73219-6

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Court of Appeals
Division I
State of Washington

No. 73219-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALAN SMITH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Linda C. Krese

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# BRIEF OF APPELLANT

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LAW REVIEW

## A. SUMMARY OF ARGUMENT

Alan Smith was convicted following a bench trial of the premeditated murder of his wife. Over his objection, the trial court erroneously admitted his privileged confession to Wendell Morris, who was acting in his role as a member of the clergy. In addition, over his objection, the court admitted evidence of barefoot impression analysis without holding a hearing pursuant to *Frye v. United States*, and where barefoot impression analysis is not generally accepted in the scientific community. The court also refused to appoint new counsel following the verdict where Mr. Smith and his attorneys had an irreconcilable conflict. Mr. Smith asks this Court to reverse his conviction and remand for a new trial.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Morris was not acting as a member of the clergy when he induced Mr. Smith's confession.

2. The trial court erred in finding Mr. Smith's confession to Mr. Morris was not privileged.

3. In the absence of substantial evidence, the court erred in entering Finding of Fact Denying Claim of Clergy Privilege 12, finding Mr. Morris was not an ordained minister.

4. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the court erred in entering Conclusion of Law 1.

5. The court erred in entering Court's Finding of Fact 12 of the Certificate Pursuant to CrR 6.1, to the extent it relies upon the testimony of Mr. Morris regarding Mr. Smith's confession.

6. The trial court erred in admitting evidence of barefoot impression analysis which is not generally accepted in the scientific community.

7. The trial court erred in refusing to hold a hearing pursuant to *Frye v. United States*[1] regarding the admissibility of barefoot impression analysis.

8. The court erred in entering Court's Finding of Fact 5 of the Certificate Pursuant to CrR 6.1, to the extent it relies upon the barefoot impression analysis of Sgt. Shelly Massey as a means of determining Mr. Smith's guilt.

9. The court erred in finding that Sgt. Massey's testimony regarding barefoot impression analysis was not a scientific process.

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[1] *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), *rejected in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997).

10. The trial court violated Mr. Smith's Sixth Amendment and article I, section 22 rights to counsel when it refused to appoint new counsel prior to sentencing.

11. The trial court erred in finding Mr. Smith and his court appointed attorneys did not have an irreconcilable conflict.

12. The trial court failed to conduct an adequate inquiry into the asserted irreconcilable conflict between Mr. Smith and his attorneys.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Statements made in confidence to a member of the clergy that are privileged under the clergy-penitent privilege are not admissible. Mr. Smith made inculpatory statements to one Wendell Morris, an associate minister acting in his role as member of the clergy. Did the trial court violate Mr. Smith's right to due process when it admitted Mr. Smith's statements where the statements fell within the clergy-penitent privilege?

2. Expert testimony regarding testing that is not accepted within the scientific community is not admissible at trial. The results from testing bloody footprints found near Mr. Smith's wife's body using the "Barefoot Morphology" testing method was admitted at trial despite the fact that this method of testing is not generally accepted within the

scientific community and the trial court failed to conduct a *Frye* hearing. Was Mr. Smith's right to due process and a fair trial violated by the admission of the results of the "Barefoot Morphology" testing?"

3. A defendant has a constitutionally guaranteed right to counsel under the United States and Washington Constitutions at all stages of a proceeding including sentencing. Where a defendant and court appointed counsel have an irreconcilable conflict, the court must appoint new counsel. Here, the court failed to conduct an adequate hearing to determine if an irreconcilable conflict existed. Did the trial court deny Mr. Smith his constitutionally guaranteed right to counsel at sentencing?

D. STATEMENT OF THE CASE

Susan Smith failed to appear for work for two consecutive days without contacting her employer, causing concern among her supervisors. 1/15/2015RP 45-47. Because of this concern, Ms. Smith's employer contacted the Bothell Police Department and asked that they conduct a welfare check for Ms. Smith at her residence. 1/15/2015RP 48. On February 12, 2013, Ms. Smith's body was discovered at the residence. 1/15/2015RP 64. Ms. Smith's death was ruled a homicide. 1/20/2015RP 155.

The police spoke to Alan Smith, Ms. Smith's husband at his office at the Boeing Company at Paine Field. In this initial interview, the police discovered Mr. and Ms. Smith were in the process of divorcing. As the investigation progressed, it focused on Mr. Smith as the perpetrator.

As the investigation continued into June 2013, Mr. Smith met and began dating a woman named Love Thai. Ms. Thai and Mr. Smith wanted to attend the City Church, specifically the campus in the Belltown neighborhood of Seattle. 1/28/2015RP 90-91. Ms. Thai had explained to members of the small church group at City Church about the allegations that had been made against Mr. Smith in the press concerning his wife and explained the difficulties these allegations had caused in their lives. 1/28/2015RP 90-91. Mr. Smith and Ms. Thai were told they could not attend services at the City Church campuses including the Belltown campus, or attend any of the small church groups under the circumstances. 1/28/2015RP 90-91.

