APPENDIX A

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	No. 97108-1
	)	
LINDA RENAE CLARK,	)	**ORDER**
	)	
Petitioner.	)	Court of Appeals
	)	No. 75330-4-I
	)	

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, Wiggins, Gordon McCloud and Montoya-Lewis (Justice Yu sat for Justice Madsen), considered this matter at its January 7, 2020, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to modify the Commissioner's ruling is denied.

DATED at Olympia, Washington, this 8th day of January, 2020.

For the Court

Stephens, C. J.
CHIEF JUSTICE

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

	:	NO. 75330-4-1
LINDA RENAE CLARK, Petitioner,	:	SUPREME COURT NO. 97108-1
	:	MOTION TO MODIFY RULING
v.		DENYING REVIEW
	:	
STATE OF WASHINGTON, Respondent.	:	

COMES NOW Linda Renae Clark, Pro Se Petitioner, and moves the Court for relief as designated below.

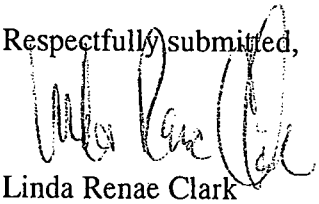
Ms. Clark requests leave from this honorable Court to modify the ruling denying review of her Personal Restraint Petition signed by the Commissioner of this Court on September 5, 2019.

Ms. Clark has set forth the reasons for this motion in the attached Memorandum in addition to the interests of justice.

THEREFORE, Ms. Clark asks that her Motion to Modify Ruling Denying Review be granted.

DATED this 29th day of October 2019.

Respectfully submitted,



Linda Renae Clark
Pro Se Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

	:	NO. 75330-4-1
LINDA RENAE CLARK, Petitioner,	:	SUPREME COURT NO. 97108-1
v.	:	MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE RULING DENYING DISCRETIONARY REVIEW
STATE OF WASHINGTON, Respondent.	:	

COMES NOW Linda Renae Clark, Pro Se Petitioner, and moves the Court for relief as designated below.

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STATEMENT OF THE CASE

Ms. Clark was charged in 2014 for burglary in the second degree and intent to take/conceal a pet. Even before her arraignment, Ms. Clark insisted to her public defender, Dean Terrillion, that the necessity defense is applicable in her case.

Prior to arraignment Ms. Clark sent Mr. Terrillion numerous documents including a witness list (which included persons from animal rescue organizations) and numerous emails to these various rescue organizations concerning the plight of the dogs.

On or about April 2, 2015, at the request of Mr. Terrillion, Ms. Clark sent him two proposed motions. One of these motions was titled "Motion for Defense of Necessity." (Exhibit A). After being pressed by Ms. Clark for a response to these proposed motions, Mr. Terrillion responded that his and Ms. Clark's defense strategies differ in that he is focusing on the "curtilage" aspect of the case despite his being confident the state will be able to overcome such a defense (Exhibit B).

Mr. Terrillion sent Ms. Clark his August, 18, 2015 email outlining his opinion that Ms. Clark's case did not satisfy the criteria for a necessity defense. Mr. Terrillion's email was erroneous in numerous ways, first and foremost that the protection order he claimed the state would use against Ms. Clark was not put into place until after the incident for which Ms. Clark was charged. Further, Ms. Clark did not once agree with Mr. Terrillion that the necessity defense did not apply in her case.

Based on Mr. Terrillion's refusal to seek a necessity defense in her case and his recommendation that she accept the state's plea agreement, Ms. Clark asked that he communicate with the prosecutor's office concerning the plea agreement. When the replacement prosecutor, Rosemary Kaholokula, relayed the new plea agreement it contained a 1000 foot

radius protection order (Exhibit C). Ms. Clark lives in the small town of La Conner. At the time she lived within 600 feet of the alleged victims' place of business. Ms. Clark's livelihood of caring for and walking her client's companion animals depended on her ability to move freely throughout the town. The 1000 foot radius meant Ms. Clark would have to move, close her dog walking/pet sitting business, leave her clients without care for their companion animals, become homeless, penniless, and without a car of her own have no way to leave town with any of her belongings. Mr. Terrillion was unable to properly advocate for Ms. Clark to convince the prosecutor to reduce the 1000 foot radius distance.

On October 12, 2015 the state filed its *Motions in Limine*. Motion A requested the court prohibit Ms. Clark from calling any witnesses other than Ms. Clark herself. Further informing the court that the state has not been made aware of any witnesses the defense plans to call nor has the defense filed a witness list. Motion C requested the court prohibit Ms. Clark from utilizing the necessity defense.

On October 16, 2015 Mr. Terrillion filed the defense's *Motions in Limine* which included among others Motion 2, the ability to utilize the necessity defense, Motion 3, Unanimity, and Motion 5, Sick Dog, preventing the state from entering evidence that the dog died as a result of walking by Ms. Clark.

On October 18, 2015, Mr. Terrillion sent an email to Ms. Clark (Exhibit D) attaching the state and defense's motions in limine. Mr. Terrillion informed Ms. Clark that he was prepared to seek a necessity defense instruction. He further stated that although the state had made a motion to preclude the defense of necessity that he had found case law that would allow that to be overturned on appeal if granted yet the defense provided sufficient evidence for the ruling. Mr. Terrillion goes on to say he has won many of his cases on appeal. Further, he advised Ms. Clark

he feels quite positive about her case in front of a jury and that she will present well to the jury and will like her. Lastly, Mr. Terrillion advises Ms. Clark that he will be questioning her about her experience as a dog walker, pet owner, small business owner, etc. with an end goal of conveying her expertise regarding animals to the jury. (Exhibit E)

At the pre-trial hearing on October 19, 2015, the court granted the State's Motions A and B without objection by defense counsel thereby precluding the defense from calling anyone other than Ms. Clark as a witness. The state moved for its Motion C and requested sanctions against Mr. Terrillion for filing his motion concerning use of the necessity defense. The court reserved its right to rule on the state's Motion C, giving the defense the opportunity to present evidence concerning the necessity defense. (Exhibit F.) The Court reserved the right to rule on the defense's Motion 2 and denied its Motions 3 and 5.

Following her trial and conviction in October 2015, Ms. Clark in November 2015 submitted a letter to Ms. Conglaton with the Washington State Bar complaining about Mr. Terrillion, Ms. Kaholokula, and Judge Brian Stiles. (Exhibit G).

On March 18, 2016, Ms. Clark was represented by Jennifer Rancourt, a conflict attorney from the Snohomish Public Defender's Association, in a hearing on a motion for a new trial. Ms. Rancourt argued Ms. Clark's original public defender, Dean Terrillion, was ineffective as counsel for failing to utilize the necessity defense, failing to investigate the charges and Ms. Clark's claims, and failing to seek new counsel for Ms. Clark when communication broke down between Ms. Clark and Mr. Terrillion.

Despite the letter sent by Ms. Clark to the Washington State Bar, Judge Stiles failed to recuse himself from the matter and heard the arguments on Ms. Clark's motion for a new trial. Her motion was denied.

Ms. Clark, acting as a pro se litigant, filed a new motion for trial in March 2016.

In March 2016, Ms. Clark filed a Writ for Habeus Corpus with the Superior Court for Skagit County. Judge Stiles presided over the hearing. Ms. Clark told Judge Stiles something to the effect that she means no offense but the reason she filed the writ was so that someone other than Judge Stiles could decide it. Ms. Clark attempted to have Judge Paxton hear her Habeus Corpus petition, but was informed that Judge Stiles would be handling the Ex Parte calendar on that particular day. After that, Ms. Clark decided to incorporate her Habeus Corpus petition into her Motion for New Trial.

At a March 30, 2016 hearing concerning Ms. Clark's pro se motion for new trial, Ms. Clark requested that a judge other than Brian Stiles hear the motion. The court denied Ms. Clark's request.

At a hearing on April 15, 2016, Ms. Clark formally requested that Judge Stiles recuse himself from hearing the habeus corpus petition as well as the motion for new trial. Judge Stiles denied Ms. Clark's request.

On the first day of the motion for new trial hearing, May 27, 2016, the state objected to the court hearing Ms. Clark's motion and indicated the Court of Appeals should hear it. The court proceeded with the hearing, despite the state's objection. The court ordered that all but the ineffective assistance claims present in Ms. Clark's motion for a new trial be forwarded to the Court of Appeals as a personal restraint petition. The Superior Court did not address Ms. Clark's Writ for Habeus Corpus. (Exhibit H)

During testimony, Ms. Clark garnered testimony from Mr. Terrillion's paralegal, Esmeralda Romero, that she did not contact or subpoena any witnesses for Mr. Terrillion nor did she schedule a pre-trial meeting with Ms. Clark and Mr. Terrillion. (Exhibit I)

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Ms. Clark garnered testimony from Keith Tyne, the Director of Public Defender's Office and Mr. Terrillion's supervisor, that "communication breakdown was an issue between Ms. Clark and Mr.Terrillion". (Exhibit J)

Ms. Clark garnered testimony from Mr. Terrillion that he relied on the accuracy of the police reports, his investigator's interviews of the police officers, and nothing else in determining his legal strategy in this case. Mr. Terrillion also testified that he had no intention of calling any witnesses or seeking a defense necessity instruction when he filed the defense's motion in limine and forwarding it in his 10/18/15 email to Ms. Clark. (Exhibit K)

On or about July 12, 2016, the Superior Court denied Ms. Clark's motion for a new trial based on ineffective assistance of counsel on all counts.

Ms. Clark filed another motion for a new trial, but realized that there was little likelihood she would be successful as long as Judge Stiles refused to recuse himself and Rosemary Kaholokula was the prosecutor. The letter Ms. Clark sent to the court is attached as Exhibit M.

Ms. Clark believed the Notice of Appeal she filed in November 2015 (Exhibit N) would cover appeal of the denial of the Superior Court of her motion for new trial in March 2016 and July 2016. The Court of Appeals commissioner disagreed. Ms. Clark's appellate counsel did not appeal this ruling nor did counsel request an extension of time pursuant to the Court of Appeal's authority to grant the same to file a new Notice of Appeal. Therefore, any evidence and testimony given during the motion hearing was not available on direct appeal.

I. ARGUMENT

A. JUDGE STILES HAD A DUTY TO RECUSE HIMSELF OR IN THE ALTERNATIVE TO TRANSFER MS. CLARK'S ENTIRE MOTION FOR NEW TRIAL OF MARCH 2016 TO THE COURT OF APPEALS IN THE FORM OF A PERSONAL RESTRAINT PETITION

The Code of Judicial Conduct states that "An Independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity will interpret and apply the law that governs our society".[1]

It also states that "judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office."[2]

It further states that "a judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[3]

"A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[4]

Rule 2.11 – Disqualificiation – specifically states that "(A) a judge shall disqualify himself...in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party..."

Lastly, according to Rule 2.15 – Responding to Judicial and Lawyer Misconduct – "(B) a judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honest, trustworthiness, or fitness as a lawyer in other respects should inform the appropriate authority."

Under the state and federal constitutions, a criminal defendant has the right to be tried & sentenced by an impartial court.[5], [6]

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[1] Code of Judicial Conduct Preamble
[2] Code of Judicial Conduct Scope [4]
[3] Code of Judicial Conduct Canon 1
[4] Code of Judicial Conduct Rule 2.2

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According to *Sherman v. State*, 128 Wash 2d, 164, 206, 905 P.2d 355 (1995)," the test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." *Sherman* at 378.

Sherman also points out that in deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. *Id.*

Recusal decisions lie within the sound discretion of the trial court, *State v. Bilal*, 77 Wash App 720, 722, 893 P.2d 674 (1995) and it is reviewed for an abuse of discretion *Wolfkill Feed & Fertilizer Corp v. Martin*, 103 Wash. App 836, 840, 14 P.3d 877 (2000), however the court is found to abuse its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons, *State ex rel Carroll v. Junker*, 79 Wash. 2d 12, 26, 482 P.2d 775 (1971). Even where recusal is not required, it may be well-advised. *Mayberry v. Pennsylvania*, 400 US 455, 463, 91 S. Ct. 499, 27 L.Ed 2d 532 (1971).

In *Mayberry*, the United States Supreme Court addressed the problem presented by the continued participation of a judge who feels he has been attacked. The Court stated "[W]e do not say that the more viscious the attack on a judge the less qualified he is to act. A judge cannot be driven out of a case." 400 U.S. at 463-64, 91 S.Ct. 499. Yet, "it is generally wise where the marks of...unseemly conduct have left personal stings to ask a fellow judge to take his place. Id at 464, 91 S.Ct. 499. "The vital point is that in sitting in judgment...the judge should not himself

[5] United States Constitution, Amendments VI and XIV
[6] Washington Constitution, Article I, Section 22

give vent to personal spleen or respond to a personal grievance." Id at 465, 91 S.Ct. 499 (quoting Offutt v. United States 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed 11 (1954).

In *West v. Washington State Ass'n of dist*, 361 P.3d 210, Wash COA Div 1 2015, the court stated "we review a trial court's decision whether to recuse for abuse of discretion. *West v. Washington*, 162 Wash App 120, 252 P.3d 406 (2011). In determining whether recusal is warranted, actual prejudice need not be proved, a mere suspicion of partiality may be enough. *Sherman v. State*, 128 Wash 2d 164, 205, 905 P.2d 355 (1995). The test for determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts. *Sherman v. State* 128 Wash. 2d 164, 206, 905 P.2d 355 (1995).

In November 2015, Ms. Clark sent a lengthy letter to the Washington State Bar complaining about Mr. Terrillion's performance as her public defender leading up to and during trial. As part of this letter, Ms. Clark also complained against Judge Stiles that he failed to adhere to CJC 2.15 by failing to bring attention to the authorities that Mr. Terrillion lacked the commensurate skill and preparation for representing Ms. Clark in her defense.

Ms. Clark requested Judge Stiles recuse himself and that the trial court assign a different judge to her motion for new trial and Habeus Corpus Petition filed in March 2016. Both of these pertained directly to the performance by Mr. Terrillion and his ineffective assistance as Ms. Clark's counsel. (Exhibit O)

Judge Stiles heard testimony wherein Mr. Terrillion admitted to relying on nothing more than the police reports in determining Ms. Clark's defense. He further admitted that he did nothing to investigate the case other than to interview the officers who had written reports in the matter and relying on the testimony of the state's witnesses, e.g. the alleged victims and the

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reporting officers. Nor did he meet with Ms. Clark prior to trial to prep her for her testimony and elaborate on his trial strategy.

MH 86, line 9

Q. So let's go to the trial. Prior to our trial date, what kind of trial preparation had you engaged in?
A. Investigation by my expert investigator, researching case law, numerous consultations with you, with other attorneys, extensive plea negotiations with two separate prosecutors where I obtained misdemeanor deals from both or either. I prepared a trial notebook. I took your case home on the weekends, several weekends, at least three or four weekends, including the weekend prior to trial. I was well prepared for trial, I believe.
Q. Had you done any research into animal abuse?
A. Not research. I did look at the websites you sent me, reviewed some of those materials, but not what I would call research.

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Q. Prior to trial, in between our last meeting, our meeting on July 21st, did you ask Ms. Romero to schedule an appointment for me to come into your offices so that we could prepare for trial?
A. I don't remember. I don't recall.
Q. Did you call me – did you schedule an appointment at all to prepare for me testifying?
A. I don't recall doing that.

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MH 25, line 18

Q. So you indicated, again, about the evidence. Did you look at – and you also testified that you didn't look at the letters that were part of the police report from the November 6th incident, is that correct?
A. If it was information that was accompanying the police reports, I would have looked at it.
Q. And in those letters, my concern was not quote/unquote about feces or things in the garage at that time; is that correct?
A. I think there were several letters that you – that you wrote. Can you be more specific, which one we're talking about?
Q. So in the letter that I sent to Janine Ceja on November 3rd indicating that the dogs were suffering because the Scotts were not winterizing their garage and closing the man door so that they can have a break from the winter elements, there was nothing in there about a current condition about feces; correct?
A. Correct. I think – I think there was nothing in your letter about them living in feces. Is that what you're –
Q. Correct.
A. I think that's right. Yes.
Q. And so my concern at the time was about their exposure to the elements, is that correct?
A. I think at least in part, yes.
Q. And with regard to that, you indicated that you hadn't contacted any independent parties about those concerns. Did you do any additional research on your own behalf to confirm whether or not those concerns expressed in that letter were valid or not?
A. Beyond what my investigator discovered and the other police reports, no, I didn't – I mean I don't know how I would have done that. I don't know what you're asking me. I mean –
Q. I'm asking if you did any independent investigation as to what constitutes forms of animal abuse.
A. No.

MH 12, line 21

Q. ... Prior to determining that a necessity defense was not a viable option, who had – what independent third party had you contacted whose primary occupation deals with the wellbeing of canine companions as to whether my concerns that Zalo and Ellie, who were

senior and ill at the time, were suffering duet to the winter elements and the lack of proper shelter?

A. Well, first, there was no evidence of the dogs suffering or lacking proper shelter. Are you asking me why I didn't retain a dog expert?

Q. I'm asking you if you contacted anybody to confirm whether or not my concerns were valid.

A. In terms of, like, an expert witness? A dog expert? No.

Q. Prior to making that determination, had Mr. Kelly gone to the house and taken any photos of the interior of the Scotts' garage?

A. I don't believe so.

Q. Had he taken any photos of the enclosure, the outdoor enclosure?

A. I don't think so. I mean we had – I had photos of that – of that area, but I don't remember if Joe took any photos also. I don't recall using any that he took at trial. We would have had him come in to testify.

In *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (2013), the District Court, Western District of Washington found the cities of Mount Vernon, Washington and Burlington, Washington in violation of the Sixth Amendment rights of indigent criminal defendants for contracting with public defenders who did nothing more than "see and plea" by encouraging indigent criminal defendants to plead guilty or some sort of offer made by the prosecutor's office without having conducted any sort of an independent investigation and relying solely on the police reports. Judge Stiles' court is in this same jurisdiction.

> In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption. . . . Adversarial testing of the government's case was so infrequent that it was virtually a non-factor in the functioning of the Cities' criminal justice system. *Wilbur* at 1124.

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> As part of the injunctive relief, the court ordered that a quarterly analysis of the Cities' public defense system "(i) provides actual representation of and assistance to individual criminal defendants, including reasonable investigation and advocacy and, where appropriate, the adversarial testing of the prosecutor's case. *Wilbur* at 1136.

In her motion for new trial in March of 2016, conflict counsel Jennifer Rancourt submitted an affidavit and informed the court (Judge Brian Stiles) that she reviewed Mr. Terrillion's entire case file and found he had conducted no independent investigation.

MH 3/18/2016 Page 12, line 4 -25, page 13, line 1:

Ms. Rancourt: In addition to that, Your Honor, Ms. Clark had made it very clear to Mr. Terrillion throughout their communications, and again the record has got plenty of references to this in the previous pleadings, that she wanted to pursue a necessity defense in this case.

Now, ultimately the strategy decision lies with the attorney about what strategy is pursued at trial. However, an attorney does owe a duty to investigate. After the – I think that the defense duties were clarified a little bit with the ANJ case which said, you know, once you have some sort of information that there is a defense that exists, you do have an obligation to at least look into that possibility.

I was provided with a copy of the defense counsel's previous – his entire file. I got a copy of the entire file. There was no indication whatsoever that he interviewed any of the multiple, multiple witnesses that Ms. Clark provided with him – provided to him. And I did indicate that in my materials, that I, as an officer of the court, have reviewed that file and did not find any indication that there was effective investigation of her claims.

Again, I think that falls below the level of care that's appropriate. I think that she deserves a new trial.

In *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), this Court stated:

...the presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations. *State v. Jury*, 19 Wn.App. 256, 263, 576 P.2d 1302 (1978).

In his March 2016 ruling denying Ms. Clark's motion for new trial, Judge Stiles heard Ms. Rancourt argue that a breakdown in communication had occurred. Judge Stiles ruled that since Keith Tyne (director of Skagit Public Defender's Office) did not replace Mr. Terrillion as counsel that no communication breakdown occurred.

However, during the evidentiary hearing in May 2016, Mr. Tyne testified that he had had conversations with Ms. Clark concerning her complaint about Mr. Terrillion and further that because of the breakdown in communication one of the effects was that Ms. Clark was not made aware of a meeting scheduled with Messrs. Tyne and Terrillion to discuss their differences.

Despite this, the trial court still did not acknowledge a breakdown in communication.

Further, in his March 2016 ruling, the court stated:

There's been much focus placed on the witness list that was presented to [defense counsel] by Ms. Clark. Sure, you would have liked to see all those probably talked to by [defense counsel] or his staff, but it seems like the whole focus on that was they would only provide character evidence, and generally

that's not admissible in any event. And if it was going to go to the necessity defense, I didn't hear that, and the necessity defense wasn't going to be a viable one in any event, particularly since the decision not to testify, I think that – by the defendant – certainly precluded any – any introduction of any sort of evidence relative to a necessity defense.

Mr. Terrillion testified he had not contacted the persons Ms. Clark identified as expert witnesses. The judge heard him testify that he did not contact any third parties experts in the area of animal abuse and care of k9 companions. Further, Mr. Terrillion's decision to proceed with a "dogs escaped theory" without first consulting Ms. Clark in this regard denied her the ability to testify in her own behalf.

In *State v. Ward,* Court of Appeals No. 77044-6, published opinion by the Court of Appeals, Division One (review denied by this court 9/4/19), the court cited *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

> The fundamental due process right to present a defense is the right to offer testimony and compel the attendance of a witness."[I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. (page 5)

The *Ward* decision stated:

> Below, the trial court prohibited Ward from presenting evidence or witnesses on the necessity defense. If Ward submitted a sufficient quantum of evidence to show that he would likely be able to meet each element of the necessity defense, then the trial court's exclusion of evidence in support of his sole defense violated Ward's constitutional rights. (page 5)

According to William Quigley in his article *Necessity Defense: Bring in the Jury (2003):*

> The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and

> sometimes the greater good for society will be accomplished by violating the literal language of the criminal law. 29

Because *Ward* testified on his own behalf and submitted the names of expert witnesses prepared to testify on Ward's behalf and his cause for attention to climate change, the Court of Appeals ruled he presented sufficient evidence that he reasonably believed the crimes he committed were necessary to minimize the harms that he perceived.

The Court of Appeals stated that :

> Ward argued that to decide whether his actions were "reasonably calculated to be effective in averting the imminent harm of climate change requires [the] expert testimony and evidence" that he was prepared to present to the jury, and that whether his beliefs were reasonable was a question for the jury, not the trial court, to decide. (page 7)

Because Ward was given the opportunity to testify on his own behalf, he successfully laid the foundation for expert witness testimony. Further, his sentence was significantly less severe than Ms. Clark's, one must surmise because of his testimony. For two criminal acts for which the fact patterns are almost identical (Exhibit P), Mr. Ward received 240 hours of community service. Ms. Clark was sentenced to 30 days in jail, 6 months community supervision, a mental health evaluation, as well as a protective order in her small town of La Conner.

Further, Ms. Clark has shown her actions have changed the minimal standard of care in the State of Washington with the passage of new laws in the 2016 legislative session.

Based on the fact that Ms. Clark complained to the Washington State Bar that Judge Brian Stiles did not adhere to the Code of Judicial Conduct 2.15, that conflict counsel, Jennifer Rancourt, swore in an Affidavit that Mr. Terrillion failed to conduct a proper investigation and Mr. Terrillion testified himself that he did not investigate anything other than the police reports,

it is highly unlikely a reasonable person aware of all of the facts would find that Judge Stiles did not abuse his discretion by refusing to recuse himself when asked to do so by Ms. Clark on numerous occasions.

ii. Trial Court had a Duty to Transfer All of Ms. Clark's Motion to the Court of Appeals in the Form of a Personal Restraint Petition

On or about May 27, 2016, trial court ordered that all of Ms. Clark's motion for new trial, with the exception of the claims for ineffectiveness, be transferred to the Court of Appeals pursuant to CrR 7.8(c)(2) in the form of a personal restraint petition. The Superior Court did not transfer Ms. Clark's Habeus Petition, which was incorporated with the motion for new trial filed March 2016 nor her ineffective assistance of counsel claim. (Exhibit Q).

Ms. Clark submits that the trial court abused its discretion, as pointed out above, by failing to transfer her entire motion for decision to the Court of Appeals either before or after the factual hearing took place.

B. SKAGIT COUNTY, THE SKAGIT COUNTY PUBLIC DEFENDER'S OFFICE AND MS. CLARK'S PUBLIC DEFENDER, DEAN TERRILLION, COMMITTED FRAUD/PROMISSORY FRAUD WHEN MR. TERRILLION FILED THE MOTION IN LIMINE CONCERNING THE NECESSITY DEFENSE AND INTENTIONALLY LIED TO MS. CLARK ABOUT HAVING ANY INTENTION TO PURSUE THIS AFFIRMATIVE DEFENSE

From the outset of her case, Ms. Clark insisted that a necessity defense was applicable in her case. Because of his failure to investigate her case, Mr. Terrillion never agreed with this defense. Yet, on October 16, 2015, the day after Mr. Terrillion advised Ms. Clark to utilize a jury trial and not a bench trial

Q. Do you recall the discussion that we had outside the hearing room on October 15th right before the trial confirmation?
A. Maybe if you refresh my memory.
Q. I asked you if you would just have a judge find me guilty because I didn't think that a jury would understand why I did what I did.
A. Yes, we discussed that. We discussed the option of the judge bench trial versus a jury trial.
Q. And you indicated that you believed that a jury would understand and that it wouldn't be advisable to have a judge just find me guilty, is that correct?
A. I don't recall. I do recall advising you to have a jury trial versus a bench trial.

Mr. Terrillion filed a *Motion in Limine* asking that a necessity defense be allowed. In this regard, Mr. Terrillion had done nothing more than:

> Q. So let's go to the trial. Prior to our trial date, what kind of trial preparation had you engaged in?
> A. Investigation by my expert investigator, researching case law, numerous consultations with you, with other attorneys, extensive plea negotiations with two separate prosecutors where I obtained misdemeanor deals from both or either. I prepared a trial notebook. I took your case home on the weekends, several weekends, at least three or four weekends, including the weekend prior to trial. I was well prepared for trial, I believe.

He had not interviewed any third parties concerning Ms. Clark's concerns and actions. He had not spoken with her proposed expert witnesses, Tracy McCallum with the Olympic Peninsula Humane Society, Jeane with Saving Grace Rescue, or Janine Ceja with the Skagit County Humane Society, nor had he subpoenaed them for their testimony.

> Q. So would Tracy McAllen [sic McCallum], or Jean from Saving Grace Rescue, or Janine Ceja with the Human [sic Humane] Society, would they be considered experts or quasi experts?
> A. I suppose they could be depending on what the issue was.
> Q. If the case was concerning animal abuse and animal cruelty, would they be considered reasonable experts in that field?
> A. That would be – again, that's potentially, yes. If they had the requisite training, education, and experience, then the judge can allow them to testify as experts if there's an issue.
> Q. Were their names present on that potential witness list?
> A. I would have to look, but I'm getting the sense that, yes.
> Q. Yes, they were. Did you make an effort to contact those –
> A. No. Again, they had no relevant, admissible evidence that I would be allowed to present.
> Q. As experts?
> A. Correct in this case. . . . There would have to be evidence of abuse before they would be allowed to testify about abuse.

Mr. Terrillion testified he never expected to get a necessity defense instruction. Even were he to try, his sole strategy for laying the foundation for Ms. Clark's testimony (were she to testify) was reliant on two blurry and orange photos.

> Q. Correct. So you chose to use the necessity defense for burglary and not the misdemeanors; is that correct?
> A. To be clear, I did not choose to use a necessity defense. I knew at the outset upon filing this motion that the Court would never give a necessity defense instruction in this case. This was done to make our relationship smoother because you would not relent on the necessity defense, even though it was not available. And I advised you countless times it was not available. So I would say yes to that.

Having no witnesses to bolster Ms. Clark's assertion she had no choice but to intervene on behalf of the dogs and having failed to get the state's witnesses to provide the evidence he

wanted/needed concerning the blurry and orange photos, Mr. Terrillion seized the opportunity to argue the dogs escaped on their own.

> Q. When Mr. Scott testified about the number of times the dogs escaped, is there a reason that you didn't use his statements in the police reports to show that was an inconsistency in his statement?
> A. No, I didn't want that to be inconsistency. That was my theory of the case that the dogs had escaped, so...
> Q. And when did you decide to pursue that theory?
> A. As soon as the jury heard that evidence. I was hopeful at the beginning of the trial that they would hear that evidence, the Prosecutor would present it, which she did. That was going to, you know, that was the theory of my case because I was certain that we weren't going to give the necessity instruction. ***Or at least I planned not to give the necessity instruction.*** (Emphasis added)
> Q. And is there a reason that you didn't discuss that theory with me prior to trial?
> A. Which theory, about the dogs escaping?
> Q. About the dogs escaping.
> A. Because at the beginning of the trial, I was under the impression the photos – you told me that the photos you gave me, that we had blown up depicted a certain thing. That's not what they depicted. So what I was planning to be my primary evidence turned out that it wasn't what you said that it was. So I had to go with an alternate theory. Unfortunately the evidence about the dogs escaping got in front of the jury.
> Q. And with that theory of the dogs escaping, how likely was it that I would be able to testify in order to bolster that theory?
> A. Almost – I would say none. We discussed that.
> Q. Prior to trial?
> A. Prior to trial I didn't know that you had misrepresented what that evidence showed.

Mr. Terrillion's promise to seek a necessity defense instruction caused Ms. Clark to depend on Mr. Terrillion to present a defense in that regard. Ms. Clark expected to be able to testify in her own defense. Because of this, she did not continue to pursue re-assignment of her case to another attorney. She entered the courtroom on October 19, 2015 expecting Mr. Terrillion would put the government's case to an adversarial testing. She believed she would get to testify to tell her side of the story to minimize the harm caused by the prosecution and the state's witnesses.

Because Ms. Clark was unable to testify, her side of the story did not come out and she was convicted on both the misdemeanor and felony, sentenced to extensive penalties, among other life-altering things.

The elements of fraud in the State of Washington are:	The elements for common law promissory fraud are:
(1) Representation of an existing fact;	(1) the defendant made a promissory representation;
(2) Materiality of the representation;	(2) the representation was, at the time it was made,

(3) Falsity of the representation;
(4) The speaker's knowledge of its falsity;
(5) The speaker's intent that it be acted upon by the plaintiff;
(6) Plaintiff's ignorance of the falsity;
(7) Plaintiff's reliance on the truth of the representation;
(8) Plaintiff's right to rely upon it; and
(9) Resulting damage.

false;
(3) the defendant knew that the representation was false or acted with reckless disregard of its truth;
(4) it was foreseeable that someone in the claimant's position would act or refrain from acting in reliance on the representation;
(5) the claimant justifiably relied on the representation, which is to say that, because of the Representation, the claimant reasonably expected that promise would be performed and relied on the Expectation; and
(6) the claimant suffered damages as a proximate result of his/her reliance

This is likely a case of first impression in the State of Washington. However, Washington's fellow courts in the Ninth Circuit have this to say concerning promissory fraud.

In *Lazar v. Superior Court*, 909 P.2d 981 Cal. SC 1996, a case concerning an employee relying on his potential employer's intentional false promises which caused him to quit his job, move from New York to California, remove himself from the New York job market, etc. only to have his job taken from him about two years later, it stated: Promissory Fraud is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform, hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. (Union Flower Market, Ltd. v. Southern California Flower Market, Inc. (1938) 10 Cal 2d 671, 676, 76 P.2d 503.

In *Engalla v. Permanente Medical Group, Inc.*, 15 Cal 4th 951-Cal Supreme Court 1997 the Court states that "False misrepresentations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." *Yellow Creek Lodging Corp. v. Dave* 1963, 216 Cal.App. 2d 50, 55 [30 Cal.Rptr. 620] and "A defrauded party has the right to rescind a contract, even without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have been breached. (*See Earl v. Saks & Co.* (1951) 36 Cal.2d 602, 611, [226 P.2d 340].

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The Law of Contracts (3d ed. 1987) § 9, 16, p. 360 Rest. 2d, contracts, § 164, com.c. pp. 246-447). The rule derives from the basic principle that a contracting party has a right to what it contracted for, and so has the right "to rescind where [s]he obtain[ed] something substantially different from that which he [is] led to expect." *Earl v. Saks & Co.*, supra, 36 Cal.2d at p.612)

In the *Estate of Michelle Schwarz v. Philip Morris USA, Inc.*, 272 Or App 268 (2015) the Oregon Court of Appeals upheld a $25 million punitive damages award against Philip Morris for intentionally misleading the public when they introduced their "low-tar" cigarettes touting their health benefits, which were believed by Michelle Schwarz, leading to her untimely death at the age of 53. The initial trial led to a $150 million punitive damages award after the jury found Morris guilty of fraud by clear and convincing evidence:

> No. 1: Philip Morris made false representations that low-tar cigarettes delivered less tar and nicotine to the smoker and were, therefore, safer and healthier than regular cigarettes and an alternative to quitting smoking;
> No. 2: Philip Morris knew the representations were false or recklessly made the representations without knowing if they were true or false:
> No. 3: Philip Morris intended to mislead Michelle Schwarz;
> No. 4: Michelle Schwarz reasonably relied on Philip Morris's representations;
> No. 5: Michelle Schwarz suffered injury and death as a direct result of her reliance on Philip Morris's misrepresentations.

In determining whether the $25 million award was unreasonable the court evaluated it based on the reprehensibility of defendant's conduct, e.g. whether:

> ***the harm caused was physical*** as opposed to economic; the tortuous conduct evinced an indifference to or reckless disregard of the health or safety of others; ***the target of the conduct had financial vulnerability***; the conduct involved repeated actions or was an isolated incident; and ***the harm was the result of intentional*** malice, trickery, or ***deceit***, or mere accident. (Emphasis added)

In *Law v. Sidney* (47 Ariz.1, 5, 53 P.2d 64, 66 (1936) "such promissory fraud lies not in the subsequent failure to perform, but in the misrepresentation of present state of mind. *See* Prosser, Torts § 104, at 744-45 statement in *Edginton v. Fitzmaurice*, 1882, L.R. 29 Ch.Div 359, to the effect that "The state of a man's mind is as much a fact as the state of his digestion."

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In *Sproul v. Fossi*, 548 P.2d 970, Or Supreme Court 1976 "[i]t is sufficient if the evidence shows either an intent not to perform the promise or that the promise is made with a reckless disregard whether the promisor can or cannot perform the promise. *Elzaga v. Kaiser Found Hospitals*, 259 Or. 542, 548, 487 P.2d 870 (1971) citing Prosser on Torts 745 (3d. ed. 1964) "It is also established that a fraudulent intent not to keep a promise can be inferred if sufficient circumstances are shown to support such an inference." *Conzelman v. N.W.P. & D. Prod. Co.*, 190 Or. 332, 352, 225 P.2d 757 (1950).

Ms. Clark submits the sworn testimony of Mr. Terrillion at the hearings on May 27, 2016, June 17, 2016, and July 5, 2016 provides undeniable evidence that Mr. Terrillion made a promise to Ms. Clark when he informed her he had filed a *Motion in Limine* concerning his seeking a necessity defense instruction on her behalf; and that she would be able to testify on her own behalf consistent with a necessity defense. Mr. Terrillion intentionally lied to Ms. Clark regarding his intention to seek the necessity defense instruction and provide supporting evidence at trial in that regard. Mr. Terrillion had conducted no independent investigation into Ms. Clark's case prior to making this promise nor had he subpoenaed any witnesses or expert witnesses on Ms. Clark's behalf. Nor did he object when the court granted the state's motion to preclude defendant from calling any witnesses other than the defendant herself.

Further, Mr. Terrillion had made no effort to prep Ms. Clark concerning her own testimony at trial to offer evidence supporting a necessity defense.

Because Mr. Terrillion was Ms. Clark's court-appointed attorney, she made reasonable reliance on the promise made to her by Mr. Terrillion. Because Mr. Terrillion had no intention of presenting evidence in order to get a necessity defense instruction he jumped at the opportunity to claim the dogs had escaped on their own which he testified gave Ms. Clark no

basis for testifying on her own behalf. As a result, Ms. Clark had no opportunity to minimize the damage done by the prosecuting attorney and to get her side of the story in front of the jury. Thus, Ms. Clark's sentence was likely significantly more severe than it likely would have been.

In *State v. Kenneth A. Ward,* a case with a very similar fact pattern and similar charges against the defendant, Mr. Ward was able to testify on his own behalf giving his side of the story and being sentenced only to community service. Ms. Clark's punishment was 30 days in jail, 6 months community probation, mental health evaluation, and a protection order against her.

Ms. Clark relied on Mr. Terrillion's promise to her great detriment. Therefore, Ms. Clark requests this court to act in the interests of justice and grant her a new trial.

C. SKAGIT COUNTY, AND THE STATE OF WASHINGTON VIOLATED MS. CLARK'S CONSTITUTIONAL RIGHTS WHEN THEY CONTRACTED WITH PUBLIC DEFENDERS WHO RELIED SOLELY ON THE POLICE REPORTS AND FAILED TO PERFORM AN INDEPENDENT INVESTIGATION OF THE CHARGES AGAINST MS. CLARK

Pursuant to *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (2013) the direct testimony of Dean Terrillion (Exhibit R) provides *prima facie* evidence that Skagit County and the State of Washington violated at least Ms. Clark's Sixth Amendment Rights when they contracted with Skagit County Public Defender's Office who relied solely on the police reports when determining Ms. Clark's defense and ability to negotiate concerning plea deals made by the Skagit County Prosecuting Attorney's Office.

THEREFORE, Petitioner motions this court to modify or set aside its Ruling Denying Discretionary Review.

DATED this 29th day of October 2019.

Respectfully submitted,
Linda Renae Clark
Pro Se Petitioner

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APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: LINDA RENAE CLARK, Petitioner.	No. 97108-1 Court of Appeals No. 75330-4-I RULING DENYING REVIEW

Linda Clark timely filed a motion for a new trial in Skagit County Superior Court following her jury conviction for second degree burglary and taking a pet animal. The superior court transferred all of the claims in the motion except ineffective assistance of counsel to Division One of the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2). The petition was stayed pending final resolution of Ms. Clark's direct appeal, then lifted after the Court of Appeals affirmed the judgment and sentence and this court denied review. The acting chief judge dismissed the petition, and Ms. Clark now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Ms. Clark must show that the acting chief judge's decision conflicts with a decision of this court or with a published Court of Appeals decision, or that she is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). To obtain postconviction relief generally, Ms. Clark must show that she was actually and substantially prejudiced by constitutional error or that her trial suffered from a

nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). If Ms. Clark ultimately fails to present an arguable basis for collateral relief in law or in fact given the constraints of the personal restraint petition procedure, her collateral challenge must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Ms. Clark seeks review of three issues: (1) whether the acting chief judge had a conflict of interest; (2) whether the acting chief judge erred by not considering all of Ms. Clark's grounds for relief; and (3) whether the petition that was transferred from the superior court to the Court of Appeals is not a true and accurate copy of the petition that Ms. Clark filed.[1]

Ms. Clark argues the acting chief judge has a conflict of interest because he is paid a salary by the State of Washington and therefore has a personal bias concerning the State's case against her. The fact that judicial officers receive a salary from the State does not create a conflict of interest, since there is no evidence that a judicial officer's salary is changed based upon judicial rulings or decisions in any particular case. No independent observer could reasonably question any judicial officer's impartiality on this basis. CJC 2.11 (disqualification).

Ms. Clark also contends that the acting chief judge failed to address her claims of ineffective assistance of counsel, but as noted above, the superior court did not transfer that claim asserted in the motion for a new trial. Instead, that claim was addressed by the superior court and then litigated on direct appeal. Ms. Clark also argues that additional claims were not addressed, but she fails to include any argument

[1] Ms. