case circumstances, including the type of witness involved, the specific nature of the

testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Testimony not directly commenting as to personal belief of the defendant's guilt or the veracity of a witness is helpful to the jury, and testimony based on inferences from the evidence is not improper opinion testimony. *State v. Blake*, 172 Wn. App. 515, 528, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013). "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Heatley*, 70 Wn. App. at 579. And constitutional error, if any, is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *See State v. Quaale*, 182 Wn.2d 191, 218, 340 P.3d 213 (2014) (discussing constitutional harmless error as applied to improper opinions on guilt).

Mr. Scribner argues his counsel provided ineffective assistance when he failed to object to a statement by Ms. Johnson to Mr. Steele via e-mail that Ms. Warsinske was "evading." RP at 812. Assuming the word "evading" is a comment on witness veracity, the statement was made in an email introduced by the defense because the email contained a statement from Ms. Johnson to Mr. Steele informing him she chose not to show Ms. Warsinske the photographs obtained showing a smaller awning. Mr. Steele responded, "Keep them guessing." RP at 781. Defense counsel chose to introduce this e-mail chain to show the insurance company was being deceptive. This is a tactical decision on behalf of defense counsel. We "will not find deficient representation if

counsel's actions were tied to a legitimate strategic or tactical rationale." *Saunders*, 120 Wn. App. at 819. Thus, Mr. Scribner fails to establish ineffective assistance. Moreover, any error outside the context of an ineffective assistance of counsel claim would be harmless under *Quaale*, 182 Wn.2d at 218. The overwhelming evidence offered by the State showing Mr. Scribner filed a false claim for a deck cover that did not previously exist would not have been undermined by a sustained objection to the e-mail.

Next, Mr. Scribner complains his counsel was ineffective for failing to object to Mr. Steele's testimony that Liberty Northwest denied his claim based on fraud. He unpersuasively argues this was inadmissible opinion testimony as to his guilt. Mr. Steele's testimony regarding why the claim was denied was part of the chronology of events that assisted the jury in understanding the case. The jury heard testimony throughout the trial regarding Mr. Scribner's actions and the jury was advised in opening statements the State charged Mr. Scribner with filing a false claim and attempted theft. Officers often similarly testify in criminal trials about why they arrested a defendant. Even assuming the statement was inadmissible and defense counsel was deficient for not objecting, Mr. Scribner cannot establish prejudice. The State's overwhelming evidence showed Mr. Scribner filed a false claim for a nonexistent deck cover, and the court would not have sustained an objection to Mr. Steele's consistent testimony. Given all, we conclude Mr. Scribner fails to show manifest constitutional error based on ineffective assistance of counsel, and while his trial was not perfect, it was fair.

C. PRP

Mr. Scribner, in his PRP, argues newly discovered evidence shows he lacked the mental capacity to remember the deck cover size before filing the insurance claim.

Under RAP 16.4(a), a petitioner may obtain relief by filing a PRP demonstrating the petitioner is under a "restraint" and the restraint is unlawful. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, is confined, is subject to imminent confinement, or is under some other disability resulting from a judgment or sentence in a criminal case. RAP 16.4(b). "Restraint" includes the continuing effects of an already-served unlawful confinement. *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 670, 675 P.2d 209 (1983).

Initially, we note the sentencing court ordered 240 hours of community service, 15 days of home arrest, and $7,200 in legal financial obligations, all completed. Mr. Scribner fails to explain how he is currently under restraint. Nevertheless, we assume he considers himself under the catchall "some other disability resulting from a judgment or sentence in a criminal case" to establish restraint. RAP 16.4(d).

To obtain PRP relief Mr. Scribner must show either constitutional error resulting in actual and substantial prejudice or nonconstitutional error resulting in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990).[1] Additionally, Mr. Scribner must support his error claims with a statement of

[1] Mr. Scriber argues he should not be held to the complete miscarriage of justice standard because he is requesting relief based on newly discovered evidence. (Petitioner's Reply Br. at 13 n.2) Solely constitutional issues are reviewed under the

facts on which his claim of unlawful restraint is based and the evidence available to support his factual allegations; he cannot rely solely on conclusory allegations. RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *see also Cook*, 114 Wn.2d at 813-14.

Mr. Scribner requests relief based on a magnetic resonance imaging (MRI) performed after he was sentenced. He argues the MRI shows brain damage affecting his ability to recall facts about the prior awning and the appraisal. Mr. Scribner chose at trial to not introduce evidence he was mentally impaired. He made this decision to prevent the State from presenting evidence that in a prior disability claim based on carbon monoxide brain damage, the State found Mr. Scribner not impaired.

