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STATE OF WASHINGTON

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NO 34615-0-II.  
Cowlitz County No 05-1-00798-0.

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ANTONIO RIAL**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

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**IV. MR. RIAL WAS DENIED HIS RIGHT TO COUNSEL WHEN HIS ATTORNEY PROCEEDED TO REPRESENT HIM IN SPITE OF AN ACTUAL CONFLICT OF INTEREST.**

**C. STATEMENT OF THE CASE**

## **1. PROCEDURAL HISTORY**

Appellant Antonio Rial was charged by Second Amended Information with Murder in the First Degree while armed with a Firearm. CP 23. A jury trial commenced on March 20<sup>th</sup>, 2006. 1 RP 116. On the first day of trial, prior to the commencement of proceedings in front of the jury and after motions in limine, the court made the following admonishment to Mr. Rial:

Mr. Rial, I noticed that you are tending to react to some things that go on. You know, to some degree, that's natural. All right. That's going to happen. I caution you, one, that if it gets extreme, I will take—I'll send the jury out and we'll talk about it. Two, it may actually damage your case. So, you know, you need to...remain as poker-faced as possible, everybody in the courtroom, because the jury needs to decide this case solely on the evidence presented in open court. All right. 1 RP 145.

Although defense counsel included self-defense instructions in his packet of proposed instructions, he decided withdrew the proposed instructions at the close of the case. CP 57-60, 5 RP 1000-1001. The jury returned a verdict of guilty to Murder in the First Degree with a firearm enhancement. CP 83-84. Mr. Rial was given a standard range sentence. CP 90. This timely appeal followed. CP 96.

## **2. FACTUAL HISTORY**

The Appellant, Antonio Rial, was involved in a dating relationship with Katherine "Kat" Weir. 3 RP 447. Prior to her relationship with

Antonio, Kat had been in an on-again, off-again relationship with the victim, Nicklis Marston, for about four years. 3 RP 446. They had a son together, who was born on April 27<sup>th</sup>, 2005. 3 RP 447. Antonio and Nick had been acquaintances and, occasionally, friends, for a couple of years. Id. Around the time of the birth of Kat and Nick's son, the friendship between Antonio and Nick had soured. 3 RP 448. At the hospital after the baby's birth, Antonio had attempted to shake Nick's hand and Nick rebuffed him, walking out of the hospital. Id.

On July 2, 2005 Stacy Barker lived with her brother Richard Barker at 268 Baltimore Street in Longview. 2 RP 171. At about one o'clock in the afternoon Stacy heard noises that sounded like firecrackers, followed by screaming. 2 RP 172. She encountered her brother, Richard, coming into the house from the back steps. Id. Richard was "panicked" at told her to call 911, saying that Tony had shot Nick. 2 RP 174. Stacy called 911 and after handing the phone to Richard, she walked outside and saw Jennifer Herrman out in the road, stopping cars and screaming. 2 RP 175. She was covered in blood. Id.

At trial Richard Barker testified that in the early morning on the day of the shooting, he had several friends over including the victim, Nick Marston, Jenny Herrman, Jennifer Brockett, Brian Thompson, and a few other people. 2 RP 184-85. According to Richard, no one was doing

methamphetamine. 2 RP 185. They were working on a car and hanging out in the garage. 2 RP 186-87. Earlier that day, prior to the shooting, Richard had seen Antonio Rial, known as "Tony," when he came over to pick up a bike frame. 2 RP 190. At that time, Tony told Nick that he (Nick) was supposed to pick up his son, and Nick told Tony he had nothing to say to him. 2 RP 191. About an hour later, Richard claimed he saw Tony come back and go into the garage, where Nick now was. 2 RP 192. Following that, Richard heard three or four gunshots. 2 RP 193. Richard also kept a gun in the garage, and it was in the garage at the time of the shooting. 2 RP 201-202.

Kevin Bolton, a neighbor of Richard and Stacy Barker, heard the gunshots. 2 RP 233-34. He called 911 and then went over the garage at 268 Baltimore. 2 RP 235-36. While in the garage, he saw several people. Id. One of the people he saw was a tall skinny man who was taking a gun and hiding it in the corner of the garage. 2 RP 236.

Nick Marston sustained two gunshot wounds, one in the front of his neck and one on the right side of his back next to the armpit area. 2A RP 265. These gunshot wounds caused his death. 2A RP 273.

Jessica Hogman and her husband Darrel were also in the garage at the time of the shooting. After the shooting, they both fled the garage, following Antonio out the "man door" to the garage. 2A RP 285. Jessica

Hogman made numerous false statements to the police in the aftermath of the shooting in order to avoid having to get involved. 2A RP 289-292.

When asked by the prosecutor if she was scared to talk to the police, she replied that she was because she didn't want to be put in the situation of having to come to court and testify. 2A RP 293-94. They were stopped by the police about a mile from the scene, at which time Darrel Hogman gave the police a false name. Id. Darrel also signed this false name to the written statement he gave to the Longview Police under penalty of perjury. 2A RP 304. He gave a false name to avoid being booked on a misdemeanor warrant. Id. This was the first of two written statements he provided. 2A RP 310. In this statement, he said he didn't see anything happen in the garage. Id. At the police station, Darrel was shown a photo montage with Antonio's picture in it and when asked if he recognized anyone in the montage, he said "no." 2A RP 307. In his first statement to the police (on which he gave a false name) he described the shooter as a black male. 2A RP 308. At the time of his testimony, Darrel was still not sure that Antonio Rial was the one who shot Nick Marston. 2A RP 311.

