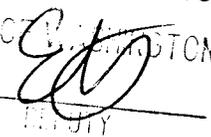


COURT OF APPEALS NO. \_\_\_\_\_  
SUPERIOR COURT CAUSE NO. 98-1-00715-1

FILED  
COURT OF APPEALS

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STATE OF WASHINGTON

BY  CLERK

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

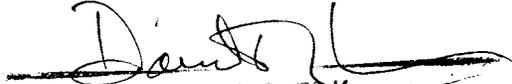
vs.

ARMONDO TREMAINE SHELBY,

Appellant and Petitioner.

**AMENDED PERSONAL RESTRAINT  
PETITION**

DEPARTMENT OF  
PETITION

  
COURT CLERK

10/7/12

Armondo T. Shelby, Pro Se  
Petitioner, DOC #709192  
Washington State  
Reformatory  
P.O. Box 777, Unit A-01-35L  
Monroe, Washington 98272

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1 A. IDENTITY OF MOVING PARTY

2  
3 **COMES NOW**, Petitioner, Armondo Tremaine Shelby, Pro Se, do hereby files this  
4 Personal Restraint Petition pursuant to RAP 16.4, relief designated in part II

5 B. RELIEF SOUGHT

6  
7 Petitioner respectfully request this Honorable Court grant him relief in the form of reversing  
8 his conviction and granting him a new trial.  
9

10 C. STATEMENT OF THE CASE

11  
12 On February 12, 1998, Thomas Tirrell Butler was shot four times by a person he identified  
13 as Mondo.” RP 410-13, 527-28. Officers dispatched to the shooting scene noticed a blood trail,  
14 visible on the Balony of the apartment complex where Butler was found, leading to apartment. D-  
15 10. RP 402-03. Jennifer Bohlen, who was present during the shooting, told an investigating  
16 officer that “Armondo shot Tirrell.” RP 886. Butler died later at Harborview Medical Center. RP  
17 646.  
18  
19

20  
21 Accompanied by family members and a Pastor, appellant Armondo Shelby turned himself  
22 into the police four days later. RP 819-29. After being advised of his rights, Shelby consented to  
23 an interview with police, with his Mother and a Pastor present. RP 820-21. Shelby said he had  
24 gone to Butler’s place with Kevin Cubean because Butler called him and asked him to come over  
25  
26  
27  
28

Armondo Tremaine Shelby  
Pro se Petitioner

1 to a party, and when they arrived there a man named "Robert" told him which apartment was  
2 Butler's. RP 822-23, 829. He went to the apartment, and an argument ensued. RP 823. Shelby  
3 maintained the shooting was in self-defense, occurring after Butler pushed or struck him, they  
4 wrestled through and broke the door of Butler's apartment, through the kitchen and then into the  
5 bedroom. RP 823, 830. He said Jennifer Bohlen was in the bedroom. RP 823. Shelby told the  
6 officers Butler then came up with a gun, but he got control of it RP 823. Shelby said that While  
7 they were fighting in the bedroom, Butler was on top of him. RP 824. Shelby said he didn't know  
8 how many shots were fired, that he sustained a superficial bullet wound on his left forearm, and  
9 that the bullet had gone through the coat he was wearing. RP 823, 825. He said Jennifer Bohlen  
10 had run out of the bedroom, and after the shooting Butler ran from the apartment, and then he  
11 panicked and also ran. RP 823, 826-28.

12  
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15  
16 Shelby agreed, when asked by the officers, to speak to them outside the presence of his  
17 mother and the Pastor. RP 831-32. When confronted with witness statements which contradicted  
18 his version of events, and after speaking in private with the Pastor, Shelby admitted he had brought  
19 a gun to the apartment, a silver .357 handgun. RP 832-34, 837-38. The bullets recovered from  
20 Butler's body and the apartment were either .38 specials or .357, either of which could be filed  
21  
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28

Armondo Tremaine Shelby  
Pro se Petitioner

1 with a .357 revolver, and had rifling consistent with a .357. RP 603, 736, 839. Shelby continued  
2 to maintain, however, that the shooting was in self-defense.<sup>1</sup> RP 834.  
3

4 Shelby was charged by Information filed on February 17, 1998 with one count of  
5 aggravated murder in the first degree with a deadly weapon enhancement, alleging as an  
6 aggravating factor that the murder of Tirrell Butler was committed in the course of the crime of  
7 burglary. CP 1-4. The Information was amended, without objection, to add an alternative charge  
8 of first degree felony murder, with first degree burglary as the predicate felony and alleging a  
9 deadly weapon enhancement, one count of first degree burglary with a deadly weapon  
10 enhancement, one count of unlawful possession of a firearm in the first degree (“UPF”), and one  
11 count of violation of a court order of protection. CP 18-21, 23-26; RP-D, 1-3; RP 146-48. The  
12 trial court denied Shelby’s motion to dismiss the first degree burglary charge, as violating double  
13 jeopardy, but granted his motion to sever the violation of a protection order charge. RP 149-175,  
14 978-80, 177-216, 279-292, 304. Shelby’s motions to dismiss the UPF charge, on the basis his  
15 prior conviction for burglary was unconstitutional on its face, or in the alternative to sever that  
16 court, were also denied. RP 357-70, 465-90, 556, 917-953, 940, 980.  
17  
18  
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21

22 A CrR 3.5. hearing was held, after which Shelby’s statements to officers after he turned  
23 himself in were held admissible.<sup>2</sup> RP 13-68, 81-142; CP 212-16. During the CrR 3.5 hearing,  
24  
25

---

26 <sup>1</sup> Shelby’s coat was never recovered, and there was no testimony during trial that the .357 described by Shelby was  
27 ever recovered. RP 836.  
28

Armondo Tremaine Shelby  
Pro se Petitioner

1 Shelby's lead counsel<sup>3</sup> brought to the court's attention his concerns that Shelby's mother had filed  
2 a bar complaint against co-counsel, who had already been ordered off the case based on Shelby's  
3 earlier objections to her representing him. RP-A, 13; RP-E, 4-13; RP 73-74. ( Exhibit C-1 C-2 D-  
4 1 D-2) Defense counsel informed the court he had inquired of Shelby whether he joined in the bar  
5 complaint allegations, and he confirmed he did. RP 73. Counsel expressed concerns about an  
6 apparent conflict of interest:  
7  
8

9  
10 There are a couple of things that concern me. . . . First of all, it concerns me that  
11 an official grievance was filed against co-counsel in April and I was not advised of  
12 it by Ms. Shelby or by my client.

13 The second thing that concerns me is that Ms. Pierson's technically still on the case  
14 until the 10<sup>th</sup>, if I recall the Court's order.

15 The third thing that concerns me is my continued representation of Mr. Shelby in  
16 light of the grievance to the bar association in that, although Ms. Pierson is the  
17 only attorney mentioned in it, the nature of the allegations are such that they  
18 encompass conduct which I was personally responsible for as well as Ms. Pierson  
19 in that I have always been the lead attorney on the case. And also it has to do with  
20 communications to Mrs. Shelby and other matters.

20 <sup>2</sup> The testimony from all offices was that after the unrecorded interviews, Shelby declined to make a taped  
21 statement without an attorney present. RP 18, 37, 85, 96. Shelby did not testify at the CrR 3.5 hearing. Shelby's  
22 uncle testified at the CrR 3.5 hearing that Shelby was initially placed in handcuffs, he was crying and emotional,  
23 he asked for an attorney, and didn't want to make a statement. RP 99-112. Neither Shelby's mother nor the  
24 pastor, both of whom were present when Shelby turned himself in outside the jail and during the initial stages of  
25 the interview, testified at the CrR 3.5 hearing. The court found Shelby's uncle "not to be credible with regard to  
26 the statement concerning his [Shelby's] desire to have an attorney." RP 142. Shelby does not argue in his  
27 opening brief that his unrecorded statements made during the interviews were rendered involuntary by his later  
28 request for an attorney as a condition for making a taped statement, which never occurred. Appellant's statements  
were admitted at trial through Detective Williams, outlining his claim of self defense and obviating his need to  
testify. RP 822-61.

<sup>3</sup> Shelby's lead counsel was Ray Thoenig, a public defender with the Department of Assigned Counsel; co-counsel  
was Jane Pierson, also with DAC.

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1 I think the complaint is broader than that. The grievance was initially dismissed. I  
2 would not that there are appellate procedures of which Mrs. Shelby can prevail  
3 herself, and it does not necessarily end because of the letter of dismissal.

4 I don't know to proceed. I personally have not had an opportunity to talk to the  
5 bar association or research the RPCs or anything as to what to do in this  
6 circumstance. I know that it makes me extremely - it would make me mare  
7 uncomfortable in an aggravated murder case, and I guess I seek the Court's advise  
8 and counsel on.

9 RP 73-74 (emphasis added). Two letters were also filed with the court by Shelby's Pastor,  
10 indicating a conflict of interest and asking for removal of lead counsel.<sup>4</sup> Supp. CP 230, 231. The  
11 State objected to counsel's withdrawal. RP 76. The trial court inquired of Shelby, who expressed  
12 a lack of confidence in his attorney:

13 [I]t's basically I feel that he don't - he don't really have too much confidence in  
14 the case, basically through the things he's telling me that I already lost the case and  
15 I'm not going to win if I take it to trial and stuff, and I feel that I need somebody  
16 that's going to fight for me, not put me inside the ring and then not do anything. . .  
17 . . . I don't feel he should [represent me] if he's not going to be representing me  
18 right.