To obtain PRP relief based on a claim of newly discovered evidence under RAP 16.4(C)(3), the petitioner must show the new evidence (1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *In re Pers. Restraint of Lord*, 123 Wn .2d 296, 319-20, 868 P.2d 835 (1994). When one factor is absent, we need not consider whether the other factors are present. *State v. Macon*, 128 Wn.2d 784, 803-04, 911 P.2d 1004 (1996).

While several of the above factors would be difficult for Mr. Scribner to establish, the third factor is particularly problematic. Mr. Scribner consciously chose not to raise an impairment defense. To now inconsistently claim he's found impairment evidence

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actual and substantial prejudice standard. *In re Brett*, 142 Wn.2d 868, 874, 16 P.3d 601 (2001).

and it could not be discovered before trial lacks persuasiveness. Moreover, this argument, like some of his other arguments, implicates the invited error doctrine. Without a showing of this factor, we need not discuss this contention further. *Macon*, 128 Wn.2d at 803-04.

Because Mr. Scribner cannot show relief is warranted based on newly discovered evidence, he cannot show that the exclusion of this evidence amounted to a complete miscarriage of justice. Given all, Mr. Scribner fails to show he is unlawfully restrained. Thus, his PRP should be denied.

Affirmed. PRP denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, A.C.J.

I CONCUR:

Lawrence-Berrey, J.

No. 31792-7-III

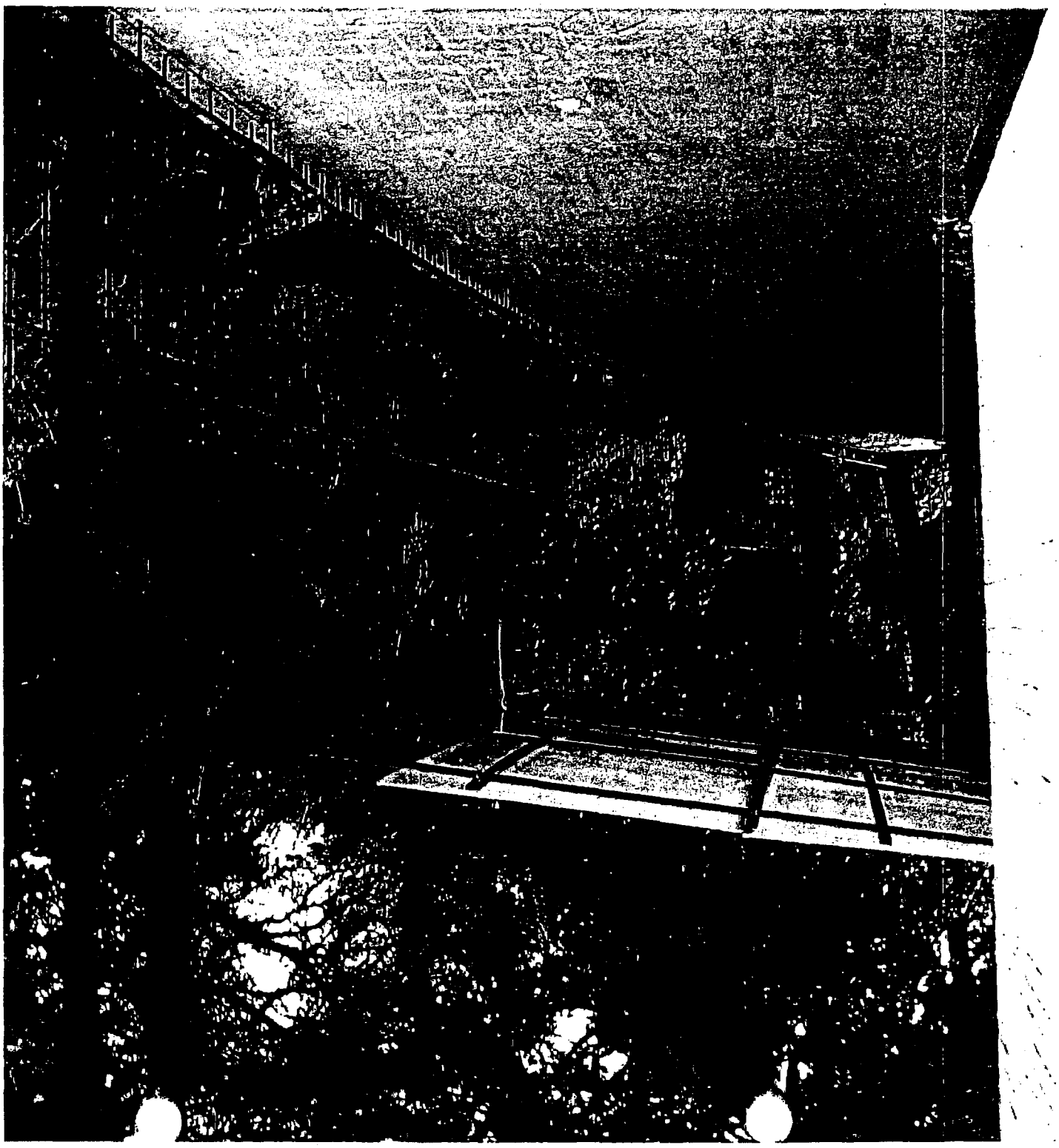
Fearing, J. — (concurrence) Keith Scribner complains his counsel was ineffective for failing to object to Ben Steele's testimony that Liberty Northwest denied his claim based on fraud. He argues that Steele's remark was inadmissible opinion testimony as to his guilt. I agree with the majority that Steele's testimony constituted factual, rather than, opinion testimony. Steele stated the ground on which the insurance company rejected payment rather than providing his view as to whether Keith Scribner committed fraud or was guilty of a crime.