Officer Monge of the Longview Police testified that he interviewed Jennifer Herrman after the shooting and she told him "Tony Cahoney" shot "Little Nick." 2A RP 351. She was not able to give a real name for Tony Cahoney. 2A RP 352. Brian Thompson testified that at the time of

the shooting he was in his van and didn't witness it, although he heard the shots. 2A RP 376. He also testified he was high on meth at the time, and uses meth all the time. 2A RP 392. Brian Thompson testified that on the day before the shooting he witnessed a fight between Tony and Nick. 2A RP 385. Thompson was reluctant to say who started the fight or whether it was mutual, stating only that he watched as others broke it up. 2A RP 385-86. He characterized the fight as insignificant. 2A RP 386. The prosecutor questioned Mr. Thompson twice about whether he wanted to be there testifying, to which he replied that he didn't. 2A RP 371, 388. In the first instance, Mr. Thompson said he would probably not have responded to a subpoena because he doesn't like courts. 2A RP 371. In the second instance, the Prosecutor asked "Do you want to be here testifying against him [Antonio] today?" He replied "No." She asked "How come?" He replied I told you before, I don't like being in court, I'm real nervous right now." 2A RP 388-89.

Jennifer Herrman was arrested on a material witness warrant for the purpose of giving testimony in this trial. 1 RP 107, 142. She testified that she spent the night at Richard Barker's house the night before the shooting. 3 RP 399-400. When she woke up the next day, she prepared a bowl of cereal and went out to the garage and began talking to Nick. 3 RP 400. As she was eating her bowl of cereal someone bumped into her and

she heard shots. 3 RP 402. She “hit the ground” and ran over to Nick. Id. She claimed that she held Nick for “45 minutes” until the police and ambulance arrived. 3 RP 403. Ms. Herrman testified that she is not sure who the shooter was. 3 RP 410. She was impeached by the Prosecutor with her prior inconsistent statement to the police that Tony Cahoney had been the shooter. 3 RP 409-11.

Ms. Herrman was asked by the Prosecutor “And you do not want to be here testifying, do you?” Ms. Herrman replied that she didn’t want to be testifying because her life has been very hard since this incident. 3 RP 411. The Prosecutor persisted: “Are there other reasons that you don’t want to testify here against Tony?” Ms. Herrman replied “no,” at which time the following exchange occurred:

Prosecutor: Well, last night didn’t you tell Mr. Scudder and myself that you ain’t no snitch?

Herrman: Well, yeah.

Prosecutor: What does that mean?

Herrman: That means that I’m not the one that should be pointing the finger. This is going to make my life so much harder.

...

Prosecutor: ...So-so, whose pointing the finger? I mean who—why do you think you’re pointing a finger? 3 RP 411-12.

At this point, a spectator in the courtroom said “Bitch.” 3 RP 412.

At that point the court removed the jury and had the spectator, Nick Marston’s sister, removed from the courtroom for the remainder of the trial. Id. The court noted that the jury heard the remark. 3 RP 413. When the jury returned, no curative instruction was requested by defense counsel or given by the court. The Prosecutor continued her line of questioning about Ms. Herrman’s reluctance to testify:

Prosecutor: --and last night didn’t you tell us that everybody’s got friends?

Herrman: Yeah.

Prosecutor: What does that mean?

Herrman: I mean that people—everybody has friends. And—and when something like this happens, people take it among themselves to do what they think they should do, in—in order to honor their friendship, or the fact that they care about somebody.

Prosecutor: So are you afraid of that?

Herrman: I’m afraid of this whole situation. I’m afraid of all of this. I’m afraid to be here today. I’m afraid—I’m afraid for everybody. I’m afraid for this whole situation. I don’t like it at all.

Prosecutor: And do you remember the last thing you said to us before you left the interview room?

Herrman: If something happens to me, just remember that you guys kept pushing me to do this. 3 RP 415-16.

Randy Greene, who is Kat Weir's mother's boyfriend, testified about an altercation he observed between Tony and Nick a few days before the shooting. He described it as follows:

I seen, uh, Tony pick up Nick and body slam him onto the alley. And Nick's friends that were with him at the time broke it up and there was—there was going to be some other kind of problems—'cause there was Nick's friends that were there. One of them went to the trunk of his car, and was going to do—pull something out, and the other friends of Nick's told the guy not to do it because there was kids and families around here.

3 RP 439.

Kat Weir testified about another prior altercation between Tony and Nick. The last time Nick was released from jail, he came over to Kat's house and Kat asked Tony to stay in the bedroom to avoid trouble. 3 RP 449. She then asked Tony to jump out the bedroom window, and Tony became upset because he felt he shouldn't have to leave. Id. When Nick saw Tony outside, they got into an argument and Nick called Tony a "fucking nigger." Id. Tony did not respond and walked off. Id. She also testified about an incident that occurred approximately one month before the shooting, where Nick and several of his friends approached Tony and Nick and Tony got into a physical fight. 3 RP 451. On that occasion, Nick's friends jumped in as well. 3 RP 451.

On yet another occasion prior to that, Tony and Kat went looking for Nick to talk to him. 3 RP 455. When they found Nick on the corner of 18<sup>th</sup> in Longview, Nick swung a padlock attached to a rope at Tony and hit him in the face. 3 RP 455-56. Nick told Tony “get the fuck out of here.” 3 RP 456. After Nick and Kat’s son was born, the situation grew worse. 3 RP 458. Nick felt that Kat and the baby were his family and Kat recalled that Nick told Tony to stay the “F away” from his family. 3 RP 460-61.

Corena Weir, Kat Weir’s mother, described the fight that occurred outside of her house between Nick and Tony the day before the shooting. 3A RP 518-20. She described the fight as follows:

Uh, Nick came over he—him and Leto came over, and they were harassing Tony. And they went outside and they were scuffling around. Tony was on his own. Nick had Leto. Leto proceeded to go to the trunk of his car, and grab for a gun. This is when, uh, Brandon Davis walked up and said, no, this ain’t gonna happen. It’s gotta stay mutual. I’m both your friends and this can’t be. And this is when he took the gun from Leto and—and the fight broke—broke the fight up. Tony proceeded to come back to my house, and the guys left calling him all kinds of racial names and...uh, that’s—was the end of that, until the next day when it happened, I guess. 3A RP 518-19.

Prior to the trial commencing, Mr. Scudder, Mr. Rial’s attorney, alerted the court to the fact that the State had placed his prior client, Steven Johnson, on their witness list just prior to trial. 1 RP 140. Mr. Scudder had represented Mr. Johnson previously. 1 RP 140. There was no discussion of continuing the trial and Mr. Scudder withdrawing. 1 RP

140-141. The court conducted no colloquy with Mr. Rial about the fact that his attorney now had an actual conflict, nor was any waiver (oral or written) procured from Mr. Rial regarding this conflict. Instead, Mr. Scudder suggested that another attorney be appointed to represent Mr. Rial for the sole purpose of cross examining Mr. Johnson. 1 RP 140. The court agreed with this suggestion: "...[W]e will certainly appoint...another defense attorney to do some of the examination in this case on the basis that you described to me on Friday, which is basically, you'll have no contact with—except to indicate what you think are the relevant areas, but you won't be disclosing any information regarding Mr. Johnson." 1 RP 141.

When the time arrived for Mr. Johnson to testify, the court appointed Mr. Blondin to represent Mr. Rial. 3A RP 603. Mr. Blondin advised the court that he had spoken to Mr. Johnson for the first and only time that day and was "relatively new getting into this matter." *Id.* Mr. Blondin did not indicate whether he had ever met with Mr. Rial to discuss the case with him. *Id.* Mr. Blondin then indicated that in his discussion with Johnson, Mr. Johnson raised his concern that his testimony might expose him to criminal liability. *Id.* Mr. Johnson's role in this case was twofold: He and several other men beat Mr. Rial in an ambush on a remote road in Columbia County, Oregon on the night of the shooting, and

he was one of the parties who recovered the gun used to kill Mr. Marston and arranged for it to be turned over to the Longview Police. 3A RP 603-643. Mr. Blondin said that Mr. Johnson asked him to relay to the court that he “wanted to speak to an attorney that had his best interests in mind.” 3A RP 604. Mr. Blondin further stated: “I was candid with him that I did not represent him. I didn’t want to steer him one way or the other, and so I think in an effort of fairness, I think someone needs to talk to Mr. Johnson about what his rights are with respect to his anticipated testimony and whether or not he is putting himself in jeopardy by being sworn in and saying something in front of the jury.” 3A RP 604.

After much back and forth between the parties, in which the Prosecutor insisted that because *she* had no ability to prosecute Mr. Johnson for crimes which occurred in Oregon, that he had no basis to claim that he might be exposed to criminal liability based on his testimony, the court admonished Mr. Blondin that his conduct could be construed as an attempt to coerce Mr. Johnson into not testifying. 3A RP 604-610. Ultimately, the court declined to appoint separate counsel for Mr. Johnson and instructed him to alert the court if he felt that he was being asked a question that exposed him to criminal liability and they would take it up outside the presence of the jury. 3A RP 610.

Mr. Johnson testified that Nick was one of his best friends. 3A RP 612. However, he had only spoken to Nick once in the past six months. 3A RP 627. Mr. Johnson, in summary, was involved in a group ambush of Mr. Rial by friends of Nick on a remote road in Columbia County, Oregon in which Mr. Rial was severely beaten. 3A RP 603-643. He was also involved in a plan to recover the gun used to kill Nick from Mr. Rial and to see that it was recovered by the Longview Police. Id.

On cross examination Mr. Blondin confirmed that Mr. Johnson had spoken to Mr. Scudder and his investigator. 3A RP 625. Mr. Blondin attempted to impeach Mr. Johnson on his apparent duplicity on the issue of whether he was involved in the ambush beating of Antonio. The following exchange occurred:

Mr. Blondin: And do you remember during that conversation with Mr. Scudder and this other individual stating that...do you recall telling Mr. Scudder and the other individual that you didn't have anything to do with Mr. Rial being ambushed and didn't know anything about how they found him?

Mr. Johnson: No, I didn't say that to him. I don't remember saying that to him, no.

...