19 RP 77. Defense counsel confirmed Shelby's statements to the court did not quiet his  
20 concerns, but made "it more difficult in some way." RP 79. Expressing a reluctance to reveal  
21 confidences or communication, counsel also informed the court there were "other things," "some  
22 basic conflicts in terms of the conduct of the case between myself and my client." RP 79. The  
23

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24 <sup>4</sup> The letter, which are attached hereto in the Appendix, alleged, among other things, that "[t]he lawyer [Thoenig]  
25 was outside in the hallway telling Mr. Shelby's mother that her son should take some kind of deal that would  
26 entail him doing 21 years in jail. He said if Mr. Shelby didn't take the deal the jury would find him guilty and  
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1 court made no further inquiry. The court professed not to “know what the rules of Professional  
2 Conduct dictate, I do know that it would be unusual in a criminal context if a defendant or a  
3 defendant’s family member could control the course of the case by filing a bar complaint and  
4 thereby forcing a continuance of forcing a change of counsel. RP 77-78. The court deferred a  
5 final ruling concluding: “I just can’t fathom that this [filing of a bar complaint] could affect the  
6 ongoing nature of the trial because if that were the case, it could be used offensively by somebody  
7 who wanted to gain a strategic advantage in the trial.” RP 78. Neither the court nor defense  
8 counsel re-addressed the mater, and defense counsel continued to represent Shelby throughout  
9 trial, and at sentencing.  
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14 During preliminary instructions, the court advised the jury panel, without objection from  
15 Shelby:  
16

17 . . . I want to tell you that normally, and this case is not any different, jurors have  
18 nothing to do with any punishment that follows a conviction. I do want to go so  
19 far as to tell you that this is not a death-penalty case. So do not have that on your  
20 mind.

21 RP 237 (emphasis added).

22 After opening statement, Kevin Cuban, an acquaintance of Shelby, testified he gave Shelby  
23 a ride to Butler’s apartment on February 12, 1998, and knew “it had something to do with his  
24

25  
26 you would give him life in prison. . . . [H]e will not get a fair trial because his lawyer does not like him at all.”  
27 Supp. CP 231.  
28

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1 girlfriend,” Jennifer Bohlen. RP 381-82. He believed Shelby saw Bohlen going upstairs at the  
2 apartment complex, and followed her. RP 384. Cubean testified he saw Shelby, Bohlen and  
3 Butler standing on the landing of the apartment complex, and that Shelby confronted Butler about  
4 Bohlen being his girlfriend, not Butler’s. RP 385. Cubean stated Butler went into his apartment,  
5 and Shelby asked Bohlen to leave with him, telling her, “Go in the house and get your stuff.” RP  
6 386. Cubean said then Bohlen went into the apartment and shut the door. RP 385.

9  
10 Bohlen testified she had agreed to leave with Shelby, but told him she wanted to talk to  
11 Butler first, and when she went into the apartment she and Butler locked the door and retreated to  
12 the bedroom. RP 879. Cubean testified he convinced then Shelby to leave, telling him, “She ain’t  
13 no good, . . . stuff like that,” but after walking away, Shelby changed his mind and went back,  
14 saying “F” this. I’m going to go kick this door in.” RP 387. Bohlen testified that Shelby was  
15 pounding loudly on the door and the window. RP 880. A neighbor also testified she was outside  
16 having a cigarette when she heard “loud noises like pounding and yelling,” someone was knocking  
17 on the window and pounding on the door, saying “Let me in. Let me in.” RP 416-19. That  
18 neighbor also heard the door being kicked in, and then gunshots. RP 419. That neighbor also  
19 heard the door being kicked in, and then gunshots. RP 419. Cubean stated that by the time he got  
20 back to Butler’s upstairs apartment, Shelby was already inside the apartment. RP 387. Cubean  
21 testified he believe he heard voices, and then gunshots. RP 387-88.

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1           There were no witnesses to the shooting itself, only the struggle which preceded it. Bohlen  
2 testified once Shelby was inside the apartment, Butler tried to shut the door to the bedroom, and  
3 then to the bathroom, but he couldn't RP 882. Bohlen testified Shelby had a gun in his hand while  
4 he was trying to push his way into the bedroom, but she couldn't remember when or where the  
5 shots were fired, and never testified to seeing shots fired. RP 889-98. She denied there was any  
6 struggle between Shelby and Butler. RP 889-898. Jeremy Cleveland, who lived with Butler and  
7 was in the apartment at the time of the incident, testified that he was in the bedroom when he heard  
8 shouting outside. RP 424-28. He said Butler was scared, and there was no phone in the house.  
9 RP 429-30. He saw Butler and Shelby fighting, grappling between the kitchen and bedroom, and  
10 during their struggle Shelby had one of Butler's hands and Butler had one of Shelby's wrists. RP  
11 434-40. Cleveland decided to go down and call police from a friend's place in the next building.  
12 RP 431. He said he heard them fighting and saw them through his "peripheral vision," and then  
13 heard a gunshot. RP 433. He testified, "I looked back and I saw Tirrell stumbling back. I didn't  
14 know if he had been shot or what." RP 433. He said then Shelby "started saying, "You like that,  
15 huh? You want some more? RP 434. He said then Bohlen screamed, and he started running. RP  
16 434.

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23           Police officers responded to the scene, and found no weapons inside, but there was  
24 extensive blood located in different areas of the small apartment. RP 406-07, 446. No blood  
25 spatter or other forensic testing was done, to determine the angle of the bullets and the positions of  
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1 Shelby and Butler, or whose blood it was. RP 600, 603, 774-77. Officers did find six live 9 mm.  
2 Rounds in Butler's kitchen wall cabinet, damage to the doorjamb, a bullet in the bedroom closet  
3 wall stud and another in the bathroom. RP 566-603. Officer Kristofferson testified that the  
4 location of the bullet found in the closet suggested it would have had to come from a low angle,  
5 near the floor. RP 603-04.  
6

7  
8 Butler's uncle testified there had been a Luger 9 mm. Handgun in Butler's apartment, which  
9 he had given to another nephew who was living with Butler, and he never got the gun back. RP  
10 516-24. He testified he looked in the apartment on January 16, 1998, where his nephew said he  
11 left the gun, but couldn't find it. RP 525. A broken box top for the gun described by Butler's  
12 uncle was located at the apartment. RP 799. Four bullets recovered from the scene had rifling  
13 consistent with a Smith & Wesson Luger or Taurus, but not a 9 mm. Such as that described by  
14 Butler's uncle. RP 734-38.  
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17  
18 The medical examiner testified that Butler had died from multiple gunshot wounds to his  
19 face area, back, right arm, chest and left thigh. RP 651. Detective William testified about Shelby's  
20 interview with police officers, including his version of events that claimed self-defense and his  
21 claim that he had been grazed by a bullet during the struggle, admitting on cross-examination that  
22 the location of blood on the bedroom radiator was consistent with Shelby's statement, and that the  
23 bullet found in the closet had to have been fired from downward to upward, from the general area  
24 between the bed and the radiator. RP 822-55.  
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1 The court found Shelby's convictions on felony murder, burglary and unlawful possession of  
2 the firearm were not precluded by double jeopardy or merger. RP-F, 12-13. The court adopted  
3 the State's calculation of Shelby's offender scores, and sentenced Shelby to 510 months,  
4 representing the high end of the standard range for each count, served concurrently, and imposed  
5 weapon enhancements for the murder and burglary convictions, served concurrently but  
6 consecutive to the underlying sentence. RP-F, 13-14, 57-58; Supp CP 232-41. This Person  
7  
8 Restraint Petition as followed.  
9

10 D. GROUNDS FOR RELIEF AND ARGUMENT

11 Issue No. 1: THE TRIAL COURT VIOLATED MR. SHELBY'S 14<sup>TH</sup>  
12 AMENDMENT EQUAL PROTECTION CLAUSE BY  
13 IMPERMISSIBLY COMMENTING ON THE EVIDENCE IN  
14 VIOLATION OF CONST. ART. IV, § 16.ERROR IN GIVEN  
15 AN GREAT BODILY HARM INSTRUCTION, INSTEAD OF  
16 INSTRUCTING THE JURY ON THE DEFINITION OF  
17 GREAT PERSONAL INJURIES.

18 The trial court erred in the original self-defense instruction created an error of constitutional  
19 magnitude and the trial court did abuse its discretion by instructing the jury on great bodily harm,  
20 instead of great personal injuries. *State v. Corn*, 95 Wn. App. 41, 975 P.2d 520 (1999); *Moran v.*  
21 *Burbine*, 475 U.S. 412, 89 L.Ed.2d 410, 106 S.Ct. 1135, 1146 (1986).  
22

23 The Court instructed the jury on Great bodily harm.. The court also instructed on the  
24 defense theories of self-defense and accident. The following instructions were given:  
25

26 Instruction No. 31  
27  
28

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1 It is a defense to a charge of murder and manslaughter that the homicide was justifiable as  
2 defined in this instruction.