I write separately because Ben Steele's testimony that Liberty Northwest denied the claim based on fraud should have been objected to by Keith Scribner's counsel and should have been excluded by the trial court on the ground of relevance. ER 401, 402. The insurance company's reason for denying Scribner's claim did not render Scribner's guilt for filing a false claim or attempting a theft more probable than not. I concur in the affirmation of the guilty verdict because the failure to object to the testimony did not prejudice Keith Scribner. Scribner fails to show ineffective assistance of counsel or a manifest constitutional error.

I CONCUR:

Fearing, J.

Appendix B



Appendix C

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEITH R. SCRIBNER, Defendant.	CAUSE NO. 2011-1-03474-8 **VERDICT FORM FOR COUNT I**

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the crime of FALSE CLAIMS OR PROOF as charged in Count I.

_____
PRESIDING JUROR

Appendix D

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEITH R. SCRIBNER, Defendant.	CAUSE NO. 2011-1-03474-8 **VERDICT FORM FOR COUNT II**

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the crime of ATTEMPTED THEFT IN THE FIRST DEGREE as charged in Count II.

_____
PRESIDING JUROR

Appendix E

Is that the full extent of the agreement?

MS. TRATNIK: Yes, Your Honor. I think that all the witnesses or many of them are going to need some refreshing of memory. This is an old case. I was just going to call them transcripts rather than depositions, not give any sort of indication. I think when people hear "deposition," they may think of a suit, but simply that you were previously interviewed. I don't care if you call them "deps."

MR. ORESKOVICH: I think we can work it out, Judge. I just wanted to make sure. We have testimony under oath and we may be cross-examining witnesses and they were under oath at the time.

MS. TRATNIK: That's not a problem.

THE COURT: Let me remind you. All right. With Ms. Tratnik, I'll ask you if you would approach and execute your signature.

MS. TRATNIK: Oh, I thought I had signed that. I guess not.

THE COURT: You did sign the other one. And while we're accomplishing that, the other stipulation for order looks like it deals with disability and that carbon monoxide exposure. I won't go into all the details there. I do see both of your signatures.

Counsel, are you in agreement with regard to

that stipulation and order?

MS. TRATNIK: Your Honor, and I've signed it, but I do want to make a brief record. It was the type of stipulation where we're both trying to balance what evidence will and won't come in without opening the door. We've captured it as best we could in the written stipulation, but I don't think it's perfect, so I wanted to let the Court know what we're trying to do here.

In 2003, Mr. Scribner was allegedly exposed to carbon monoxide and this caused various cognitive deficiencies such as memory problems, things of this nature.

The Office of the Insurance Commissioner did an investigation about whether or not he was, in fact, cognitively impaired, and there's a whole case on this that I've turned over to Mr. Oreskovich, which I believe is evidence that he was not impaired in any manner.

However, he is on medication as a result of that, and if he were to testify, the defense wants the jury to know, hey, this person testifying is taking medication and, you know, if he seems a little out of it or whatever, that's why. And I think it's necessary they do that, quite frankly.

What I want to avoid is anything that indicates that at the time he used misrepresentations -- it's the state's position he made misrepresentations to the insurance company during this period of time '08/'09 -- that that was a result of this cognitive impairment.

So the defense has agreed to simply ask, Did you take medication yesterday or this morning? What are they and how might they affect you as you testify today? And I just want to be sure that it's left at that.

If there was anything about, Well, I have this impairment; it started in 2003, we would be making a motion to bring in, as the door being opened, this prior investigation showing that he wasn't impaired. So it's a fine line, and that's the line we're trying to draw.

The defense has agreed they're not going to argue that he was impaired in '08 and '09, but I think it's going to be testified that he's on medication today. That inference is going to be lingering out there, and there's nothing I can do about that, but I do want to keep it narrowly contained.

THE COURT: Thank you. Mr. Oreskovich?

MR. ORESKOVICH: I agree, Judge. The only

real issue and I think the jury has a right to know it, if Mr. Scribner takes the witness stand and he is under the influence of some medications, I may, but I'm not telling you that I necessarily will ask him about that. And I intend to limit it at that to, you know, Did you take something before you testified? What is it? How does it affect you? Is it affecting you? And leave it. And I'm not going any farther than that, and our agreement is if I do that that doesn't open the door.

THE COURT: That that doesn't?

MS. TRATNIK: Does not, and I agree with that.

THE COURT: All right. Very well. And Ms. Tratnik, I don't want to keep pestering you. You did sign the order part but you didn't sign the stipulation part, so I'm glad you're helping to present this.

MS. TRATNIK: There's a lot of paperwork flying around. Thank you, Your Honor.

THE COURT: And I encourage you, Counsel, to keep talking about this. If there are other areas of stipulation, please free.

Mr. Oreskovich?

MR. ORESKOVICH: There's one more we're working on, Your Honor. It's not finalized. My

Appendix F

FILED

FEB 28 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON,

Plaintiff,

vs.

KEITH R. SCRIBNER,

Defendant.

No. 11-103474-8

STIPULATION FOR ORDER IN LIMINE RE: DISABILITY

COME NOW the parties, the State of Washington represented by Melanie Tratnik, and the Defendant, KEITH R. SCRIBNER, by and through his undersigned counsel, and do hereby moves the Court to enter an Agreed Order in Limine regarding:

1. Defendant was exposed to extended contact with Carbon Monoxide and claimed in 2003 that he suffered from cognitive deficits that interfered with his ability to perform his occupational tasks. He made a claim for disability and was awarded disability benefits. The injury and claimed disability occurred during the period at issue in this case. Defendant has been previously investigated by the Office of the Insurance Commissioner under investigative report number 07-0008 arising from a disability claim. Although investigated, the defendant was not charged with any crimes and the investigation was closed. The defendant maintains that his injuries

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and resulting cognitive deficits are permanent but terminated his disability benefits claim.

2. The defendant has been prescribed and regularly takes the following medications arising out of his 2003 injury: Citalopram 20mg; Gabapentin 400mg; Hydrocodone; Zolpidem 10mg; and Oxycontin 20mg.

3. It is anticipated that Defendant may testify in this case and it is expected that he will be taking his prescribed medications during the trial.

4. The parties agree that they will not offer evidence concerning his 2003 injury and cognitive deficits, including but not limited to, any evidence of the disability fraud investigation under report number 07-0008.

5. The parties agree that the nature and extent of the Defendant's prescribed medication and its effect upon him while testifying is admissible during trial and that the introduction of this evidence only will not open the door for the introduction of the disability investigation. If necessary, the parties may prepare the appropriate jury instructions regarding this issue.

DATED this 27 day of February, 2013.

ETTER, McMAHON, LAMBERSON, CLARY & ORESKOVICH, P.C.

By _____
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COURTNEY A. GARCEA, WSBA 41734
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OFFICE OF THE ATTORNEY GENERAL

By _____
MELANIE TRATNIK, WSBA 25576
Assistant Attorney General

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ORDER

IT IS HEREBY ORDERED, based upon stipulation:

1. All evidence of the defendant's 2003 injury and resulting cognitive deficit and prior disability investigation is excluded.

2. Evidence of medications that may affect Defendant while testifying shall be admitted and will not open the door for the admissibility of the prior disability investigation.

DONE IN OPEN COURT this 27th day of February, 2013.

JUDGE/COURT COMMISSIONER

Jointly Stipulated to
and Presented by:

ETTER, McMAHON, LAMBERSON,
CLARY & ORESKOVICH, P.C.