Mr. Blondin: As I understand it, you caught up to another vehicle, cut it off, in your words, told the driver of the other vehicle to leave, and then assaulted Mr. Rial while in Columbia County, Oregon?

Mr. Johnson: Uh-huh.

Mr. Blondin: Okay. Now, during your conversation with Mr. Scudder and the other individual while you were in Columbia County, did you indicate that all you wanted to do was go back to Longview to see your girlfriend?

Mr. Johnson: Me? No. No. I don't have a girlfriend in Longview...I don't even live in Longview.

3A RP 635-636.

Mr. Johnson's testimony was critical because he claimed to be one of the few people who handled the murder weapon before it came into police custody. 3A RP 616. Neither Mr. Scudder nor Mr. Blondin called the defense investigator, Mr. Bradley Morrow, to rebut and thereby complete the impeachment of Mr. Johnson. Verbatim Report of Proceedings.

Detective Deisher testified that he interviewed Antonio Rial on July 5<sup>th</sup>, 2005. 4 RP 683. Antonio initially denied having seen Nick at all during the weekend of the shooting. 4 RP 706. Later in the interview, Antonio told Detectives Deisher and Huhta that Nick pulled a gun on him.

4 RP 709. Specifically, he said that Nick pulled a gun on him and tried to shoot him but that he kicked the gun out of Nick's hand and then picked it up and shot Nick. 4 RP 710. He did not recall how many shots were fired. 4 RP 711.

Mary Wilson from the Washington State Toxicology Laboratory testified that Nick Marston had both amphetamines and methamphetamines in his blood at the time of the murder. 4 RP 740. Michael Dornan, a forensic scientist with the Washington State Patrol Crime Laboratory testified about DNA testing he conducted in this case. Mr. Dornan tested DNA from the magazine taken from the murder weapon and found three possible contributors of the DNA, one of whom was Mr. Rial. 4A RP 781. Mr. Marston was excluded as a contributor. Id.

Richard White, Randy Greene's nephew, testified that he knew Antonio threw Kat. 4A RP 835. The night before the shooting he stayed up all night "tweaking" on his car while high on meth at the house shared by Kat, her mother and Randy Greene. 4A RP 834. He continued working on the car through the next morning. Id. On the morning of the shooting Mr. White saw Antonio leaving the house and saw him again when he came back. 4A RP 837. Antonio jumped into his car when he returned and, according to Mr. White, was sweating badly. Id. Mr. White

testified that the night before the shooting he and Antonio discussed an incident in which Nick had pulled a gun on Antonio and about the tension between Nick and Antonio because of Kat. 4A RP 837. Based on that discussion, Mr. White believed that Antonio was planning on shooting Nick, not knowing about what had just occurred on Baltimore street. 4A RP 837-38. Antonio then went into the house, and came back out a short time later and he and Mr. White drove over to Oregon. 4A RP 840-841. During the ride, Antonio placed the gun under his seat. Id.

Detective Huhta testified that in the early morning hours of July 3<sup>rd</sup>, 2005 he and Detective Deisher received information that Antonio was found walking on Nicolai Road in Rainier, Oregon. 5 RP 951. They traveled to Rainier and contacted Deputy Richie of the Columbia County Sheriff's Office at the Rainier Police Department. 5 RP 952. When Detective Deisher contacted Antonio in the back of the patrol car Antonio said he didn't feel good and asked for help. Id. Deputy Richie then told Deisher and Huhta that he had contacted the paramedics. 5 RP 953. After being treated by the paramedics, Antonio was transported to a hospital. 5 RP 955. On the 5<sup>th</sup> of July Deisher and Huhta went to the Columbia County jail to speak with Antonio. 5 RP 964. At the outset of the interview Huhta asked Antonio if he remembered how he received his injuries and he said he didn't remember anything but waking up. 5 RP

966. He did not know where he had woken up or what date and time it was. Id. The following exchange occurred between the Prosecutor and Detective Huhta:

Prosecutor: Did you go back to Saturday again to see if he would tell you anything?

Huhta: Yes.

Prosecutor: What'd he say?

Huhta: He said he didn't remember anything about Saturday.

Prosecutor: Did you try Friday again?

Huhta: Yes.

Prosecutor: And what did he say?

Huhta: He didn't remember anything about—anything before going to the people for help.

Prosecutor: Did he say anything about—well, what did you ask him then?

Huhta: I started asking questions about his memory, asked him if he remembers anything about his last birthday. He said no. Asked him if he remembered anything about Christmas, the previous Christmas, he said no. Asked him about New Year's, he said no.

Prosecutor: Were you concerned that he didn't know what the heck was going on?

Huhta: No.

Defense counsel did not object. 5 RP 977-78. Deisher told Antonio that there must be a reason for him to have shot Nick, at which time Antonio told him that Nick had pulled a gun on him. 5 RP 981. Specifically, Antonio said that Nick pulled a gun on him and he kicked the gun out of Nick's hands, they then wrestled over the gun and the gun went off. 5 RP 983. Antonio also said he ran from the scene because he was scared. Id. Later, the following exchange occurred between the Prosecutor and Detective Huhta:

Prosecutor: If you ever had a concern that a suspect didn't know what was going on and had major head problems, would you continue an interview with them?

Huhta: No.

Prosecutor: How long were you there talking to him?

Huhta: About an hour and 21 minutes.

Prosecutor: Did you have any concerns that he didn't know what the heck was going on?

Huhta: No.

Defense counsel did not object. 5 RP 986-87.

Counsel for Mr. Rial did not present a case. 5 RP 997. During discussion of the instructions, defense counsel indicated he had no

objections or exceptions to the instructions. 5 RP 999. The court conducted the following colloquy with defense counsel:

Court: Counsel, you were not going to raise self-defense; is that correct, that was a conscious decision?

Mr. Scudder: It was a conscious decision.

Court: And you've discussed that with your client, you're not raising that; is that correct?

Mr. Scudder: That's correct.

Court: All right. Okay. Because I will give that instruction, if you request. I just want to be sure that that's on the record. Okay? All right. 5 RP 1000-1001.

During closing argument, defense counsel conceded that Antonio shot Nick, but focused on whether the State proved intent or premeditation. 5 RP 1032. However, defense counsel essentially made a self-defense argument as the reason for the shooting. 5 RP 1038-1039. Defense counsel concluded by asking the jury to find Mr. Rial not guilty of both Murder in the First Degree and Murder in the Second Degree. 5 RP 1046.

The jury returned a verdict of guilty to Murder in the First Degree, and answered yes to the special verdict that Mr. Rial was armed with a deadly weapon, to wit: a firearm. CP 83-84. (Unlike the situation in

*Washington v. Recuenco*, 126 S.Ct. 2546 (2006), the Information and the special verdict form in this case both specified that the deadly weapon was a firearm). CP 1, 84. Mr. Rial was given a standard range sentence. CP 90.

#### **D. ARGUMENT**

##### **I. MR. RIAL WAS DENIED A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 3 OF THE WASHINGTON CONSTITUTION WHEN THE COURT ORDERED HIM NOT TO REACT TO THE TESTIMONY.**

The court ordered Mr. Rial not to react to the testimony presented in the case against him. Specifically, the court ordered Mr. Rial to maintain a “poker face,” and told him that if he failed to do so he would be subjected to consequences from the court. This violated Mr. Rial’s right to a fair trial because the court improperly injected itself into a matter of strategy to be decided by Mr. Rial and his counsel, thereby infringing on his right to counsel.

The courtroom demeanor of the defendant, irrespective of whether he testifies, inevitably bears upon a jury’s impression of him. A defendant who maintains his innocence, particularly in the face of a charge of premeditated murder (which, as any reasonable juror knows, carries an extremely long prison sentence) would be expected by a reasonable juror to react negatively in the face of a false accusation against him. He would

be expected to react to perjured testimony by witnesses when such testimony could result in a lifetime of incarceration. Sitting expressionless, with a “poker face,” is exactly the opposite of the manner in which a reasonable person, who is innocent of the accusation against him, would behave. A reasonable juror would likely conclude the opposite of what the defendant wanted him to conclude, which is that the defendant is guilty.

More importantly, the decision of whether and how to react to testimony which, in the mind of the defendant, supports a false accusation against him, is between the defendant and his counsel. A reasonable attorney might advise his client to behave naturally and not suppress his instinctive responses, knowing a reasonable juror would expect the same thing. For the court to interfere with a decision that is intrinsically tactical is inappropriate and serves to deny the defendant a fair trial. This is particularly so where the court leaves the defendant with the impression that he will suffer some sort of consequence if he deviates from the court’s order not to react to the testimony.

In *State v. Moreno*, 147 Wn.2d 500, 58 P.3d 265 (2002) the Supreme Court cautioned that “the trial court must not undertake the role of either prosecutor or defense counsel.” *Moreno* at 509, quoting *People v. Carlucci*, 23 Cal.3d 249, 258, 590 P.2d 15 (1979). A defendant is

denied due process under the 14<sup>th</sup> Amendment to the United States Constitution when the court improperly assumes the role of either the prosecutor or defense counsel. *Moreno* at 509, relying on *People v. Carlucci* at 258, and *State v. Avena*,, 281 N.J. Super. 327, 339, 657 A.2d 889 (1995).

There is no question that the court has the right to maintain order in his or her court and to see that the proceedings are conducted in an orderly manner. In particular, the court is entitled to control the conduct of spectators so as to ensure the defendant a fair trial. *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997). Here, however, the court's admonishment to Mr. Rial about *his* conduct was based on his opinion (which is, frankly, counterintuitive) that the defendant's reaction of any kind to the testimony against him would hurt, rather than help, his case. This is obviously a matter upon which reasonable minds can differ, which supports the conclusion that the decision of how or whether to react to testimony and evidence is a matter to be decided by the defendant and his counsel, not the court.

Last, requiring a defendant to maintain a lack of expression interferes with his natural role in discouraging perjury by those who would lie in order to achieve a conviction. Even more important, an innocent defendant would be expected to react in the face of witness perjury and

any reasonable juror would hold his failure to react against him, as argued above.

**II. MR. RIAL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO ARGUE SELF-DEFENSE.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

It is not clear from the record why self-defense was abandoned in this case. It was the only plausible defense that could have been raised. The evidence established that Mr. Rial entered the garage at 268 Baltimore Street and shot Mr. Marston in front of no less than four witnesses, and then fled the scene. He then fled in a car to Columbia County, Oregon with the murder weapon hidden beneath his seat. Several days later, during his police interrogation, he gave a conflicting statement to police in

which he first denied having seen Mr. Marston the previous weekend, and later admitted the shooting was in self-defense.