3  
4 Homicide is justifiable when committed in the lawful defense of the slayer when:

5  
6 (1) the slayer reasonably believed that the person slain intended to commit a felony  
7 or to inflict death or great personal injury;

8  
9 (2) the slayer reasonably believe that there was imminent danger of such harm  
10 being accomplished; and

11  
12 (3) the slayer employed such force and means as a reasonably prudent person  
13 would use under the same or similar conditions as they reasonably appeared to  
14 the slayer, taking into consideration all the facts and circumstances as they  
15 appeared to him at the time of and prior to the incident.  
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17

18  
19 The State has the burden of proving beyond a reasonable doubt that the homicide was not  
20 justifiable. If you find that the State has not proved the absence of this defense beyond a  
21 reasonable doubt, it will be your duty to return a verdict of not guilty.  
22

23 A person is entitled to act on appearances in defending herself, if that person believes in  
24 good faith and on reasonable grounds that she is in actual danger of great bodily harm, although it  
25 afterwards might develop that the person was mistaken as to the extent of the danger. *State v.*  
26  
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1 *Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). “Jury instruction on self-defense must  
2 more than adequately convey the law.” *State v. LeFaber*, 128 Wn.2d 896, 900, P.2d 369 (1996).  
3 Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to  
4 the average juror. *LeFaber*, 128 Wn.2d at 900; 101 Wn.2d 591, 595, 682 P.2d 312 (1984); *State*  
5 *v. Painter*, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981).  
6 “A jury instruction misstating the law of self-defense amounts to an error of constitutional  
7 magnitude and is presumed prejudicial.” *LeFaber*, 128 Wn.2d at 900.  
8

9  
10  
11 The trial court failed to give the following Great Personal Injury definition, Instead the trial  
12 court included INSTRUCTION 32, which provides:  
13

14 A person is entitled to act on appearances in defending himself, if that  
15 person believes in good faith and on reasonable grounds that he is in actual danger  
16 of great bodily harm, although it afterwards might develop that the person was  
17 mistaken as to the extent of that danger.

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

19 In determining whether a homicide was justifiable, the phrase “great personal injury” means  
20 an injury that the slayer reasonably believe, in light of all the facts and circumstances known at the  
21 time, would produce severe pain and suffering if it were inflicted upon either the slayer or another  
22 person.  
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1 RCW 9A.16.050 provides in part that homicide is justifiable when there is reasonable  
2 ground to apprehend a design on the common case law definition of “great personal injury” (and  
3 the definition formerly set forth in this instruction) was:  
4

5 Great personal injury means an injury of such a nature as to produce severe pain  
6 and suffering. It means an injury of a more serious nature than an ordinary striking  
7 with hands or fists.

8 *See State v. Painter*, 27 Wn.App. 708, 620 P.2d 1001 (1980) and the cases cited therein.  
9

10 In short, instruction number 31 and 32 did not accurately convey to the jury the subjective  
11 standard employed in evaluating self-defense. And the instructions convinced the jury to discredit  
12 the injuries Mr. Shelby claimed he sustained from the affray. In addition, the *Painter* court went  
13 further and concluded that the instructions constituted a comment on the evidence by indicating to  
14 the jury that the evidence presented at trial was insufficient to support the theory of self-defense.  
15 *Painter*, 27 Wash. App. at 711, 620 P2d 1001.  
16  
17

18  
19 Issue No. 2: THE AGGRESSOR INSTRUCTIONS CONSTITUTED A  
20 MANIFEST CONSTITUTIONAL ERROR THAT REQUIRES  
21 REVESAL.

22 Mr. Shelby’s trial counsel objected to the trial court giving of the aggressor instruction  
23 requested by the State. *See State v. Kassahun*, 78 Wn. App. 938, 900 P.2d 1109 (1995). When a  
24 defendant in an assault case, raises the issue of self-defense, the State bears the burden of proving  
25 the absence of self-defense beyond a reasonable doubt. *State v. Accost*, 101 Wn.2d 612, 683 P.2d  
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1 1069 (1984); *State v. Redwine*, 72 Wn. App. 625, 629-30, 865 P.2d 552 (1984). This court is  
2 dealing here with a manifest constitutional error, i.e., one which is “unmistakable, evident or  
3 indisputable, as distinct from obscure, hidden or concealed.” *See State v. Lynn*, 67 Wn. App. 339,  
4 345, 835 P.2d 251 (1992). Such an issue may be raised for the first time on appeal. *See State v.*  
5 *Scott*, 110 Wn. 2d 682, 688, 757 P.2d 492 (1988); RAP 2.5(a)©. *See also State v. Ellis*, 71 Wn.  
6 App. 400, 404, 859 P.2d 632 (1993).

9 An error is manifest when it has practical and identifiable consequences in the trial of the  
10 case. *State v. Green*, 80 Wn. App. 692, 694, 906 P.2d 990 (1995) (citing *State v. Lynn*, 67 Wn.  
11 App. 339, 345, 835 P.2d 251 (1992)). If the instructions allowed the jury to convict Shelby  
12 without finding an essential element of the crime charged, the State has been relieved of its burden  
13 of proving all elements of the crimes(s) charged beyond a reasonable doubt, and thus the error  
14 affected his constitutional right to fair trial. A defendant cannot be said to have a fair trial “if the  
15 jury might assume that an essential element need not be proved.” *State v. Smith*, 131 Wn.2d 258,  
16 263, 930 P.2d 917 (1997) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)).  
17 The aggressor instruction created an error of constitutional magnitude. *Id.* Here, the instruction  
18 to the jury may be so construed, therefore the error was manifest and of constitutional magnitude.  
19 *State v. Stein*, 144 Wn.2d 236, 240-41 (2001). CP 1003-1004.

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25 Jury instruction No. 34.

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MR. THOENIG: Thank you, your Honor. On behalf of Mr. Shelby, Your Honor, we take exception to the giving of the aggressor instruction requested by the state, No. 34. We submit the evidence is not supported. I have no argument on it.

THE COURT: All right. Any further exceptions?

MR. THOENIG: No further exceptions.

THE COURT: Does the State have any comment they want to make on the aggressor instruction?

MS. SHOLIN: No, Your Honor.

THE COURT: I'll just make a brief comment. I do think there's ample evidence to suggest that one of the versions of this was that Mr. Shelby was the aggressor from the beginning, went to the apartment in an aggressive manner, confronted out side participants in an aggressive manner, broke through the door in an aggressive manner. All of which necessitates the giving of the aggressor instruction.

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I think the jury would be totally at a loss as to what to do with the aggressor conduct without those factual underpinnings. So I think that's appropriate.

Jury Instruction Number 34.

“No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon kill, use, offer or attempted to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.”

Shelby argues that he was entitled to introduce corroborating evidence of the victim's violent propensities under *United State v. Pitts*, 6 F.3d 1366 (9<sup>th</sup> Cir. 1993). But *Pitts* is distinguishable. In that case, not a self defense case, the district court admitted evidence that the defendant had been arrested for possession of sawed off shotguns, because it corroborated a government witness's claim that she had bought them for him. In this case, the exclusion of the evidence that the victim had a propensities to violent, which would have been relevant to Mr. Shelby's self-defense theory and offered proof that the victim was the aggressor. *U.S. v. James*, 139 F.3d 748, 752 (9<sup>th</sup> Cir. 1998).

In *United States v. Keiser*, 57 F.3d 847 (9<sup>th</sup> Cir. 1995), we held that the district court correctly excluded evidence that the shooting victim had, during the shooter's trial, threatened the

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1 shooter's brother in the courtroom corridor. We held that the evidence in that case would have  
2 been relevant to show the victim's propensity for violence, to support the defendant's claim that  
3 the victim was the aggressor, but we held that only reputation or opinion evidence could come in  
4 for that purpose, not evidence of specific acts. *Id* at 853-55.

6  
7 "Wigmore On Evidence § 63, at 1369. On the other hand, where the issue is who the  
8 aggressor was, the actual character of the deceased, though unknown to the defendant, is relevant  
9 to show the probability that the deceased was the aggressor. *See States v. Burks*, 470 F.2d 432,  
10 437 (D.C. Cir. 1972); II Wigmore On Evidence § 246(1)(h), at 60-61. For example, even if the  
11 defendant does not know about a victim's gunfighting propensities, history of them affects the  
12 credibility of a defendant's claim that the victim was the aggressor:  
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15  
16 "It is well and generally known that there are some violent and dangerous  
17 men in this country, who are in the habit of carrying pistols, belted behind them  
18 and in their pockets, who never think of fighting in any other than with deadly  
19 weapons, who are expert in using them, and who, especially when intoxicated,  
20 bring on and press to the extreme of outrage their deadly encounters for causes  
21 and provocation's that would be regarded as utterly trivial by peaceable men.

22  
23 In *State v. Kassahun*, 78 Wn. App. at 951, the court held that it was not error to give the  
24 first aggressor instruction in that the defendant did not object to that instruction. It was error to  
25 give the instruction in language which allowed the prosecutor to argue that *Kassahun's* first  
26 aggression toward *Combs* negated his claim of self-defense as to *Walker*. In the case at bar,  
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1 Shelby's attorney preserved the issue for Appeal. Shelby clearly was prejudiced by the States  
2 argument that painted him as the sole aggressor. The State claimed that Shelby initiated the  
3 provocation outside and that Shelby initiated the provocation inside the bedroom where there had  
4 been a wrestling match over the gun. And with the exception of an eye witness who saw a fight  
5 brewing inside the bedroom, it was plain error to advise jurors that Shelby's self-defense claim is  
6 invalid due to his aggression.  
7

8  
9 Detective Williams (state expert witness) testified in part that it was a struggle, which would  
10 have been consistent with Mr. Shelby self-defense claim and the fact that the victim was the  
11 aggressor. "This was consistent with the struggle, being that the bullet found in the wall came  
12 from a downward to an upward direction. RP 855. That the hand holding the gun would have had  
13 to have been within 2 feet off the ground at a low angle. RP 605. An eye-witness, Jeremy  
14 Cleveland, testified that he saw Mr. Butler and Mr. Shelby "grappling". They were both chest to  
15 chest hands on wrists. RP 439-440.  
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20 Issue No. 3 MR. SHELBY'S SIXTH AMENDMENT RIGHT TO A SPEEDY  
21 TRIAL WAS VIOLATED WHEN THE CASE WAS  
22 CONTINUED DUE TO COURT CONGESTION.

23 It is well established that courtroom congestion is not a valid basis for a continuance in  
24 violation of an appellant's speedy trial rights. As the record set forth, that the sole reason for the  
25 continuance was because the court need to provide a courtroom. *State v. Kokot*, 42 Wn. App.  
26 733, 713 P.2d 1121 (1986). If the court committed a constitutional error, we must reverse unless  
27  
28

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1 the Government establishes that the error was harmless beyond a reasonable doubt. Id.; *United*  
2 *States v. Rosales-Lopez*, 617 F.2d 1349, 1355 (9<sup>th</sup> Cir. 1980), *aff'd*, 451 U.S. 182, 101 S.Ct.  
3 1629, 68 L.Ed.2d 22 (1981); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17  
4 L.Ed.2d 705 (1967). Applying this standard to Mr. Shelby case, the trial court error was not  
5 harmless beyond a reasonable doubt.  
6

7  
8 The trial court set the trial date for February 1<sup>st</sup>, 1999, then the pretrial court claimed that  
9 no courtroom was available for the remaining month of February and Mr. Shelby's speedy trial  
10 right on that date was violated by court congestion. Here to the pre-trial court were preparing to  
11 impose an indeterminate continuance on behalf of a courtroom not being available when Shelby  
12 was scheduled for trial. But Shelby claims that it was due to court congestion. CP 13. The  
13 record provides in part:  
14  
15

16  
17 THE COURT: Well, I'll tell you what. You're going to hear from me  
18 now, and I'm going to sign an order, and I'm not going to change my mind, if you  
19 haven't got all this all squared away, you just come back – when is the trial date?  
20

21  
22 MS. PIERSON: February 1, Your Honor.

23  
24 THE COURT: -- you just come back in here on the 7<sup>th</sup> of January and  
25 we'll talk some more about it.  
26  
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1 MS. PIERSON: Sounds good.

2 THE COURT: Thank you.

3 MS. PIERSIN: Thank you.

4  
5  
6 In *Kotot*, the court reversed the conviction and ordered the charge dismissed. The sole  
7 reason for the continuance requested that was the subject of the speedy trial violation was court  
8 congestion. *Kotot* set forth as follows at 42 Wn. App, 736-37:  
9

10  
11 It is important to focus on the primary reason why this challenged continuances  
12 was granted. The presiding court indicated no courtrooms were available for the  
13 follow two weeks. This "reason" for a continuance is in reality court congestion,  
14 which was condemned in *State v. Mack*, 89 Wn.2d 788, 576 P.2d 44 (1978).  
15 Nothing in the record indicates how many courtrooms were actually in use at the  
16 time of this continuance, the availability of visiting judges to hear criminal cases in  
unoccupied courtrooms, etc. Without these facts, a continuance granted for court  
congestion was an abuse of discretion. *Mack*, 89 Wn.2d at 795, 576 P.2d 44.

17 . . . This State has always been strict in its application of the speedy trial provisions  
18 of CrR 3.3. "past experience has showed that unless a strict rule is applied, the  
19 right to a speedy trial as well as the integrity of the judicial process, cannot be  
effectively preserved". *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976).

20  
21 In fact, in *Warren*, 96 Wn. App. 306, 979 P.2d 915 (Div. II 1999), the granting of a two  
22 day continuance based upon courtroom unavailability on the day of a speedy trial was not a basis  
23 for good cause. As in *Warren*, there was no detailed explanation of why individual Superior Court  
24 departments were unavailable, in this case as well. Although, some minimum effort was given to  
25 explain which courtrooms were available and which were not available, there was no explanation  
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1 as to why those courtrooms were not available. *U.S. v. Loud Hawk*, 816 F.2d 1323 (9<sup>th</sup> Cir.  
2 1987); *U.S. v. Hardeman*, 249 F.3d 826, 829 (9<sup>th</sup> Cir. 2001).

3  
4 When Shelby's case got resigned in April of 1999, the record reflects that the trial court had  
5 a duty to resolve and make a full inquiry into the reason for the prior continuance. The record  
6 reflect that on April 7<sup>th</sup>, 1999, the defense counsel advised the court that his client was objecting to  
7 any continuance. The trial court professed not to know why the objection was invoked. CP14-15.  
8  
9 *See State v. Smith*, 104 Wn. App. 244 -52, 15 P.3d 711 (2001).

10  
11 The record provides in part:

12  
13 MS. SHOLIN: I do know that we've had – I know Ms. Whitmer has  
14 contacted me previously regarding the Court's scheduling over the next couple of  
15 weeks here, and I did provide that information to the defense back in February. I  
16 don't know if the Court still has the scheduling problem with this case, but there  
17 are a few things that we do need to have heard prior to the trial as well.  
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20  
21 THE COURT: okay. The April 26<sup>th</sup> trial date, while it is not operable  
22 because it falls within the last week of my civil schedule, I suppose it's going to be  
23 inevitable that whenever you set this it is going to create some sort of scheduling  
24 conflict for me, but I could live with April 26<sup>th</sup>. If you have another date in mind  
25 that is by agreement, I certainly don't mind adjusting the date, either . What's  
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your desire with regard to the current trial date? And we can set the discovery matters thereafter or the pre-trial matters thereafter.

MS. SHOLIN: Your Honor, we would like to either keep the date that we have or keep it as close to the current date as possible.

MR. THOENIG: My preference would be to keep the date or continue it—I have no objection to continuing it one week.

THE COURT: That would be optimal for me, I think. How long do you anticipate the trial is going to run?

MS. SHOLIN: Approximately about two weeks.

THE COURT: All that creates is the problem with Thurston County ; right?

JUDICIAL ASSISTANT: One week would put us exactly on Thurston County. Two weeks would be great because this is the first, and then start their trial on the 10<sup>th</sup>.

MR THOENIG: Your Honor, my client doesn't want any continuance. I'm sorry.

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1 THE COURT: Okay. We will just leave it where it is then, unless there is ,  
2 of course, some unavoidable problem that either side has, and then we will take  
3 that up at a later time.  
4

5 “(1) Whenever a person has entered upon a term of imprisonment in a penal or  
6 Correctional Institution of this state, and whenever during the continuance of the  
7 term of imprisonment there is pending in this State any untried indictment,  
8 information or complaint against the response, He shall be brought to trial within  
9 hundred and twenty days after he shall have cause to be delivered to the  
10 prosecuting attorney and the Superior Court of the County in which the  
11 indictment, information or complaint is pending written notice of the place of his  
imprisonment and of his request for a final disposition to be made of the  
indictment, information or complaint. ...”

12 Defendant’s final request for disposition is a prerequisite to the commencement period for  
13 trial on the untried information. *State v. Rising*, 15 Wn. App. 693, 552 P.2d 1056 (1976); *See*  
14 *also State v. Young*, 16 Wn. App. 838, 561 P.2d 204, rev. denied, 88 Wn.2d 1-16 (1977); *State v.*  
15 *Morris*, 126 Wn.2d 306, 892 P.2d 734 (1995). CP 11-12  
16

17  
18 On April 26<sup>th</sup> 1999, the Speedy trial issue was finally brought to the courts attention by lead  
19 counsel. The State claimed that Shelby had time remaining. The court still granted another  
20 continuance over Mr. Shelby’s objections, without inquiring into the specific nature for the prior  
21 continuance when there was no specific trial date scheduled.  
22

23  
24 “In the event that the action is not brought to trial within the period of time as herein  
25 provided, no Court of the State shall any longer have jurisdiction thereof, nor shall the Untried  
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1 Indictment, information of complaint be of any further force of effect, and the Court shall enter an  
2 order dismissing the same with prejudice.  
3

4 The 120 days speedy trial requirement of § 9.98.010 applies only from such time as an  
5 imprisoned defendant gives written notice of the place of his imprisonment, even where the State  
6 has earlier requested his custody under § 9.98.040; “Absent the defendant’s formal request for a  
7 disposition, the timelines of his trial must be measured under CrR 3.3 whose time period runs from  
8 the date of the defendant’s preliminary appearance.” *State v. Rising*, 15 Wn. App. 693, 696, 552  
9 P.2d 1056 (1976).  
10  
11

12 *Under State v. Monson*, 84 Wn. App. 703, 929 P.2d 1186 (1977), “If long and unnecessary  
13 delay occurs in bringing defendant who is amenable to process before Court for his or her first  
14 appearance, speedy trial period is deemed to commence at time information or complaint was  
15 filed.” *See also State v. Allen*, 36 Wn. App. 582, 676 P.2d 501 (1983) (“Delay of 108 days after  
16 the information between when defendant became available and the date of his arraignment between  
17 violated the speedy trial rule.”); *State v. Nelson*, 47 Wn. App. 579, 736 P.2d 686 (1987) (6) six  
18 month delay between information and arraignment had violated defendant’s right to speedy trial  
19 since defendant was not unavailable during the period nor had he cause the delay.”); *State v.*  
20 *Holien*, 47 Wn. App. 124, 734 P.2d 508 (1987).  
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1           *State v. Silva*, 72 Wn. App. 80, 863 P.2d 597 (1993), also set forth that since the court did  
2 not make a record of why each trial department was unavailable and whether there was judge pro  
3 terms available to try the case or visiting judges to try the case, that it was a violation of speedy  
4 trial. No such offer was made for the six departments that were at recess at the time of the  
5 continuance that violated appellant's speedy trial. *Henderson v. United States*, 476 U.S. 321, 323  
6 n. 2, 106 S.Ct. 18761, 90 L.Ed.2d 299 (1986).  
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9           The parties dispute whether the January 27<sup>th</sup> continuance was proper. The State argues that  
10 court congestion justified a continuance of five more days under either CrR 3.3(h)(2) of CrR  
11 3.3(d)(8). Smith argues that court congestion could not justify a continuance under either rule.  
12  
13 *State v. Smith*, 104 Wn. App. 244, 252 (2001).  
14

15           Mr. Shelby then requested the State to provide him with the unordered pre-trial motion  
16 through the public disclosure act. The State claimed that there were no records in his file  
17 pertaining to the hearing that was held for the continuance past the original trial date, therefore the  
18 State did not respond to Mr. Shelby's request for public disclosure of that issue.  
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21           Issue No. 4: MR. SHELBY'S SIXTH AMENDMENT CONSTITUTIONAL  
22 RIGHTS WERE VIOLATED BY IMPLIED BIAS ON THE  
23 APPLICATION WHEN A JUROR HAD THIRD PARTY  
24 CONTACT WITH HER BROTHER WHO HAD DIRECT  
25 CONTACT WITH THE DEFENDANT IMPROPERLY  
26 INFLUENCED THE JURY VERDICT.  
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1 In this case, the juror brother escorted Mr. Shelby to court, and he spoke on attending a  
2 “Mariner’s baseball game with his sister, (the juror). The juror’s brother who is currently a deputy  
3 staff member at the Pierce County jail, made some slandering comments/remarks towards Mr.  
4 Shelby about his guilt while the trial was in session. The remarks resulted in a well founded  
5 grievance filed by Mr. Shelby that caused the deputy to be removed, and to be resigned by his  
6 corrections lieutenant. ( Exhibit A-1 A-2).  
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9 After Mr. Shelby got into a dispute with County jail deputies, because of the grievance he  
10 filed against the deputy. The dispute caused him to be forced to wear a stun-belt during his trial,  
11 because the County jail staff member ( Sergeant Gerrish) felt Mr. Shelby was dangerous. It was  
12 ordered by the Prosecuting Attorney’s that Mr. Shelby be forced to wear the stun-belt. *See State*  
13 *v. Cho*, 108 Wn. App. 315, 320 (2001). Mr. Shelby went on record and filed a complaint against  
14 this very deputy for stating he was guilty in the middle of trial.  
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18 The record reflect that Mr. Shelby went on record addressing the grievance against the  
19 deputy who’s sister was impaneled on his jury. CP 54, 8/20/99. The record states in part:  
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21 So you know, I’m here to give my life right to God, but I ask you to be fair  
22 at what you do because I know that, you know, throughout my trial, you been –  
23 you’ve been fair, but there was some stuff that had been happening before I even  
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1 started trial that was – there was a guard’s sister that was on my jury duty and he  
2 was one of the officers that was taking me to court.  
3

4 And I wrote a kite, a grievance to the lieutenant and to Sergeant Gerrish  
5 right there about this guy because I seen her right there – what’s her name? Ms.  
6 Oliver? Ms. Sholin. I heard her and him talking over something just like two  
7 weeks before I started picking the jury, and she was telling the officer to keep his  
8 eye on me, saying some things about me. Then when I got back to the unit, the  
9 officer was, like, taunting to me and talking to me and yelling at me. So I wrote a  
10 grievance up so that he would not be transporting me back and forth to court.  
11 They still –they took him off the court procedure, taking me back and forth to  
12 court, but his sister was on the jury duty.  
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17 *Cho’s* appeal requires us first to determine the standard that a trial court must use when  
18 faced with a motion for a new trial based on a juror’s alleged failure to disclose information during  
19 voir dire, and then to decide whether the trial court erred in denying *Cho’s* motion based on the  
20 facts presented. We will disturb a trial Court’s decision or deny a new trial only for a clear abuse  
21 of that discretion or when it is predicated on an erroneous interpretation of the law. *State v.*  
22 *Briggs*, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989). A trial court abuses its discretion when its  
23 decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.  
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1 *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Duncan v. State of*  
2 *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 1447 (1968).

3  
4 The question has been asked whether a right is among those “fundamental principles of  
5 liberty and justice which lie at the base of all our civil and political institutions,” *Powell v. State of*  
6 *Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932), it is “basic in our system of  
7 jurisprudence,” *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948); and  
8 whether it is “a fundamental right, essential to a fair trial,” *Gideon v. Wainwright*, 372 U.S. 335,  
9 343-344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct.  
10 1489, 1492, 12 L.Ed.2d 653 (1964); *Pointer v. State of Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065,  
11 1067, 13 L.Ed.2d 923 (1965). The claim before us is that the right to trial by jury guaranteed by  
12 the Sixth amendment meets these tests. *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct.  
13 1444, 1447 (1968).

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18 In the case at bar, the juror in Shelby’s trial concealed material during the peremptory  
19 challenges. Which is clearly prejudicial and requires reversal. *See U.S. v. Scott*,<sup>5</sup> 854 F.2d 697,  
20 698 (5<sup>th</sup> Cir. 1988). In *Smith v. Phillips*, the Supreme Court stated:

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25 <sup>5</sup> *Smith v. Phillips*, 455 U.S. at 221.22, 102 S.Ct. at 948, 71 L.Ed.2d at 89 (O’Connor, J., concurring) (emphasis  
26 added).

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1 This Court has long held that the remedy for allegations of juror partiality is a  
2 hearing in which the defendant has the opportunity to prove actual bias.

3 In *McDonough Power Equipment, Inc. v. Greenwood*,<sup>6</sup> the Court explained the standard  
4 for evaluating alleged juror misconduct in answering voir dire question:

5  
6 to obtain a new trial . . . a party must first demonstrate that a juror failed to answer  
7 honestly a material question on voir dire, and then further show that correct  
8 response would have provided a valid basis for challenge for cause. The motives  
9 for concealing information may vary, *but only those reasons that affect a juror's*  
10 *impartiality can truly be said to affect the fairness of a trial.*

11 The test on a new trial motion as articulated by this court is whether the movant can  
12 demonstrate that information a juror failed to disclose in voir dire was material, and also that a  
13 truthful disclosure would have provided a basis for a challenge for cause. *See e.g., State v.*  
14 *Carlson*, 61 Wn. App. 865, 877, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022 (1993);  
15 *State v. Briggs*, 55 Wn. App. at 52. Applying the second part of this test, the trial court must  
16 conclude that even if *Shelby* had learned during voir dire that the juror was a brother to the deputy  
17 who brought *Mr. Shelby* to the courtroom, thus this disclosure would have provided a basis for a  
18 challenge for cause. Therefore, this court must reverse his conviction and grant him a new trial.  
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21 Issue No. 5. INEFFECTIVE ASSISTANCE OF COUNSEL

22  
23 a. MR. SHELBY'S FOURTEENTH AMENDMENT EQUAL PROTECTION  
24 RIGHT'S WAS VIOLATED WHEN TRIAL COUNSEL AND APPELLANT  
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26 <sup>6</sup> *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663, 671  
27 (1984) (emphasis added).  
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prepared a notice of appeal and appropriate orders, and if the Court will sign that, I've spoke to Ms. King and I've also spoken to my client about it.

MS. SHOLIN: Your Honor, I'd ask that the Court read the notice anyway. I've seen case law in the past that it's error to not advise the defendant even if he is appealing and we already know that.

This standard in *United States v. Selava*, 559 F.2d 1303, 1305 (5<sup>th</sup> Cir. 1977), represents an effort to ensure a criminal defendant's right to a meaningful appeal based on a complete transcript. See *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.L.Ed.2d 331 (1964). The Act requires that a reporter "shall record verbatim by shorthand or by mechanical mean. . . .(1) all proceedings in criminal cases had in open court. . . ." *Id.* § 753(b). This language is clear, and it requirements are mandatory. See *e.g.*, *United States v. Upshaw*, 448 F.2d 1218, 1223 (5<sup>th</sup> Cir. 1971); *Calhoun v. United States*, 384 F.2d 180, 183 (5<sup>th</sup> Cir. 1967). It is also established beyond any shadow of doubt that a criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial. *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964); *U.S. v. Knott*, 142 F.Supp.2d 468 (S.D.N.Y. 2001).

A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. *Wheat v. United States*, 486 U.S. 153, 159, n. 3, 108 S. Ct. 1692, 1697 n. 3, 100 L. Ed. 2d 140 (1988); *State v. DeWeese*, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991). A court has

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1 discretion in deciding whether a particular defendant's reasons for dissatisfaction merit substitution  
2 of counsel. *Wheat*, 486 U.S. at 164; *DeWeese*, 117 Wn.2d at 376 (citing *State v. Sinclair*, 46  
3 Wn.2d 1006 (1987)).  
4

5 Mr. Shelby contends, however, that the court erred in failing to inquire into his reasons for  
6 requesting a new attorney. See *State v. Dougherty*, 33 Wn.App. 466, 655 P.2d 1187 (1982),  
7 review denied, 99 Wn.2d 1023 (1983), in which the defendant did not trust his appointed attorney  
8 and asked to appear pro se. In *Dougherty*, the issue was whether the defendant had knowingly and  
9 intelligently waived his Sixth Amendment right to counsel. *Dougherty*, 33 Wn. App. at 468. The  
10 court noted:  
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14 The problem faced by a defendant who distrusts his attorney's is solved by the trial  
15 court's inquiry into the defendant's subjective reasons for his district. When that  
16 hearing occurs, reasons such as those held by *Mr. Dougherty* will be evaluated by  
17 the court. A penetrating and comprehensive examination by the court of the  
18 defendant's allegation will serve as the basis of whether different counsel needs to  
19 be appointed for direct representation at trial, or for standby purpose.

20 *Dougherty*, 33 Wn. App. at 471. Arguably, this language does not apply directly here,  
21 since Mr. Shelby was not asking to appear pro se. As a practical matter, however, the  
22 circumstances are similar. When a defendant lacks faith in his appointed attorney and the court  
23 refuses to permit a substitute, the defendant must choose between continuing with his appointed  
24 counsel, or appearing pro se. See, e.g., *DeWeese*, 117 Wn.2d 369; *State v. Staten*, 60 Wn. App.  
25 163, 802 P.2d 1384, review denied, 117 Wn.2d 1011 (1991); *State v. Lopez*, 79 Wn. App.  
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1 “The Supreme Court has held that a state “must, as a matter of equal protection, provide  
2 indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are  
3 available for a price to other prisoners.” *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct.  
4 431, 433, 30 L.Ed.2d 400 (1971). The Equal Protection Clause prohibits disparate treatment by a  
5 state “between classes of individuals whose situations are arguably indistinguishable. *Ross v. Miff*,  
6 417 U.S. 600, 609, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974).

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9 *In Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674  
10 (1984); the Supreme Court established a two-part test for effective assistance of counsel. First,  
11 the defendant must show deficient performance. Second, the defendant must show prejudice,  
12 “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result  
13 is reliable.” *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389  
14 (2000); *Smith v. Stewart*, 241 F.3d 1191 (9th Cir 2001); *Lambright v. Stewart*, 241 F.3d 1201  
15 (9th Cir. 2001).  
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19 “It appears the Seventh Circuit drew the substance of its no-prejudice rule from our opinion  
20 in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). *Lockhart* holds  
21 that in some circumstances a mere difference in outcome will not suffice to establish prejudice. *Id.*  
22 at 369, 113 S.Ct. 838. The Seventh Circuit extracted from this holding the rule at issue here,  
23 which denies relief when the increase in sentence is said to be not so significant as to render the  
24 outcome sentencing unreliable or fundamentally unfair. *See Durrive, supra*, at 550-551. The  
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1 Court explained last Term that our holding in *Lockhart* does not supplant the *Strickland* analysis.  
2 *See Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (“Cases  
3 such as *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and *Lockhart v.*  
4 *Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a  
5 straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the  
6 defendant of a substantive or procedural right to which the law entitles him”; *id.*, at 414, 120 S.Ct.  
7 1495 (opinion of O’Connor, J.) (“As I explained in my concurring opinion in [*Lockhart*], ‘in the  
8 vast majority of cases . . . [t]he determinative question - whether there is “a reasonable probability  
9 that, but for counsel’s unprofessional errors, the result of the proceeding would have been  
10 different” - remains unchanged’ “).  
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15 b. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO  
16 INVESTIGATE AND PROVIDE EXPERT WITNESS REGARDING  
17 BLOOD-SPLATTER EVIDENCE IN VIOLATION OF MR. SHELBY’S  
18 SIXTH AMENDMENT RIGHT’S

19 Trial counsel failed to call expert witness that would have provided proof that the blood-  
20 splatter was consistent with Mr. Shelby theory of self-defense. CP 774-77. *Demarest v. Price*,  
21 130 F.3d 922, 932 (10<sup>th</sup> Cir. 1997).  
22

23 MR. Thoenig:: Thank you.  
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25 Q. (By MR. Thoenig) In this case, did you lift any fingerprints from the crime  
26 scene?  
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A No, sir, we did not.

Q Do you do any blood spatter analysis that you know of?

A I do not know, sir.

Q Was there any diagram made to illustrate where blood occurred at the crime scene?

A There was a diagram made, but I'm not sure if it included the actual location of all the blood, no, sir.

Q Do you ever take it upon yourself to, if you come upon a crime scene and, say, there's furniture that may or may not have been disturbed, do you take it upon yourself to interview witnesses to try and reconstruct the scene and see what was disturbed?

A No, sir. The detectives usually do that.

Q Okay. Did you preserve any of the blood samples by removing a section of wall or anything for possible spatter analysis later?

A No, sir, we did not.

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1 Counsel elected not to call a blood spatter expert. And at this point a expert was needed to  
2 determine whether the statements Shelby made to the Detectives were factual and consistent to  
3 the location of the shooting. The State claimed that everything transpired in the bathroom and that  
4 claim was inconsistent.:

6 The Washington State and United States Constitution guarantee a criminal defendant the  
7 right to effective assistance of counsel. Const. Art. 1 § 22 (amend. 10); U.S. Const. Sixth  
8 Amendment; U.S. Constitution Fourteenth Amendment § 1; *Strickland v. Washington*, 466 U.S.  
9 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). During the course of the trial, defense counsel  
10 permitted inculpatory hearsay to be introduced. Shelby was deprived of his constitution right to  
11 effective assistance of counsel when his attorney failed to recognize that his constitutional right to  
12 confront his accuser were being violated.

15 In *Washington v. Strickland*, 693 F.2d 1243 (5<sup>th</sup> Cir. Unit B 1982) (en banc), petition for  
16 cert. filed, 541 U.S.L.W. 3704 (U.S. March 21, 1983) (No. 82-1554), the court concluded that to  
17 prevail on a claim of ineffective assistance of counsel in a habeas corpus proceeding, a petitioner  
18 must demonstrate both a denial of effective assistance of counsel, and showing of substantial  
19 prejudice to his defense. 693 F.2d at 1258. *U.S. v. Jones*, 766 F.2d 412 (9<sup>th</sup> Cir. 1985); *Davis v.*  
20 *Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974); *Pointer v. Texas*, 380 U.S. 400,  
21 13 L Ed.2d 923, 85 S. Ct. 1065 (1965).

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1 A criminal defendant claiming ineffective assistance must prove (1) that the attorney's  
2 performance was deficient, i.e. that the representation fell below an objective standard of  
3 reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the  
4 deficient performance, i.e. that there is a reasonable probability that, but for the attorney's  
5 unprofessional errors, the results of the proceedings would have been different. *State v. Early*,  
6 Wn. App. 452, 260, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); *State v.*  
7 *Graham*, 78 Wn. App. 44, 56, 899 P.2d 704 (1995); *State v. McFarland*, 127 Wn.2d 332, 335,  
8 899 P.2d 1251 (1995).

11 c. TRIAL COUNSEL FAILED TO CALL FAVORABLE WITNESS AND  
12 PRESENT A DEFENSE TO MR. SHELBY'S THEORY OF THE CASE IN  
13 VIOLATION OF SHELBY'S SIXTH AMENDMENT RIGHT TO  
14 EFFECTIVE ASSISTANCE OF COUNSEL.

15 Mr. Shelby's trial counsel failed to call a witness who would have testified that the victim  
16 had previously shot at him in the same apartment. The shooting took place a few weeks prior to  
17 the incident with Mr. Shelby. *See Matthews v. Abramajtys*, 92 F.Supp.2d 615, 634 (E.D. Mich.  
18 2000).

21 Trial counsel's performance may be deemed deficient for failing to investigate and present  
22 possible alibi witnesses. *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6<sup>th</sup> Cir. 1987) (counsel was  
23 deficient for failing to investigate a known and potentially important alibi witness); *Jemison*, 672  
24 F.Supp. at 1008 (counsel was deficient, in part, for failing to interview potentially effective alibi  
25 witness); accord *Brown v. Myres*, 137 F.3d 1154, 1158 (9<sup>th</sup> Cir. 1998) (finding counsel deficient  
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1 for failing to investigate and call possible alibi witnesses); *Grooms v. Solem*, 923 F.2d 88, 90 (8<sup>th</sup>  
2 Cir.1991) (same). Trial counsel's performance may also be deemed deficient when counsel relies  
3 solely upon the weaknesses in the prosecution's case and fails to present a defense theory. *See*,  
4 *e.g.*, *Harris v. Reed*, 894 F.2d 871, 878-79 (7<sup>th</sup> Cir. 1990) (counsel's reliance upon weakness of  
5 prosecution's case and failure to present defense theory was ineffective); *United States v. rel.*  
6 *Cosey v. Wolff*, 727 F.2d 656 (7<sup>th</sup> Cir. 1984) (counsel's out-of-hand rejection of potential  
7 witnesses and decision not to call them because prosecution's case was weak fell below minimum  
8 standard of professional competence.). (EXIBIT B-1)  
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10

11  
12 The trial counsel informed Mr. Shelby by the way of a letter that he had misplaced his  
13 witnesses statement:  
14

15  
16 In response to your recent letter I examined your file and retrieved the  
17 investigative notes on the interview with Mr. Howard. I was unable to locate and  
18 notes with respect to Mr. Singleton. I have enclosed the notes on Mr. Howard.

19  
20 In this case, trial counsel claimed he misplace the witnesses statements that would have  
21 provided clear testimony of the victim potential for violent and added credence to Mr. Shelby's  
22 theory that he had no other choice but to defend himself at the time of the incident. Butler's uncle  
23 testified that there had been a 9mm handgun in the apartment, which he had given to another  
24 nephew who was living with Butler, and he never got the gun back. And the state had Mr.  
25 Bradley testify to Butler's good character. (R.P 516-24) See Exhibit A.. *See U.S. v. Dawson*,  
26 857 F.2d 923 (3<sup>rd</sup> Cir. 1988).  
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1 d. MR. SHELBY'S FOURTEENTH AMENDMENT CONSTITUTIONAL  
2 RIGHT TO CONFRONT WITNESSES AND IMPEACH THEIR  
3 TESTIMONY WAS VIOLATED WHEN COUNSEL MADE AN  
4 OBJECTION AND CEASED VOIR DIRE.