By
CARL J. ORESKOVICH, WSBA 12779
COURTNEY A. GARCEA, WSBA 41734
Attorneys for Def. Scribner

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By
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Appendix G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, and KEITH SCRIBNER, Defendant.	NO. 11-1-03474-8 **DECLARATION OF HAL BAILEY**

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DR. HAL BAILEY hereby declares, under penalty of perjury under the laws of the State of Washington, that the following is true and correct to the best of his knowledge and belief:

1. I am over the age of 18 and competent to be a witness to the matters stated herein. I make this declaration on personal knowledge and in good faith.

2. I am Keith Scribner's primary care physician.

3. I make this declaration as a supplement to the declaration I signed in June 2013.

4. I have been asked, specifically, to comment on the results and significance of an MRI that was obtained on June 18, 2013. This MRI occurred after my prior declaration, signed on June 13, 2013.

5. The 2013 MRI was obtained due to Mr. Scribner's continuing moderately severe sleep apnea – the onset of which occurred in approximately 2009 – but which in June

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of 2013 seemed to causing new or worsening symptoms, including cognitive decline, short term memory loss and worsening peripheral neuropathy.

6. For comparison purposes, it should be noted that I ordered an initial MRI in February 2003. The 2003 MRI was obtained as a result of the onset of Mr. Scribner's peripheral neuropathy. An outside neurologist recommended it to establish a baseline of Mr. Scribner's condition relevant to the treatment of symptoms that resulted from his carbon monoxide exposure in 2001.

7. The 2003 MRI also formed part of the basis of my opinion that Mr. Scribner suffered a disability that affected his ability to perform the responsibilities of job – which I understand was utilized to support his 2003 application for disability benefits.

8. To fully understand the significance of the differences observed in the 2013 MRI as compared to the 2003 MRI it is necessary to understand the progression of Mr. Scribner's various diagnosis, including the 2009 realization that he suffered from sleep apnea.

9. As was set out in my prior declaration, Mr. Scribner suffered a significant exposure in his home to carbon monoxide in 2001. The exposure occurred when Mr. Scribner's house was being remodeled. Banner fuel installed several open-faced fireplaces that were not appropriately vented, releasing carbon monoxide into the dwelling where Mr. Scribner and his family resided. A lawsuit was instigated against Banner fuel, which was ultimately settled.

10. On August 14, 2002, Mr. Scribner first reported symptoms to me that I related to carbon monoxide poisoning. He reported experiencing intermittent episodes of shortness of breath and severe chest pain. It was apparent that he was suffering

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bloating, and he reported experiencing regular diarrhea. Additionally, he reported that his short-term memory had been compromised since the exposure to carbon monoxide. I referred him to a pulmonologist for carbon monoxide poisoning. I am aware that he also saw a specialist at the Mayo Clinic in Detroit, Michigan.

11. In November 2002, I saw Mr. Scribner in my office. He was still experiencing chest pain that I related to the carbon monoxide exposure.

12. As we progressed into 2003, the symptoms reported by Mr. Scribner continued to expand, prompting the first MRI in February of that year.

13. From 2003 through 2009 I saw Mr. Scribner for a variety of symptoms related to his exposure to carbon monoxide. These symptoms included numbness to his hands, feet and face; tingling in his hands (from his wrists down) and feet (from ankle down); pain to his hands and feet; and memory loss.

14. The symptoms affecting his hands and feet were amplified at night and any other time he would be off his feet. For those reasons, over a period of years Mr. Scribner has had to ice his feet at night to fall asleep.

15. During this timeframe, I prescribed various medications to address the symptoms described above, including titrating doses of Amitriptyline, which then advanced to Lyrica and Gabapentin. We also introduced strong pain medications to keep him functional.

16. In March 2009 his symptoms were worsening and expanding. He reported a burning sensation to his face, lips and eyelids, in addition to experiencing increases in the pain and other sensations to his hands and feet.

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17. It was suspected that the increased symptoms were resulting from decreased oxygenation to Mr. Scribner's body. This condition is known as Hypoxia, which is described as a lower than normal level of oxygen in one's blood. In order to function properly, one's body needs a certain level of oxygen circulating in the blood to cells and tissues. When this level of oxygen falls below a certain amount, hypoxia occurs.

18. Mr. Scribner's neurologist suggested that he try night-time oxygen administration, which he began in March 2009. Because some semblance of improvement was noted, we began to suspect sleep apnea may be causing Mr. Scribner's Hypoxia.

19. Still, his symptoms persisted in May. He reported a progression of whole body numbness that would come and go. Specifically, on May 14, 2009, he reported whole body numbness, dizziness and nausea. He was still packing his feet in ice at night due to the pain.

20. Because in December he was still experiencing increasing and worsening symptoms, we utilized a pulse oximeter as a screening device for one night while Mr. Scribner slept in his home to estimate his blood oxygen levels. The results were abnormal, which tended to confirm a diagnosis of sleep apnea.

21. By February of 2010, I began to discuss the possibility of a formal sleep study with Mr. Scribner.

22. On March 1, 2010, a polysomnography was conducted, indicating moderately severe sleep apnea. It was as a result of the March 1, 2010, sleep lab that Mr. Scribner was formally diagnosed with sleep apnea.

23. On March 12, 2010, a split-night polysomnography was conducted. This included a half night of testing while Mr. Scribner utilized a CPAP machine, and a half night

without the machine. "CPAP", or continuous positive airway pressure, is a mechanical treatment that uses mild air pressure to keep the airways open.

24. The results of the March 12, 2010, sleep lab showed significant improvement of Mr. Scribner's blood oxygen levels.

25. Since March 2010, Mr. Scribner has utilized a CPAP machine while he sleeps. The use of the CPAP has reportedly significantly improved his daytime functioning. He is more alert and less tired by the afternoon.

26. On September 7, 2011, a follow-up polysomnography was conducted while Mr. Scribner utilized the CPAP. Again, significant improvement was observed.

27. I was satisfied that the use of the CPAP successfully took Mr. Scribner out of the danger zone of potentially harmful night-time desaturation. The machine had a stabilizing affect by providing night-time oxygen, allowing him to experience deep REM cycles that had previously been deficient from his observed sleep patterns.

28. His improved sleep helped with the burning, tingling and numbness that he was feeling in his face, lips and eyelids. He still has problems with his hands and feet, and he experiences periodic daytime facial flushing and tingling.

29. Having outlined the above history, I will return to the issue of the June 18, 2013, MRI. The 2013 MRI of Mr. Scribner's brain was conducted to address an observed cognitive decline and short-term memory loss, among other previously-stated symptoms.

30. Significant progression of the injuries to Mr. Scribner's brain is apparent when the 2013 MRI is compared to the 2003 MRI. First, the radiologist noted, "non-specific white-matter lesions". They are further described as "microvascular ischemic

changes", or "lesions". Two such lesions were observed in the 2003 MRI, but seven were observed in 2013. These lesions can be related to the 2001 carbon monoxide exposure. Injuries related to carbon monoxide poisoning are slow and insidious. It would be expected that we would see continuing changes over a significant period of time.

31. The second observation is different, but perhaps more significant. It is apparent that Mr. Scribner's left frontal lobe mammillary body shrunk between 2003 and 2013. The decrease in size is equal to the difference in size as measured in 2003 (0.1198 centimeters squared), minus the size as measured in 2013 (0.1104 centimeters squared). This decrease in size is significant. It constitutes a non-reversible, permanent injury to Mr. Scribner's brain.

32. Research has proven that there is a correlation to memory loss and a reduction in size of the mammillary bodies. The loss can significantly impact both short and intermediate-term memory, including one's ability to recall names, places and events.

33. The data resulting from the comparison of the 2003 and 2013 MRIs represents indisputable proof that Mr. Scribner has suffered short and intermediate-term memory loss during that timeframe.

34. Hypoxia is a known cause of atrophy of the mammillary bodies. While hypoxia can be caused both by carbon monoxide exposure and by sleep apnea, I can say based on the relevant circumstances and history of this patient that the 2001 exposure to carbon monoxide is likely the initial trigger to the deterioration of Mr. Scribner's left mammillary body.

35. At the same time, the low oxygen levels associated with his sleep apnea would have exacerbated the deterioration of the mammillary body. There is no question that Mr. Scribner's memory is more impaired as a result of having incurred the second insult from the consequences of his sleep apnea, beginning in approximately 2009.

36. The reduction in the size of his left mammillary body is an insidious injury, meaning that it developed gradually over a period of time, likely beginning in 2001 and continuing over time.

37. Prior to June of 2013 its presence was unknown and could not have been discovered except by way of an additional MRI, and prior to June 2013 there was no known medical reason to obtain an additional MRI.

Signed at Spokane, Washington, this 9th day of June, 2014.

DR. HAL BAILEY

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Attached for filing for the case referenced above, please find the following documents:

1) Answer to Petition for Review with Appendices
2) Declaration of Service

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