At a church sponsored dinner, Mr. Smith met Wendell Morris, who was a City Church Group Leader at the Belltown campus and a

licensed minister.[2] 1/28/2015RP 90-91. After this initial meeting, Ms. Thai and Mr. Morris's wife began texting on a regular basis. 1/28/2015RP 95. Ms. Thai expressed that she and Mr. Smith were upset by the Church's refusal to allow them to attend services or meetings. 1/28/2015RP 96-97. Mr. Morris and his wife decided to minister Mr. Smith and Ms. Thai and let them "hear the word of God." 1/28/2015RP 98-99.

Mr. Morris, his wife, Ms. Thai and Mr. Smith agreed to meet at the Starbuck's adjacent to South Lake Union in Seattle. 1/28/2015RP 99. Mr. Morris and his wife were inside the Starbucks when Ms. Thai arrived and told them Mr. Smith was still in the car in the parking lot and was extremely distraught. 1/28/2015RP 102-03. Mr. Morris met Mr. Smith at his car. Mr. Morris spoke to Mr. Smith, who was still seated inside the car. 1/28/2015RP 104-05. Mr. Morris coaxed Mr. Smith out of the car and the two began walking along the lake. 1/28/2015RP 112-13. Mr. Smith began talking about his children and became emotional. 1/28/2015RP 114. According to Mr. Morris, Mr. Smith then admitted that he had killed his wife. 1/28/2015RP 114. The

[2] City Groups were small officially church-sanctioned groups designed to discuss the topics raised in the Sunday services. 4/4/2014RP 129-30. In the City Church there were approximately 500 - 600 groups in the four Seattle area campuses. 4/4/2014 RP 122, 154.

two then spent several minutes discussing the scripture. 1/28/2015RP 116-17. The next day, Mr. Smith and Mr. Morris met again and Mr. Morris encouraged Mr. Smith to surrender. 1/28/2015RP 125. When Mr. Smith did not accept Mr. Morris's invitation to surrender, Mr. Morris called the police and disclosed the confession. 1/28/2015RP 132-33.

In the search of Ms. Smith's house after the discovery of her body, the police discovered bloody footprints in the kitchen and bathroom. 1/15/2015RP 80, 85; 1/23/2015RP 10. Photographs of these footprints were obtained. 1/23/2015RP 10. The police contacted Sergeant Shelly Massey of the Royal Canadian Mounted Police (RCMP) about engaging in a comparison of the footprints with known samples. 1/23/2015RP 10-11. At Sergeant Massey's suggestion, the police took photographs and inked impressions of Mr. Smith's feet, while walking and standing still. 1/23/2015RP 11, 14. The inked impressions involved Mr. Smith barefoot and wearing cotton socks. 1/23/2015RP 15. All of these items were sent to Sergeant Massey. 1/23/2015RP 19.

Sergeant Massey is a forensic identification specialist for the RCMP. 1/23/2015RP 23. Sergeant Massey also had a subspeciality in barefoot morphology, or the comparison of:

> impressions of the human foot, specifically the morphology or the shape of the impression left by the human foot whether it be barefoot impressions, a socked foot impression, or the impression on the inch [sic] sole of a shoe.

1/23/2015RP 25. Regarding the bloody footprints found at the scene of Ms. Smith's murder, Sergeant Massey using the forensic testing procedure in which she specialized, compared the photographs of the footprints with the impressions and photographs of Mr. Smith's feet. 1/23/2015RP 36-45, 51. Sergeant Massey was unable to exclude Mr. Smith as a potential source of three of the footprints. 1/23/2015RP 74-76. Sergeant Massey's conclusion was not that Mr. Smith made the footprints but that he could have. 1/23/2015RP 93.

Mr. Smith was charged with first degree murder with an aggravating factor and sentence enhancement were charged as well: that Ms. Smith was a family or household member, and that Mr. Smith was armed with a deadly weapon. CP 1283. Mr. Smith waived his right to a jury trial and the matter was tried to the bench. CP 127;

1/12/2105RP 5-10. At the conclusion of the trial, the court found Mr. Smith guilty as charged. CP 1-6; 2/4/2015RP 17-18.

Prior to sentencing, Mr. Smith moved for the appointment of new counsel based upon his despair over his attorneys' handling of the trial. CP 87-92. Specifically, Mr. Smith alleged that defense counsel had rendered constitutionally deficient representation and an irreconcilable conflict had emerged between himself and counsel. *Id.* Out of an abundance of caution, the trial court transferred the hearing on Mr. Smith's motion to another judge. 2/20/2015RP 4-5.

Presiding Judge Michael Downes presided over the hearing regarding Mr. Smith's motion for the appointment of new counsel. Mr. Smith told the court that his motion was the result of a long standing conflict over trial tactics and a general lack of communication between defense counsel and himself. 2/25/2015RP 5-6. In addition, Mr. Smith alleged counsel failed to adequately cross-examine witnesses and failed to present favorable witnesses to his defense. 2/20/2015RP 8-16, 19.

At the conclusion of the hearing, Judge Downs denied Mr. Smith's motion, finding that decisions about trial tactics was the sole province of defense counsel and Mr. Smith's complaints did not rise to the level of ineffective assistance of counsel.

E. ARGUMENT

**1. Wendell Morris was acting in his capacity as a member of the clergy when Mr. Smith confessed to him in confidence, thus the confession was privileged.**

a. *The admission of irrelevant evidence violates the due process right to a fair trial.*

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id., citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied,* 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

b. *Confessions made to a member of the clergy are privileged.*

The present day clergy-penitent privilege has its origin in the early Christian Church sacramental confession, which existed before the Reformation in England. It has evolved over the years into the contemporary "minister's" privilege adopted in some form in virtually every state. Yellin, *The History and Current Status of The Clergy–Penitent Privilege* 23 Santa Clara L.Rev. 95 (1983). Justification for the privilege is grounded on societal interests in encouraging penitential communication and the development of religious institutions by securing the privacy of the penitential communication. *Id.*, at 113-14. Counterbalanced against these interests is the fundamental principle that "the public ... has a right to every man's evidence" requiring strict construction of testimonial exclusionary rules and privileges. *Trammel v. United States* 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

> The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.

*Trammel*, 445 U.S. at 51. But, the clergy-penitent privilege must not be so strictly construed as to violate the right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution. *State v. MacKinnon,* 288 Mont. 329, 337, 957 P.2d 23, 28 (1998).

The clergy-penitent privilege is a creature of statute having no apparent origin in the common law. *State v. Buss,* 76 Wn.App. 780, 784, 887 P.2d 920 (1995), *overruled on other grounds* by *State v. Martin,* 137 Wn.2d 774, 788, 975 P.2d 1020 (1999). In Washington, the clergy-penitent privilege is codified in RCW 5.60.060(3):

> A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

For the privilege to apply, communications between the penitent and clergy must be: (1) made to an ordained member of the clergy; (2) involve a confession "in the course of discipline enjoined by the church;" and (3) must be confidential. *Martin,* 137 Wn.2d at 791; *State v. Glenn,* 115 Wn.App. 540, 547, 62 P.3d 921, *review denied,* 149 Wn.2d 1007 (2003). The privilege is held by the penitent, not the

clergy member. *"Jane Doe" v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 122 Wn.App. 556, 563, 90 P.3d 1147 (2004) *review denied*, 153 Wn.2d 1025 (2005).

c. *Mr. Morris was acting as a member of the clergy at the time Mr. Smith confessed.*

RCW 5.60.060(3) does not define the term "clergy." In *State v. Motherwell*, 114 Wn.2d 353, 359-60, 788 P.2d 1066 (1990), the Court adopted the definition of clergy stated in RCW 26.44.020(6), which states:

> "Clergy" means *any regularly licensed or ordained minister*, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(emphasis added). "Status as a member of the clergy is conferred by license or ordination within one's church or religious denomination." *Motherwell*, 114 Wn.2d at 360.

Applying the *Motherwell* definition to Mr. Morris leads to the inescapable conclusion that he was a member of the clergy. Mr. Morris was associate minister at Eastside Baptist Church, which is the same as a licensed minister. 4/4/2014RP 107, 115, 175. Mr. Morris was granted a temporary license while at Eastside, which became permanent so long as Mr. Morris had no problems. 4/4/2014RP 116.

Mr. Morris admitted in his application to City Church that he was a licensed minister and he told the police when interviewed that he was a licensed minister. 4/9/2014RP 36, 60.

The trial court focused on the fact Mr. Morris was not a pastor at City Church in finding the clergy-penitent privilege did apply to Mr. Smith's confession. CP 866. But that is not the standard for determining whether one is a member of the "clergy" for the purposes of RCW 5.60.060(3). Rather, one merely must be a "licensed minister." RCW 5.60.060(3). Mr. Morris repeatedly referred to himself as a licensed minister. In addition, he was issued a temporary license when at Eastside Baptist Church which automatically became permanent. The trial court in its written findings agreed that Mr. Morris was an associate minister who had received his permanent license. CP 864 (Finding of Fact 12).

It is abundantly clear that Mr. Morris was an associate minister, which under the statute is a member of the clergy when Mr. Smith made his confession. The fact he was not a "pastor" is no moment under the statute.

d. *Mr. Smith's confession to Mr. Morris was given in the course of discipline enjoined by the City Church practice or rules in providing spiritual guidance and receive confessions.*

The term "in the course of discipline enjoined by the church to which he or she belongs" used in RCW 5.60.060(3), requires that the "clergy member ... be enjoined by the practices or rules of the clergy member's religion to receive the confidential communication and to provide spiritual counsel." *State v. Martin*, 91 Wn.App. 621, 629, 959 P.2d 152 (1998), *aff'd*, 137 Wn.2d 774, 975 P.2d 1020 (1999). Although the clergy member privilege as originally drafted in 1870, may be dated in form, under a proper interpretation, "discipline enjoined" refers to the duties of the clergy member and to the rules of the clergy member's faith. *Id.* "The clergy member must be constrained by his or her religious dictates to receive penitential communications and to provide spiritual instruction and guidance in return." *Id.* The fact that the penitent did not formally belong to the clergy member's church does not negate the privilege. *Martin*, 91 Wn.App. at 632.[3]

[3] "[C]ourts have recognized the privilege although the communicant was not a member of the clergy member's church or faith. *See e.g., Nicholson v. Wittig*, 832 S.W.2d 681 (Tex.Ct.App.1992) (clergy privilege applied to statements made to hospital chaplain); *Commonwealth v. Shallenberger*, 38 Pa. D. & C.3d 201 (Pa.Com.Pl.1985) (defendant's confidential conversations with two clergy members protected despite fact that one clergy member was not defendant's pastor). As one court stated, the "clergy [member]'s door should always be open; [the clergy

"Determination of the definition of 'confession' . . . is to be made by the church of the clergy member." *Martin,* 137 Wn.2d at 787. In *Martin,* the Court of Appeals found a communication was a "confession" because the clergy member receiving the communication considered it to be a confession. *Glenn,* 115 Wn.App. at 548, *citing Martin,* 91 Wn.App. at 628.

It is clear that Mr. Smith's admission that he killed his wife was an admission of guilt. The issue was whether Mr. Morris was allowed to provide spiritual guidance and receive confidential communications such as this admission.

City Church had no rule or practice regarding confession. The church believed that confession is between the person and God:

> A: We would believe that confession -- confession -- let me start it this way. When you believe in Jesus and you have professed that Jesus is Lord of your life, he is the one and only one, only God can forgive sins. So part of the confessing that he's the one who is in charge of your life is saying, "God, I'm a sinner, you're my Savior, forgive me, save me, change me." The Bible says, "If you confess your sins, he's faithful and just to forgive your sins and cleanse you from all unrighteousness." That means that it's only God who can save you and forgive

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member] should hear all who come regardless of their church affiliation." *In re Swenson,* 183 Minn. 602, 237 N.W. 589, 590 (1931)."

*Martin,* 91 Wn.App. at 632 fn. 7.

you. And we do not take a stance of -- we are not a church that necessarily you need to go confess your sins to a pastor or a leader or anyone. We believe that you confess to Jesus because he's the one who forgives you. And every week in our services, say, "Hey, when you make Jesus the one who is Lord of your life, you confess that he's in charge, we believe that you are forgiven, your past, your present, your future. That's all a step of faith that you have placed within him." So confession isn't necessarily something that people would hear about publicly, like you need to go confess that you lied today to somebody. We believe that's not necessarily something that we would hold fast to as a doctrine of our church.

Q. To make sure I understand --

A. Yes, sorry.

Q. -- as far as City Church is concerned, a confession is between the sinner and Jesus?

A. And God, yeah.

Q. Not to an intermediary such as a priest or pastor or minister?

A. No.

4/4/2014RP 140-41.

Further, the Church believed that many issues for which church members sought counseling did not merit involvement by a pastor and were better resolved in the small groups. 4/4/2014RP 172. It was Church policy that it would be up to the individual group leader to determine whether they could handle the issue or felt that a referral to a

pastor was required. 4/42014RP 173.

Mr. Morris was a licensed minister and group leader at City Church with an urge to move up in the church organization. 4/24/2014RP 38. Mr. Morris stressed to the members of the church as a group leader that part of confession was coming out with what the person's actual sins were.

Mr. Morris agreed to meet Mr. Smith with the intent to urge him to confess his sins, including his involvement in the murder of his wife:

> Q. Did you have some concerns about Alan not fully understanding what it meant to confess and repent?
>
> A. My main concern was that he hadn't heard the gospel with clarity, and that he hadn't had the opportunity to experience that true repentance over who he was and what he had done in the past as a sinner.
>
> . . .
>
> Q. So you could talk to him about the gospel?
>
> A. Preach the gospel to him.
>
> Q. Specifically about what it means to confess and repent?
>
> A. Yeah, a true salvation experience, a true repentance, true contrition really.

4/24/2014RP 46-47. Mr. Morris's goal was:

> That he understands about repentance and turning from your sins?
>
> A. Yes.

> Q. And confessing your sins?
>
> A. Right.
>
> Q. That he needs to confess?
>
> A. Right.
>
> Q. And that that's something that would be needed to talk about? That you would need to talk about?
>
> A. Right. And that list would have been kind of in order based off of importance. I would start with receiving Jesus Christ, in that nature. Confessing sins is a natural overflow of those first things taking place, hearing the gospel about Jesus Christ and truly receiving him.

4/24/2014RP 50.

Mr. Morris was a licensed minister who met with Mr. Smith with the specific intent to convince him confess his sins in order to, in Mr. Morris's mind, stay true to his conversion and faith. Given the fact that City Church had no specific policy on confession, and the fact that the majority of issues facing parishioners were left to group leaders such as Mr. Morris, it is clear the confession was part of Mr. Morris's duties as a minister in the church.

e. *Mr. Smith's confession was confidential.*

"Whether a communication is confidential turns on the *communicant's* reasonable belief that the conversation would remain private." *Martin*, 91 Wn.App. at 632 (emphasis added). Thus, it is irrelevant whether Mr. Morris considered Mr. Smith's confession confidential, rather the issue is whether *Mr. Smith* considered it confidential.

During the conversation between Mr. Smith and Mr. Morris, Mr. Morris admitted that he told Mr. Smith that whatever Mr. Smith said "this stays between you and I." 4/4/2014RP 203.[4] Morris admitted that as far he knew, Mr. Smith believed his confession would stay between the two men. 4/9/2014RP 60. He never told Mr. Smith that he intended to go to the police. 4/24/2014RP 60.[5] While Morris felt that what transpired between he and Mr. Smith was not confidential, that was of no moment; based upon Mr. Morris's assurances, Mr. Smith reasonably believed that it was confidential. Since the issue turned on

[4] The church policy on confidentiality was that it was discretionary; it was up to the clergy member whether or not to disclose. 4/4/2014RP 157.

[5] This particular cite is from the 4/24/2104 volume containing the first 65 pages of transcript.

Mr. Smith's belief, his resulting confession to Morris can only be considered confidential.

f. *The admission of Mr. Smith's confession to Mr. Morris prejudiced Mr. Smith denying him a fair trial.*

An error in admitting the evidence is prejudicial where "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Given that the State's case without Mr. Smith's admission was an extremely weak circumstantial case, the admission of the admission constituted the only direct evidence that Mr. Smith committed the offense. It does not matter what harmless error standard is applied here, there can be no argument that the admission of Mr. Smith's confession was harmless. Mr. Smith is entitled to reversal of the conviction and remand for a new trial.

**2. "Barefoot morphology" or "Barefoot Impression Analysis" is not generally accepted in the scientific community and was inadmissible absent a *Frye* hearing.**

a. *Expert testimony regarding novel scientific or technical knowledge is only admissible after meeting the test under Frye v. United States.*

A witness qualified as an expert may testify on the basis of "scientific, technical, or other specialized knowledge" if the testimony

"will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. But the admission of expert testimony about novel scientific evidence involves two related inquiries: (1) whether the scientific principle or theory from which the testimony is derived has garnered general acceptance in the relevant scientific community under the *Frye* standard; *and* (2) whether the expert testimony is properly admissible under ER 702. *State v. Riker,* 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

Washington has adopted the *Frye* test for evaluating the admissibility of new scientific evidence. *State v. Cauthron,* 120 Wn.2d 879, 886, 846 P.2d 502 (1993), *citing Frye,* 293 F. at 1014. The primary goal of the *Frye* test is to determine "whether the evidence offered is based on established scientific methodology." *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye. Id.* "If there is a *significant* dispute among *qualified* scientists in the relevant scientific community, then the evidence may not be admitted," but scientific opinion need not be unanimous. *Id* (emphasis in original).

A trial court's decision to admit or exclude novel scientific evidence under *Frye* is reviewed *de novo*. *Cauthron,* 120 Wn.2d at 887. This review necessarily involves a mixed question of law and fact. *Id.; State v. Copeland,* 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

Courts do not evaluate whether the scientific theory is correct, but whether it has achieved general acceptance in the relevant scientific community. *Riker,* 123 Wn.2d at 359-60. The *Frye* test recognizes that judges do not have the expertise to assess the validity of a challenged scientific theory and, therefore, they must defer this judgment to the qualified scientists. *Cauthron,* 120 Wn.2d at 887. The main rationale for the test is that it ensures the reliability of scientific evidence. *Id.* "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." *Id.*

To determine whether a consensus of scientific opinion has been achieved, the reviewing court examines expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions. However, "the relevant inquiry is general acceptance by the scientists, not the courts." *Eakins v. Huber,* 154 Wn.App. 592, 599-600, 225 P.3d 1041 (2010), *quoting Cauthron,* 120 Wn.2d at 888.

b. *Sergeant Massey's opinions regarding her analysis using the Barefoot Morphology test was a novel scientific test requiring a Frye hearing.*

An opinion is admissible only if it has a rational basis, which is the same as to say that the opinion must be based on *knowledge.* ER 701; ER 702; *Riccobono v. Pierce Cy.*, 92 Wn.App. 254, 267-68, 966 P.2d 327 (1998). The knowledge may be personal, or it may be scientific, technical or specialized. *State v. Kunze,* 97 Wn.App. 832, 850, 988 P.2d 977 (1999), *review denied,* 140 Wn.2d 1022 (2000). So-called "lay" opinion is simply opinion based on personal knowledge (i.e., on knowledge derived from the witness' own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion). *Id.*

An expert opinion is opinion based in whole or in part on scientific, technical or specialized knowledge, whereas a lay opinion is based on personal knowledge (i.e ., on knowledge derived from the witness's own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion). *Id.*

> [F]orensic science is dependent on the existence and identification of *individualizing* characteristics, as opposed to *class* characteristics. An individualizing characteristic is one that shows an object to be unique, or, in alternative terms, one that distinguishes the object from all other objects; it "may be a single feature viewed

> alone, or an ensemble of features viewed in combination." A class characteristic merely "separate[s] a group of objects from a universe of diverse objects."
>
> A forensic scientist must respect this difference between individualizing and class characteristics when opining about the maker of a latent print. On the basis of class characteristics alone, a forensic scientist can say that a suspect "cannot be excluded" as the maker of a latent print, that the suspect "could have made" a latent print, or that a latent print is "consistent with" exemplars. On the basis of individualizing characteristics—and *only* on the basis of individualizing characteristics—a forensic scientist can say that a suspect made or probably made a latent print.

*Kunze*, 97 Wn.App. at 851-52 (emphasis in original, internal citations omitted).

Here, Sergeant Massey opined that Mr. Smith could have made the foot impressions. CP 1209 ("I would include this individual as being the possible originator of the impression in question"). Thus, Sergeant Massey was "individualizing" which necessarily required "employing scientific, technical or specialized knowledge." *Kunze*, 97 Wn.App. at 852.

The trial court refused to hold a *Frye* hearing, finding Sergeant Massey's analysis of the barefoot prints merely a "visual comparison," not a "scientific process. CP 890. The Sergeant's own words belie that conclusion: "The technique used follows *scientific method* and is

commonly described as ACE-V . . . Verification [of the comparison] occurs when another *qualified examiner* verifies the process used repeats the observations made and validates the conclusions reached."[6] CP 1205 (emphasis added). Thus, even the Sergeant referred to her analysis as a scientific test.

More importantly, the "experts" in this field describe the comparison analysis as one involving "forensic science" which can only be done by "trained specialists:"

> Barefoot morphology comparison refers to the forensic examination of the impressions of weight-bearing areas on the bottom of the human foot, when ridge detail is not present, to establish a link between the bare foot of an individual and an impression found in mud or some other medium (e.g., blood) . . .
> . . .
> Barefoot morphology comparisons can involve bare or socked foot impressions found at the crime scene or shoes that have been linked to the crime scene.
> . . .
> *Barefoot morphology comparison should only be undertaken by adequately trained specialists*. The first step in the process is to ensure that the individual has a background in forensic science. He or she must receive proper training in the examination and comparison in barefoot impressions . . . *Only after successful completion of a recognized training course should a forensic specialist consider conducting a barefoot morphology comparison*.

[6] The "ACE-V forensic comparison process is described in detail in the Journal of Forensic Identification at 400-08. CP 1162-70.

CP 1145, 1148, 1162-63 (*Barefoot Morphology Comparisons: A Summary*, Journal of Forensic Identification, Vol. 57, No. 3, 383, 385 (2007)) (emphasis added).

Further, in *State v. Jones*, 681 S.E.2d 580, 592 (S.C. Supreme Ct. 2009) (Jones II), the South Carolina Supreme Court ruled that similar comparison analysis evidence to what Sergeant Massey testified regarding here to be "outside the realm of an average juror's knowledge[.]" *Id.*

Substantial evidence supported Mr. Smith's claim that Sergeant Massey was employing a scientific, technical or specialized knowledge thus requiring a *Frye* hearing.

Urged by the State, the trial court here relied on the decision in *State v. Brewczynski*, in finding the Sergeant's analysis was a simple physical comparison rather than a scientific test. 173 Wn.App. 541, 556-57, 294 P.3d 825, *review denied*, 177 P.3d 1026 (2013). But following the State's argument would inevitably lead to the absurd result that evidence such as latent fingerprint, toolmark, ballistics, or handwriting evidence would be admissible without any expert testimony, merely because such evidence is nothing more than a physical comparison that the jury is capable of doing without any

expert assistance. This ruling flies in the face of the multiple decisions that found latent fingerprint, toolmark, ballistics, or handwriting evidence was admissible only after applying the *Frye* test because these tests were scientific tests, not merely simple lay comparisons.

c. *"Barefoot morphology" or "Barefoot impression" testimony is not generally accepted in the scientific community and should have been barred in Mr. Smith's matter.*

While no reported decision from Washington has dealt with the admission of barefoot morphology opinion testimony, several decisions from other jurisdictions have refused to admit this evidence, finding it was not widely accepted within the science community.

*Frye* provides that novel scientific, technical or other specialized knowledge may be admitted or relied upon only if generally accepted as reliable by the relevant scientific, technical or specialized community. *State v. Greene*, 139 Wn.2d 64, 69, 984 P.2d 1024 (1999). General acceptance may be found from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts. *Id.* General acceptance may not be found "[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence." *Greene*, 139 Wn.2d at 69. When general acceptance is reasonably disputed, it must be shown, by a

preponderance of the evidence. *Greene*, 139 Wn.2d at 69; *Kunze*, 97 Wn.App. at 852-53.

As stated *supra*, there are no Washington decisions dealing with barefoot morphology evidence. Other states have addressed this evidence in reported decisions. In *State v. Jones*, 541 S.E.2d 813 (S.C. Supreme Ct. 2001) (Jones I), the State sought to admit testimony from an agent, relying on studies done by RCMP Sergeant Robert Kennedy[7], that a pair of steel-toed boots which had made a bloody footprint at a murder scene were worn by Mr. Jones. The agent, using a barefoot insole impression test, was allowed to opine that the boots were likely worn by Mr. Jones. Based upon testimony at trial by Sergeant Kennedy about his research, the South Carolina Supreme Court ruled the evidence was not admissible because "[i]n our opinion, it is premature to accept that there exists a science of 'barefoot insole impressions.'" 541 S.E.2d at 819.

On retrial, the State again sought to admit the same "barefoot insole impression evidence" without any additional evidence of subsequent research. *Jones II*, 383 S.E.2d at 540. Again the trial court allowed it and again the South Carolina Supreme Court reversed that

[7] This is the same person from whom Ms. Massey learned the barefoot morphology comparison technique. 1/23/2015RP 25-29.

decision. *Id.* at 550 ("Based on our decision in *Jones I* and the lack of any subsequent research developments which would validate 'barefoot sole impression' evidence, we find the trial judge erred in denying Jones's motion to suppress this evidence.").

Similarly, in *State v. Berry*, the State was allowed to admit the opinion testimony of Sergeant Kennedy that it was likely that Mr. Berry regularly wore a pair of shoes found near the body of a murder victim. 546 S.E.2d 145 (N.C. App. Ct. 2001). Kennedy came to this conclusion using a barefoot comparison analysis of Mr. Berry's foot and an impression left in the pair of shoes. The North Carolina appellate court came to the same conclusion as the Court in *Jones*, ruling that "[w]e agree that, based on Kennedy's own testimony, this [barefoot impression] evidence was not sufficiently reliable at the time of trial." *Berry*, 546 S.E.2d at 156.

"Barefoot morphology" evidence simply is not generally accepted in the scientific community. The results of Sergeant Massey's testing should have been ruled inadmissible.

d. *The admission of Sergeant Massey's opinion regarding the footprints was not a harmless error by the trial court.*

No witness, however, may express an opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Demery*,

144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make an independent evaluation of the facts. *State v. Carlin*, 40 Wn.App. 698, 700-01, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).

As noted, the State's case against Mr. Smith was an extremely weak circumstantial case. The barefoot morphology testing results were one more of the circumstantial pieces the State relied upon in making it case against Mr. Smith. Similar to the legs of a table, when one takes a table leg away, the table cannot stand. Here, taking the barefoot morphology results away would cause the State's case to collapse. Thus, the error in admitting the barefoot morphology evidence was not a harmless error and must result in the reversal of Mr. Smith's conviction.

### 3. Mr. Smith's federal and Washington Constitutional rights were violated when the court refused to appoint new counsel for sentencing despite an irreconcilable conflict between himself and counsel.

#### a. *A defendant has the constitutionally protected right to counsel free from conflict.*

Under the Sixth Amendment, a criminal defendant has a constitutional right to conflict-free representation. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). That right to counsel extends to all critical stages of prosecution, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 2010 (1987). A claim of ineffective assistance of counsel does not necessarily create an unconstitutional conflict of interest requiring substitution of counsel. *State v. Stark*, 48 Wn.App. 245, 253, 738 P.2d 684 (1987). The determination whether an alleged conflict of interest warrants substitution of counsel lies within the discretion of the trial court. *Id.* at 252-53. If the trial court knows of a potential conflict of interest, the court should inquire into the nature and extent of the conflict. *State v. McDonald*, 143 Wn.2d 506, 513, 22 P.3d 791 (2001). However, a trial court's failure to conduct an inquiry does not necessarily require

reversal. *Dhaliwal*, 150 Wn.2d at 571. A trial court's refusal to substitute counsel will be reversed where it is an abuse of discretion. *See State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).

If the attorney-client relationship completely collapses, "the refusal to substitute new counsel violates the defendant's Sixth Amendment right to the effective assistance of counsel." *In re Pers. Restraint of Stenson* (Stenson 2), 142 Wn.2d 710, 722, 16 P.3d 1 (2001), *citing United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir.1998). To justify appointment of new counsel, a defendant must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

A defendant is entitled to new counsel where the conflict is deemed irreconcilable. To determine whether the trial court erred and an irreconcilable conflict existed, the appellate court considers: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. *Stenson 2*, 142 Wn.2d at 723-24. With respect to the first *Stenson 2* factor, the appellate court must analyze both (1) the extent and nature of the breakdown in communication

between attorney and client, and (2) the breakdown's effect on the representation the client actually received. *Stenson 2,* 142 Wn.2d at 724.

The breakdown of a relationship between attorney and defendant from irreconcilable differences effectively results in the complete denial of counsel. Therefore, unlike a claim of ineffective assistance, there is no requirement to show prejudice. *Stenson 2,* 142 Wn.2d at 722.

b. *The trial court's inquiry of Mr. Smith regarding the irreconcilable conflict was insufficient.*

"An adequate inquiry must include a full airing of the concerns ... and a meaningful inquiry by the trial court." *State v. Cross,* 156 Wn.2d 580, 610, 132 P.3d 80 (2006).

The court's inquiry here was less than adequate to address Mr. Smith's concerns and allegations against defense counsel. While the court stated it had reviewed Mr. Smith's *pro se* motion and allowed him to speak in court, the court failed to inquire further about Mr. Smith's assertion that he had a longstanding dissatisfaction with counsel.

Mr. Smith told the court of his distrust of counsel and his lack of confidence in their ability to defend him:

> That was really, I think, the culmination of many, many longstanding communication problems that we have. I've sent several letters describing difficulties with communication, especially difficulties in conveying facts to my counsel, and conveying lines of investigation that ultimately were not pursued in trial.
>
> And indeed this is a rather unusual trial in which virtually no facts were ever established. And I think at one point, or I know at one point – I would like to clarify that at one point the communication between myself and counsel was deteriorated to such an extent that Ms. Mann had prevented me from contacting the paralegals at the Public Defenders' Office, and indeed even contacting Ms. Mecca. I was told when I called the switchboard that I had to wait.

2/25/2015RP 5. The Court never followed-up with Mr. Smith regarding what the "longstanding communication problems" were or how bad the communications between Mr. Smith and defense counsel had become. Had they deteriorated to such an extent that Mr. Smith's right to counsel had been violated – the court never determined the answer to that question.

Mr. Smith provided further evidence of the extent of the conflict, but again the court failed to probe deeper to determine the extent of the conflict:

> That was very difficult. I certainly offered my thoughts, but Ms. Mann was adamant that she would not discuss any strategy with me.

> I had absolutely no idea what defense strategy would be during trial. I was stunned constantly by their, I guess you could call it, conservative approach to cross-examination; and again stunned that they called only one witness, which I thought was not particularly beneficial, that particular witness.
>
> And Ms. Mann told me explicitly, strategy is the right of the attorney. I have the right to testify or not, and I have the right to a jury trial, but strategy is the sole discretion of counsel.

2/25/2015RP 19.

While it's true that strategy is the sole province of the attorney, not to discuss the strategy with the defendant or even disclose the strategy with him can be the basis of an irreconcilable conflict. Yet the court again never probed into this lack of communication. The court was merely satisfied that Mr. Smith and his attorneys sometimes spoke. 2/25/2015RP 20-21.

In *Stenson,* the Supreme Court provided illustrative examples of what might constitute a complete breakdown of communication between an attorney and client. A complete breakdown exists where a defendant refuses to cooperate or communicate with his attorney in any way. *Stenson 2*, 142 Wn.2d at 724, *citing Brown v. Craven,* 424 F.2d 1166 (9th Cir.1970). Next, a complete breakdown exists where a defendant has been at odds with his attorney for a long time and the

"relationship was a 'stormy one with quarrels, bad language, threats, and counter-threats.'" *Stenson,* 142 Wn.2d at 724, *quoting United States v. Williams,* 594 F.2d 1258, 1260 (9th Cir.1979). Lastly, a complete breakdown exists where an attorney's actions are especially egregious, including "verbally assaulting [the] client by using a racially derogatory term and threatening to provide substandard performance for him if he chose to exercise his right to go to trial." *Stenson,* 142 Wn.2d at 724-25, *citing Frazer v. United States,* 18 F.3d 778, 783 (9th Cir.1994).

It is impossible to determine whether the relationship between Mr. Smith and his attorneys had descended to these levels because of the cursory inquiry by the court. The court never followed up on some of Mr. Smith's assertions to determine the full extent of the potential breakdown. In light of this wholly inadequate inquiry, Mr. Smith's right to counsel was denied and his sentence should be reversed and the matter remanded for resentencing.

F. CONCLUSION

For the reasons stated, Mr. Smith asks this Court to reverse his conviction and remand for a new trial, or in the alternative, remand for the appointment of new counsel for the purpose of resentencing.

DATED this 24th day of November 2015.

Respectfully submitted,

*s/Thomas M. Kummerow*

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

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 73219-6-I |
| | ) | |
| | ) | |
| ALAN SMITH, | ) | |
| | ) | |
| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 24TH DAY OF NOVEMBER, 2015.

X_____

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