The evidence also established that Mr. Marston was a bully who had assaulted Mr. Rial on previous occasions, once by hitting him in the face with a padlock and once by jumping him with the assistance of several friends, one of whom attempted to draw a gun on Mr. Rial. It was well known in this circle of “friends” that Mr. Marston considered Kat and their child to be “his family” and was upset at Mr. Rial’s presence in Kat’s life. The evidence further established that people in this meth-addicted crowd typically carry weapons and firearms. Last, the evidence established that there was a gun near Mr. Marston when Mr. Rial entered the garage and that an independent witness (Kevin Bolton) saw a man trying to hide that gun immediately after the shooting.

In light of the battery of evidence presented against Mr. Rial, the failure to raise self-defense was tantamount to a concession of guilt and rendered the entire trial superfluous. Although the record is not clear as to whose decision it was to abandon this defense, defense counsel or Mr. Rial’s, it matters not. If it was defense counsel’s decision, it was patently incompetent and indefensible, particularly in light of the court’s explicit statement that it would instruct the jury on self-defense if counsel wished.

If it was Mr. Rial's decision, defense counsel was entitled to disregard his wishes and raise it anyway, which is what he should have done.

In *State v. Cross*, 156 Wn.2d 580 (2006), the Washington Supreme Court addressed the difference between decisions which are tactical, and therefore left to the judgment of trial counsel, and decisions which affect the very goal of representation itself, which are to be made by both counsel and the client. Although the precise issue the Court was addressing in that portion of the *Cross* opinion was whether there was an actual conflict between trial counsel and the client where the client was opposed to a defense based upon diminished capacity and/or insanity, the analysis controls the precise issue presented here.

In *Cross*, the Court held: "Generally, the client decides the goals of litigation and whether to exercise some specific constitutional rights, and the attorney determines the means." *Cross* at 606. The *Cross* Court noted that in *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001), counsel's actions were upheld where, against the defendant's strenuous objection, counsel conceded the defendant's guilt during the penalty phase of his death penalty trial even though the client wished to maintain that he was innocent. *Cross* at 607. "We held this was a strategy decision in the hands of counsel and no right of Stenson had been compromised." *Cross* at 608, *Stenson* at 732. Regarding the case

against Mr. Cross, the Court observed that “Counsel clearly believed that given the overwhelming evidence that Cross had killed his family, the best or only defense available was to plead (in the guilt phase) that Cross was not guilty by reason of insanity, or lacked the ability to premeditate, or suffered from diminished capacity.” *Cross* at 608.

Such is the situation here. It is clear that the *objective* of the case, for Mr. Rial, was a not guilty verdict. Otherwise, counsel would likely have made the easiest argument available to him which was that his client was not guilty of murder in the first degree but guilty of murder in the second degree. His request of the jury that they acquit outright (which, absent a defense based on self-defense, was as unlikely as anything ever requested of a jury in any criminal trial ever conducted) demonstrates that Mr. Rial’s goal was an acquittal. It is unlikely that defense counsel didn’t recognize this, and the trial court essentially confirmed as such when it went out of its way to make a record of the fact that self-defense instructions were offered and declined. Once the goal of the representation was established (i.e. outright acquittal), defense counsel was entitled to employ the method that, in his professional judgment, would generate the highest probability of achieving this goal. This was a defense based on self-defense.

**III. PROSECUTORIAL MISCONDUCT AND  
INEFFECTIVE ASSISTANCE OF COUNSEL DENIED MR.  
RIAL A FAIR TRIAL WHERE THE PROSECUTOR  
SOLICITED, WITHOUT OBJECTION FROM COUNSEL,  
IMPROPER OPINION TESTIMONY ABOUT MR. RIAL'S  
VERACITY.**

During Detective's Huhta's direct testimony the following exchange occurred between him and the Prosecutor:

Prosecutor: Did you go back to Saturday again to see if he would tell you anything?

Huhta: Yes.

Prosecutor: What'd he say?

Huhta: He said he didn't remember anything about Saturday.

Prosecutor: Did you try Friday again?

Huhta: Yes.

Prosecutor: And what did he say?

Huhta: He didn't remember anything about—anything before going to the people for help.

Prosecutor: Did he say anything about—well, what did you ask him then?

Huhta: I started asking questions about his memory, asked him if he remembers anything about his last birthday. He said no. Asked him if he remembered anything about Christmas, the previous Christmas, he said no. Asked him about New Year's, he said no.

Prosecutor: Were you concerned that he didn't know what the heck was going on?

Huhta: No.

Defense counsel did not object to this testimony. 5 RP 977-78.

Prior to this testimony, evidence had been presented that Mr. Rial had suffered a severe beating as a result of an ambush assault by Mr. Marston's friends and had been treated in a hospital. As such, this testimony amounted to an opinion on the part of Detective Huhta that Mr. Rial was faking any loss of memory, as opposed to simply having a poor memory. An insinuation that he was faking memory loss is the equivalent of calling Mr. Rial a liar.

This testimony constituted an opinion on an ultimate issue to be decided by the trier of fact and invaded the province of the jury. This is improper and inadmissible. *State v. Farr-Lenzini*, 93 Wn.App. 453, 462, 970 P.2d 313 (1999); *State v. Kirkman*, 107 P.3d 133 (2005). In *State v. Kirkman*, the Court of Appeals reiterated the well-settled prohibition on witnesses, particularly police officers, expressing an opinion about the veracity of another witness. The court stated: "This is significant because a police officer's testimony may particularly affect a jury because of its 'special aura of reliability.'" *State v. Kirkman*, 107 P.3d at 137. Such error is of constitutional magnitude and can be raised for the first time on

appeal in the absence of an objection by defense counsel. *State v. Kirkman*, 107 P.3d at 137, *State v. Jones*, 117 Wn.App. 89, 68 P.3d 1153 (2003). Allowing one witness to testify about the truthfulness of another witness invades the fact-finding process of the jury and violates a defendant's right to a jury trial. *State v. Kirkman*, 107 P.3d at 137, citing *State v. Dolan*, 118 Wn.App. 323, 73 P.3d 1011 (2003).

In *Kirkman*, the Court of Appeals reversed the defendant's conviction for first degree child rape where a doctor and a police officer offered improper opinion testimony on the credibility of the child victim. *State v. Kirkman*, 107 P.3d 133. The prosecutor in that case asked the doctor: "Based upon the physical examination, can you tell us whether you have an opinion within a reasonable degree of medical certainty of whether the physical examination was consistent with the girl's explanation of what occurred?" *State v. Kirkman*, 107 P.3d at 135. The doctor replied that he found nothing in the victim's physical exam that would either confirm or negate the victim's allegation. *State v. Kirkman*, 107 P.3d at 135. The doctor further testified that the victim "...gave a clear and consistent history of sexual touching with appropriate affect ('sad when one would expect her to be sad, and reluctant to talk about things that were embarrassing...and the vocabulary seemed to be appropriate for a young lady of her age') and her history was clear and

consistent with plenty of detail. *State v. Kirkman*, 107 P.3d at 136. The court, in reversing Kirkman's conviction, said "The physician was clearly commenting on A.D.'s credibility." *State v. Kirkman*, 107 P.3d at 136.

Detective Huhta opined that Mr. Rial was not credible not only once, but twice. The Prosecutor returned to this theme later in Detective Huhta's testimony:

Prosecutor: If you ever had a concern that a suspect didn't know what was going on and had major head problems, would you continue an interview with them?

Huhta: No.

Prosecutor: How long were you there talking to him?

Huhta: About an hour and 21 minutes.

Prosecutor: Did you have any concerns that he didn't know what the heck was going on?

Huhta: No.

Again defense counsel did not object. 5 RP 986-87. This evidence was particularly damaging because Mr. Rial did not testify at trial. The only statements the jury heard about were the statements he made to others. Detective's Huhta's status as a law enforcement officer, as noted by the *Kirkman* court, likely carried a heavier weight with the jury than the testimony of any other witness to statements made by Mr. Rial. As such,

being branded a malingerer by Huhta invaded the province of the jury and denied Mr. Rial his right to a jury trial.

**IV. MR. RIAL WAS DENIED HIS RIGHT TO COUNSEL WHEN HIS ATTORNEY PROCEEDED TO REPRESENT HIM IN SPITE OF AN ACTUAL CONFLICT OF INTEREST.**

Defense counsel, on the Friday before trial began (March 17<sup>th</sup>, 2006), brought to the trial court's attention his belief that he had an actual conflict of interest, under RPC 1.9, based upon his prior representation of an adverse witness (Steven Johnson) who was disclosed by the State just prior to trial. There was no hearing regarding this issue and this conversation evidently took place off the record.<sup>1</sup> Because we do not know what was said in this off-the-record discussion, it is impossible for appellate counsel to make any argument about the validity of the trial court's conclusion that defense counsel did, in fact, have an actual conflict of interest under RPC 1.9. It is worth noting, however, that an attorney's prior representation of an adverse witness does not, by itself, constitute a conflict under RPC 1.9. *State v. Ramos*, 83 Wn.App. 622, 922 P.2d 193 (1996); *State v. Vicuna*, 119 Wn.App. 26, 32, 79 P.3d 1 (2003).

RPC 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter :

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<sup>1</sup> The clerk's minutes do not reveal any hearing which occurred on Mr. Rial's case on this particular date.

- (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts;
- or
- (b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 permit.

In *Ramos*, Division I held that prior representation of an adverse witness would not necessarily involve inquiry into matters that are not already a part of the public record (such as prior convictions or current probationary conditions), and as such would not necessarily require inquiry into confidences or secrets acquired in the course of the prior representation. *Ramos* at 632. In reversing, the *Ramos* Court noted not only that the trial court erred in concluding there was an actual conflict under RPC 1.9, but that the adverse witness at issue had waived the conflict, on the advice of new counsel, in writing. *Ramos* at 633.

Because the trial court in this case concluded, rightly or wrongly, that Mr. Scudder's prior representation of Steven Johnson created an actual conflict of interest in his representation of Mr. Rial under RPC 1.9, the appropriate remedy was to require Mr. Scudder to withdraw. When an actual conflict exists under RPC 1.9 and is raised at the trial court level, prejudice is presumed and the trial court is required to disqualify counsel. *State v. White*, 80 Wn.App. 406, 414, 907 P.3d 310 (1995); citing *State v. Hunsaker*, 74 Wn.App. 38, 43, 873 P.2d 540 (1994). When the conflict is

raised for the first time on appeal, prejudice is not presumed and the Appellant must demonstrate prejudice. *White* at 416. Because the conflict in this case was raised at the trial court level, the court was required to presume prejudice and order Mr. Scudder's withdrawal.

Compounding the error committed by the trial court in not requiring Mr. Scudder to withdraw is that there is no on-the-record colloquy by the trial court with Mr. Rial explaining this conflict of interest. He was never asked his position on the matter and never offered the advice of independent counsel. A defendant has the right to be represented by an attorney free from conflicts. *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003). This right takes on a particular importance in a case such as this, where the credibility of the adverse witness was at issue.

The remedy employed by the court in this case was not adequate to ensure preservation of Mr. Rial's right to effective assistance of counsel. Mr. Scudder had specifically agreed not to reveal any information about Mr. Johnson, which could have had a detrimental affect on Mr. Rial if Mr. Scudder possessed information relating to Mr. Johnson's lack of credibility or substance abuse. Further, appointing Mr. Blondin for the sole purpose of conducting cross examination assumes that a trial can be broken down into separate parts that do not interrelate. How could Mr.

Blondin effectively represent Mr. Rial when he knew, by his own admission, very little about the case and had only interviewed Mr. Johnson on the day of trial? Representation of a criminal defendant in a case of this magnitude requires substantial preparation and attention to detail, and an effective trial strategy requires a cohesive approach to the examination of each witness. This is particularly so where the defense chooses not to present a case and relies solely on the cross examination of the State's witnesses.

Here, Mr. Blondin attempted to impeach Mr. Johnson but failed to complete the impeachment by calling the defense investigator who presumably could have contradicted Mr. Johnson's testimony. Perhaps he felt that Mr. Scudder would take care of that after he left the courtroom and his involvement in this case ended. As Mr. Rial's attorney, however, it was his responsibility to see that this witness was called to testify just as much as it was Mr. Scudder's.

Further, he was admittedly ill-prepared to participate in this case. Last, perhaps based upon his lack of a personal connection with his new client Mr. Rial, he repeatedly advocated for the rights of Mr. Johnson in his potential Fifth Amendment claim. Contrary to the court, who viewed Mr. Blondin's action as a potential attempt to influence Mr. Johnson not to testify, a more fair reading of the record suggests that Mr. Blondin was

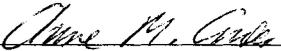
acting on the pure instinct that any defense attorney in his position would possess, which is to protect anyone from potential self-incrimination. In other words, he seemed to forget for a moment that Mr. Rial was his *client*. He was there to do more than simply ask questions that Mr. Scudder felt he couldn't; he was there as Mr. Rial's legal counsel.

In conclusion, once the trial court concluded, as it did here, that Mr. Scudder's prior representation of Mr. Johnson created an actual conflict of interest in his representation of Mr. Rial under RPC 1.9, it was required to order Mr. Scudder's withdrawal and appoint new counsel for Mr. Rial. The court's failure to follow this procedure denied Mr. Rial his right to counsel under the Sixth Amendment.

**E. CONCLUSION**

Mr. Rial's conviction should be reversed and his case remanded for a new trial based upon the errors claimed above.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of December, 2006.

  
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ANNE M. CRUSER, WSBA #27944  
Attorney for Mr. Rial

## APPENDIX

### 1. § 9A.32.030. Murder in the first degree

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony

### 2. § 9A.32.050. Murder in the second degree

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

**3. § 9A.32.020. Premeditation -- Limitations**

(1) As used in this chapter, the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time.

(2) Nothing contained in this chapter shall affect RCW 46.61.520.

**4. Wash. Const. Art. I, § 3 (2006)**

**§ 3. Personal rights**

No person shall be deprived of life, liberty, or property, without due process of law.

**5. Rule 1.9. Duties to former clients.**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client.

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former

client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**6. CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 6**

USCS Const. Amend. 6

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 7 DOCUMENTS.  
THIS IS PART 1.  
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**7. CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 14**

USCS Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY Chm  
DEPUTY

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

STATE OF WASHINGTON,	)	Court of Appeals No. 34615-0-II
	)	Cowlitz County No. 05-1-00798-8
Respondent,	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
ANTONIO RIAL,	)	
	)	
Appellant.	)	
_____		)

ANNE M. CRUSER, being sworn on oath, states that on the 15<sup>th</sup> day of December 2006 affiant placed a properly stamped envelope in the mails of the United States addressed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. 1<sup>st</sup> Avenue  
Kelso, WA 98626

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300

Anne M. Cruser  
*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
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AND

Mr. Antonio Rial  
DOC# 873363  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Ave.  
Walla Walla, WA 99362-1065

and that said envelope contained the following

- (1) OPENING BRIEF OF APPELLANT (2 COPIES TO MR. PONZOHA)
- (2) R.A.P. 10.10 (TO MR. RIAL)
- (3) AFFIDAVIT OF MAILING

Dated this 15<sup>th</sup> day of December 2006

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

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

Date and Place: December 15<sup>th</sup>, 2006, Kalama, Washington

Signature: Anne M. Cruser