5 It is noted that lead counsel did object to the damning testimony the witness Daniel Griffith  
6 provided the State with to assist them in securing a premeditation guilty verdict. See ( R P 500)  
7 During the trial a State witness testified that Mr. Shelby made threatening phone call to his  
8 residence a few days prior to the incident in question. The trial attorney did not impeach his  
9 testimony or challenge his character by bringing out his prior criminal history, in which he was  
10 convicted of felony possession of stolen property. Furthermore, the witness own sister had already  
11 made a statement in which she stated she never heard or received any threatening phone calls from  
12 Mr. Shelby. But the attorney refused to call her as a witness to impeach her brother's testimony.  
13

14  
15 "The federal and state constitutions guarantee criminal defendant effective assistance of  
16 counsel at all critical stages of trial." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct.  
17 2052, 80 L. Ed. 2d 674 (1984); *United States v. Cronin*, 466 U.S. 648, 657, 104 S. Ct. 2039, 80  
18 L. Ed. 2d 657 (1984). United States Constitution Sixth Amendment and Washington State  
19 Constitution Article 1 Section 22. In *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct.  
20 2052, 80 L.Ed.2d 674 (1984); the Supreme Court established a two-part test for effective  
21 assistance of counsel. *First*, the defendant must show deficient performance. *Second*, the  
22 defendant must show prejudice, "that counsel's errors were so serious as to deprive the defendant  
23 of a fair trial, a trial whose result is reliable." *Shelby v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495,  
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1 1511-12, 146 L.Ed.2d 389 (2000); *Smith v. Stewart*, 241 F.3d 1191 (9th Cir 2001); *Lambright v.*  
2 *Stewart*, 241 F.3d 1201 (9th Cir. 2001).

3 “To prevail on a claim of ineffective assistance of counsel, counsel’s representation must  
4 have been deficient, and the deficient representation must have prejudice the defendant.”  
5 *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v.*  
6 *McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Aho*, 137 Wn.2d 736, 745, 975  
7 P.2d 512 (1999). ( R.P 888-892).

8  
9  
10 Trial counsel failed to confront State eye witness who claimed that the shooting occurred in  
11 the bathroom, when the physical evidence support Mr. Shelby claim that the fight started in the  
12 bedroom. The evidence supported Mr. Shelby claim that there were some kind of struggle before  
13 the shooting and Mr. Shelby was face with a situation where it would be him or the victim, “he had  
14 to fight for his life”.

15  
16  
17 However, the Court further held that “effective assistance of counsel . . . may in a particular  
18 case be violated if [the] error is sufficiently egregious and prejudicial.” *Carrier*, 477 U.S. at 496,  
19 106 S.Ct. at 2649 (citing *United States v. Cronin*, 466 U.S. 648, 657 n.20, 104 S.Ct. 2039, 2046  
20 n.20, 80 L.Ed.2d 657 (1984); *Strickland*, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069)).  
21 (Alteration in original). Actual or constructive denial of the assistance of counsel is also legally  
22 presumed to result in prejudice. *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. Negligent or  
23 inadvertent failure of counsel to raise an issue in the manner necessary to avoid a state procedural  
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1 default also constitutes cause and prejudice sufficient to excuse the procedural default rule.  
2 *Rodacker v. State of Oregon*, 587 F.Supp. 1481, 1484 (1984).

- 3 e. COUSEL FAILED TO CALL WITNESSES WHO OVER HEARD THE EYE  
4 WITNESS TELL ANOTHER PARTY AFTER THE INCIDENT THAT IT  
5 WAS SELF-DEFENSE, AND THAT MR. SHELBY WAS LEFT WITH NO  
6 OTHER CHOICE BUT TO DEFEND HIMSELF.

7 Trial counsel prejudiced Mr. Shelby by failing to call witnesses that over heard the eye  
8 witness tell another party that it was a case of self-defense. The deficiencies of trial counsel  
9 representation is apart of the record of this issue. The prejudice to defendant is obvious: the jury  
10 that convicted Mr. Shelby never considered material evidence that supported Mr. Shelby's version  
11 of the facts and directly contradicted the prosecutor's evidence that was withheld. (EXIBIT B-2).  
12

13  
14 Thus, applying *Strickland*, the court finds that there is a "reasonable probability" that (a)  
15 the result of the criminal trial would have been different, and (b) confidence in the outcome of  
16 those proceedings has been undermined. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. This  
17 conclusion is apparent when the deficiencies of trial counsel are considered cumulatively, as is  
18 appropriate in the instant case. *See Williams v. Washington*, 59 F.3d 673, 682 (7<sup>th</sup> Cir. 1995). As  
19 mentioned above biased potential jurors and failing to call witnesses would not, by themselves,  
20 constitute, when added to the many other acts of incompetence and unprofessional conduct they  
21 lead to the inescapable conclusion that "counsel's errors were so serious as to deprive Mr. Shelby  
22 of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.  
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1 The Seventh Circuit considered a similar issue of lack of preparation for trial. *Berry v.*  
2 *Gramley*, 74 F.Supp.2d 808, 817 (N.D. Ill. 1999); *White v. Godinez*, 143 F.3d 1049, 1055 (7<sup>th</sup>  
3 Cir. 1998), *vacated on other grounds* (527 U.S. 1001, 119 S.Ct. 2335, 144 L.Ed.2d 233).  
4 *Original opinion reaffirmed* 192 F.3d 607 (7<sup>th</sup> Cir. 1999). In *White*, the court held that counsel's  
5 failure to consult with his client or otherwise prepare for trial, leading to a failure by counsel "to  
6 comprehend the evidence in the case," result in prejudice under *Strickland* and its progeny. If  
7 such evidence of lack of preparation is established, "then the further missteps Mr. Shelby alleges  
8 are almost necessarily not attributed to sound strategy decisions. As in *White*, Mr. Shelby has  
9 made the required showing that "there is at least a reasonable probability that the jury would have  
10 seen matters differently" had the defense presented the corroborating and exculpatory evidence  
11 discussed above. *Id.* at 1065. *Brown v. Myers*, 137 F.3d 1154, 1156-57 (9<sup>th</sup> Cir. 1998); *Matthews*  
12 *v. Abramajtyis*, 92 F.Supp.2d 615, 637-38 (E.D. Mich. 2000).

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18 f. TRIAL COUNSEL UNDERMINED MR. SHELBY'S SIXTH  
19 AMENDMENT RIGHT TO COUNSEL WHEN HE FAILED TO  
20 CONFRONT STATE WITNESSES WITH CRITICAL IMPEACHMENT  
21 EVIDENCE OF THEIR PRIOR CRIMINAL HISTORY WHICH COULD  
22 HAVE BEEN USED TO UNDERMINE THEIR CREDIBILITY.

23 The counsel failed to confront State witnesses with critical impeachment information  
24 concerning their prior criminal history whose testimony was critical to the State's claim of first  
25 degree murder, as well as the State's theory regarding Shelby's principal motive for killing the  
26 victim. Ms. Bohlen had outstanding warrants for her arrest and misdemeanor thefts during Mr.  
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1 Shelby's trial and that material lead counsel had in his possession but elected not to consider. ( R  
2 P 882).

3 "It appears the Seventh Circuit drew the substance of its no-prejudice rule from our opinion  
4 in *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). *Lockhart* holds  
5 that in some circumstances a mere difference in outcome will not suffice to establish prejudice. *Id.*  
6 at 369, 113 S.Ct. 838. The Seventh Circuit extracted from this holding the rule at issue here,  
7 which denies relief when the increase in sentence is said to be not so significant as to render the  
8 outcome sentencing unreliable or fundamentally unfair. *See Durrive, supra*, at 550-551. The  
9 Court explained last Term that our holding in *Lockhart* does not supplant the *Strickland* analysis.  
10 *See Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("Cases such  
11 as *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and *Lockhart v.*  
12 *Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a  
13 straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the  
14 defendant of a substantive or procedural right to which the law entitles him"; *id.*, at 414, 120 S.Ct.  
15 1495 (opinion of O'CONNOR, J.) ("As I explained in my concurring opinion in [*Lockhart*], 'in the  
16 vast majority of cases . . . [t]he determinative question - whether there is "a reasonable probability  
17 that, but for counsel's unprofessional errors, the result of the proceeding would have been  
18 different" - remains unchanged' ").

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25 g. TRIAL COUNSEL FAILED TO RAISE DEFENDANT'S THEORY THAT  
26 THE VICTIM HAD A REPUTATION TO VIOLENCE VIOLATING MR.  
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1 1950, 87 U.S. App. D.C 172, 174, 183, F.2d 990, 992, that "evidence of uncommunicated  
2 threats of the deceased against the defendant is admissible." "The justification of self-defense must  
3 be evaluated from the defendant's point of view. The legitimacy of his conduct must be in light of  
4 all the facts and circumstances known to him at the time of the shooting. *State v. Allery*, 101  
5 Wn.2d 591, 594, 682, P.2d 312 (1984). The reputation of a particular group for lawlessness may  
6 be taken into account if the defendant knew the victim was a member of that group. *State v. Smith*,  
7 2 Wn. App. 769, 771, 470 P.2d 214 (1970) (quoting *State v. Despenza*, 38 Wn. App. 645, 649,  
8 689 P.2d 87 (1984).  
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11  
12 In re *Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 282 (1948) (emphasis added).  
13 Since then, the Supreme Court has again noted the "fundamental" or "essential" character of a  
14 defendant's right both to present a defense, *Crane v. Kentucky*, 476 U.S. 683, 687, 690, 106 S.Ct.  
15 2142, 90 L.Ed.2d 636 (1986); *California V. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81  
16 L.Ed2d 413 (1984); *Webb v. Texas*, 409 U.S. 95, 98, 93 S.Ct. 351, 34 L.Ed2d 330 (1972);  
17 *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) and to present  
18 witnesses as a part of that defense. *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S.Ct. 646, 98  
19 L.Ed.2d 798 (1988); *Rock v. Arkansas*, 483 U.S. 44, 55 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987);  
20 *Chambers v. Mississippi*, 410 U.S. 284, 294, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Webb*,  
21 409 U.S. at 98, 93 S.Ct. 351; *Washington*, 388 U.S. at 19, 87 S.Ct. 1920. The Court has  
22 variously stated that an accused's right to a defense and right to present witnesses emanated from  
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1 the Sixth Amendment, *Taylor*, 484 U.S. at 409, 108 S.Ct. 646; *United States v. Valenzuela*  
2 *Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982); *See Gay v. Klauser*, 282  
3 F.3d 633, at 645 (9<sup>th</sup> Cir. 2002).

4  
5 6. PROSECUTION MISCONDUCT

7 THE PROSECUTION VIOLATED MR. SHELBY'S FOURTEENTH  
8 AMENDMENT EQUAL PROTECTION CLAUSE BY WITHHOLDING  
9 WITNESS STATEMENTS THAT WOULD HAVE ADDED CREDIBILITY TO  
10 MR. SHELBY'S CLAIM OF SELF-DEFENSE CONSTITUTING A BRADY  
11 VIOLATION.

12 The instant case present several incidents where misconduct by the prosecutor occurred.  
13 Mr. Shelby's defense was that he committed the crime in self-defense and that he had no other  
14 choice but to defend himself. *See U.S. v. Murrah*, 888 F.2d 24, 27-28 (5<sup>th</sup>499, 92 L.Ed.2d. 682  
15 (1948).

16  
17 All of the misconduct undermined Mr. Shelby's plausible theory of the case. The prosecutor  
18 withheld witnesses statements that would have supported Mr. Shelby's theory that he acted in self-  
19 defense. His trial counsel refused to call an alibi witness who would have given testimony to Mr.  
20 Shelby's credibility that he acted in self-defense and that he had no other choice but to defend  
21 himself. The defense attorney claimed they misplaced the witnesses statements that would have  
22 provided evidence that the victim had a history of violence, and that he had threatened to kill one  
23 of the witnesses sometime earlier. Then, Mr. Shelby intelligently requested a Public Disclosure to  
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1 the witness statements of Danielle Griffith and Danien Singleton. The State denied his request and  
2 claimed that they were “exempt under work product doctrine” Since his attorney had those  
3 witness statements in his files. (Exhibit E-1).  
4

5 Here, the prosecutor sharply contrasted Mr. Shelby’s theory of the case that he acted in self-  
6 defense and withheld witnesses statements that would have added credibility to Mr. Shelby’s self-  
7 defense claim. Moreover, the prosecutor misconduct violated Mr. Shelby’s due process rights  
8 when it “so infected the trial with unfairness as to make the resulting conviction a denial of due  
9 process. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)  
10 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974));  
11 *Mancuso v. Olivarez*, 282 F.3d 728, 745 (9<sup>th</sup> Cir. 2002). The Supreme Court held that Mr.  
12 Shelby is required to show that the prosecution suppressed evidence that was favorable to Mr.  
13 Shelby’s theory of the case and the material was credible in determining Mr. Shelby of guilt or  
14 innocence); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)  
15 (nondisclosure of evidence affecting credibility constitutes a denial of due process). *Minnick v.*  
16 *Anderson*, 151 F.Supp.2d 1015, 1033 (N.D. Ind. 2000).  
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21 If exculpatory or impeachment evidence is not disclosed by the prosecution and prejudice  
22 ensues, a defendant is deprived of due process. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194,  
23 10 L.Ed.2d 215 (1963). See also *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766,  
24 31 L.Ed.2d 104 (1972); *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d  
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1 481 (1985). Prejudice is determined by looking at the cumulative effect of the withheld evidence  
2 and asking “whether the favorable evidence could reasonably be taken to put the whole case in  
3 such a different light as to undermine confidence in the verdict.” *Strickler v. Greene*, 527 U.S.  
4 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (citations and internal quotation marks  
5 omitted). *See Killian v. Poole*, 282 F.3d 1204, 1210 (9<sup>th</sup> Cir. 2002).  
6

7  
8 Under *Brady*, evidence is material “if there is a reasonable probability that, had the evidence  
9 been disclosed to the defense, the result of the proceeding would have been different, A  
10 ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”  
11 *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 2383, 87 L.Ed.2d 481 (1985).  
12 Taken together, these undisclosed items would not only radically have affected the defense at Mr.  
13 Shelby’s trial, but would, in their totality, have affected the entire truth-gathering enterprise before  
14 the jury.  
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16

17  
18 7 UNDER THE SIXTH AMENDMENT AND FOURTEENTH  
19 AMENDMENT CONSTITUTIONAL RIGHT’S THE CUMULATIVE  
20 ERROR DOCTRINE DOES ENTITLE MR. SHELBY TO A NEW TRIAL.

21 In some cases, although no single trial error examined in isolation is sufficiently prejudicial  
22 to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.<sup>7</sup> See  
23 *United States v. Green*, 648 F.2d 587 (9<sup>th</sup> Cir. 1981). Where, as here, there are a number of  
24

25  
26 <sup>7</sup> In accordance with RAP 10.1(g)(2), and the interest of brevity; [for the purposes of this argument] Mr. Shelby  
27 hereby adopts and incorporates the statement of the case raised in his appellate counsel’s Opening brief filed in  
28 this

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1 errors at trial, “a balkanized, issue-by-issue harmless error review” is far less effective than  
2 analyzing the overall effect of all the errors in the context of the evidence introduced at trial against  
3 the defendant. *United States v. Wallace*, 848 F.2d 1464, 1476 (9<sup>th</sup> Cir. 1988). In those cases  
4 where the government’s case is weak, a defendant is more likely to be prejudiced by the effect of  
5 cumulative errors. *United States v. Berry*, 627 F.2d 193 (9<sup>th</sup> Cir. 1980), cert. denied, 449 U.S.  
6 113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981). “This is simply the logical corollary of the harmless  
7 error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt.”  
8 *Id.* at 201; see also *United States v. Hibler*, 463 F.2d 455 (9<sup>th</sup> Cir. 1972); *U.S. v. Frederick*, 78  
9 F.3d 1370, 1379 (9<sup>th</sup> Cir. 1996). The combined effects of error may require a new trial, even if  
10 those errors individually might not require reversal. A personal restraint petition will be granted if  
11 the petitioner establishes actual and substantial prejudice resulting from a violation of his or her  
12 constitutional rights or a fundamental error of law. *In re Brett*, 142 Wn.2d 868,874 (2001); *In re*  
13 *Personal Restraint of Benn*, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998), *rev’d sub nom. on*  
14 *other grounds by Benn v. Wood*, No. C98-5131RDB, 2000 WI 1031361 (W.D. Wash. June 30,  
15 2000); *United States v. Preciado-Cordobas*, 981 F.2d 1206,1215 n.8 (11th Cir. 1993). Reversal is  
16 required where the cumulative effect of several errors is so prejudicial as to deny the defendant a  
17 fair trial under the federal constitution. *Mak v. Blogett*, 970 F.2d 614 (9th Cir. 1992); *United*  
18 *States v. Frederick*, 78 F.3d 1370,1381 (9th Cir. 1996).

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Armondo Tremaine Shelby  
Pro se Petitioner

1 The combined effects of error may require a new trial, even if those errors individually might  
2 not require reversal. *State v. Coe*, 101 Wn.2d 772,789, 684 P.2d 668 (1984); *In re Brett*, 142  
3 Wn.2d 868,882 (2001); *United States v. Preciado-Cordobas*, 981 F.2d 1206,1215 n.8 (11th Cir.  
4 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny  
5 the defendant a fair trial under the federal constitution. *Mak v. Blogett*, 970 F.2d 614 (9th Cir.  
6 1992); *United States v. Frederick*, 78 F.3d 1370,1381 (9th Cir. 1996).

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8  
9 Here, the combined effect of all the errors set forth above and in Mr. Shelby's appellate  
10 attorney's opening brief were vital to his receiving a fair trial. These errors, combined were so  
11 pervasive and prejudicial as to deny Mr. Shelby his right to due process and a fair trial, thus,  
12 facilitating the State to convict an innocent person of first degree murder, simply because he was  
13 defending himself. Mr. Shelby's conviction must therefore be reversed because of the individual  
14 errors and the cumulative effect of the errors.

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18 CONCLUSION

19  
20 For the reasons set forth above, petitioner respectfully urges this Honorable Court to grant  
21 his Personal Restraint Petition and remand his case for a new trial.

22 I, Armondo T. Shelby, do hereby swear under the penalty of perjury that all of the above is  
23 true and correct to the best of my knowledge. Dated this 20<sup>th</sup> day of Sept,  
24 2002.

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Armondo Tremaine Shelby  
Pro se Petitioner

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RESPECTFULLY SUBMITTED:

  
Armondo Tremaine Shelby

Subscribed and Sworn to on this 20<sup>th</sup> day of Sept, 2002.

\_\_\_\_\_  
Notary Public in and for the State of Washington  
Residing at \_\_\_\_\_  
My Commission expires \_\_\_\_\_

Armondo Tremaine Shelby  
Pro se Petitioner

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**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of Sept, 2002, the original and correct copy of the foregoing PERSONAL RESTRAINT PETITION filed by ARMONDO TREMAINE SHELBY, was served upon the following individuals by depositing same in the United States Mail, postage prepaid, addressed to :

CLERK: WASHINGTON COURT OF APPEALS  
DIVISION TWO 950 BROADWAY, SUITE 300  
TACOMA, WASHINGTON 98402

PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE  
PIERCE COUNTY COURTHOUSE  
930 TACOMA AVENUE SOUTH  
TACOMA, WASHINGTON 98402

RESPECTFULLY SUBMITTED: Armondo Shelby

Armondo Tremaine Shelby

02 SEP 24 PM 1:49  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

FILED  
COURT OF APPEALS  
WASHINGTON

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