

 ORIGINAL

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

STATE OF WASHINGTON,
Respondent,
v.
JOHN KENNETH ROBERTS,
Appellant.

CASE NO.: 37922-8-II
STATEMENT OF
ADDITIONAL GROUNDS
FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
09 APR -7 PM 12:50
STATE OF WASHINGTON
BY 

I, John Kenneth Roberts, have received and reviewed the opening brief prepared by my attorney, Stephanie C. Cunningham. Summarized below are the additional grounds for review that are not addressed in that brief. Appellant believes that the following issues have merit and should be addressed by this Honorable Court. Appellant understands that the Court will review this Statement of Additional Grounds for Review prepared by me when my appeal is considered on its merits.

In addition to the issues raised by appellate counsel, appellant would like to bring to the courts attention the following grounds for review.

GROUNDS FOR REVIEW

GROUND ONE

Mr. Roberts was denied effective assistance of counsel when his attorney failed to propose any instructions to the jury.

The instructions given to the jury for deliberation were written up and submitted to the court by the prosecution. The defense never objected to any of these instructions nor did the defense submit any instructions. There was sufficient evidence in the record to warrant a lesser include instruction Mr. Tabor the witness for the State testified *essentially* that he never seen Mr. Roberts enter the house. RP 134, 136 Given this evidence the defense should have requested instructions on a lesser included offense. A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that are alleged not to have been result of reasonable professional judgment and, then, court must determine whether, in light of all circumstances, identified acts or omissions were outside wide range of professional competence; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case. U.S.C.A Const. Amend. 6. *STRICKLAND v.*

WASHINGTON 104 S.Ct 2052 (1984). at 2053. It is the contention of the appellant that had his attorney requested a lesser included instruction of trespass the outcome of the trial proceedings would have been different.

Ineffective assistance is to fail to ask for instruction.

A defendant has the right to effective assistance by the lawyer acting on the defendant's behalf. *State v. Adams*, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978). *Strickland* requires a showing of deficient performance and prejudice 466 U.S. at 687.

Deficient Performance.

The first prong is the question of whether a reasonable attorney should propose any jury instructions under these facts. (counsel's performance is deficient if it falls below "a minimum objective standard of reasonable attorney conduct"). Defense counsel's failure in capital murder prosecution to object to or propose jury instructions was deficient, as, due to counsel's failure to offer instruction defining manslaughter, which was subject of defendant's admitted prior

conviction, jury was free to believe prosecutor when he warned them in closing argument that defendant “has killed before”; further, there was reasonable probability that, but for that deficiency, result of penalty phase would have been different, but there was no reasonable probability with respect to guilt phase. U.S.C.A. Const. Amend. 6; *Harris By and Through Ramseyer v Blodgett*, 853 F. Supp. 1239, affirmed 64 F.3d 1432(W.D. Wash. 1994).

Prejudice.

The second *Strickland* prong requires proof that “defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *In re Personal Restraint Petition of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002)(quoting *McFarland*, 127 Wn.2d at 334-35)

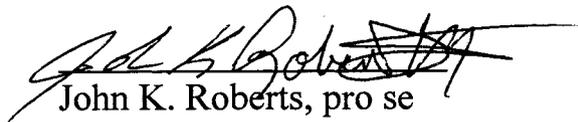
Mr. Roberts respectfully requests this Court to exercise its discretion pursuant to RAP 10.10(f) and direct Mr. Roberts' counsel to further brief these grounds for proper review by this Court.

Mr. Roberts also seeks to preserve and exhaust these issues in the State Courts for possible further review in the Federal Courts. The issues briefed in this Statement of Additional Grounds are supported by clearly established state and federal law as determined by the Washington State Supreme Court and the United States Supreme Court and are appropriate for consideration in this Court.

Conclusion

Mr. Roberts was deprived of fundamental rights protected by the Washington and United States Constitution. The errors cannot be said to be harmless in light of the issues presented by appellate counsel and the cumulative error doctrine. For the reasons established this Court should reverse Mr. Roberts' conviction and remand this case for a re-trial.

Respectfully submitted this 5th day of April, 2009


John K. Roberts, pro se

State of Washington,
Petitioner,

v.

John K. Roberts III,
Respondent.

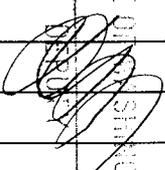
DECLARATION OF MAILING

CAUSE NUMBER 37922-8-11

I, John K. Roberts III, declare that on the 5th day of
April, 2009, I deposited the foregoing (name documents sent below)
SAC

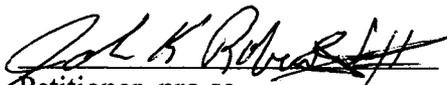
or a true copy thereof, in the internal mail system of the MONROE CORRECTIONAL
COMPLEX - WSR-UNIT and made arrangements for postage, addressed to:

Court of Appeals DIV II
950 Broadway STE # 300
Tacoma, Wa. 98402

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BY 

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

Dated this 5th day of April, 2009.


Petitioner, pro se.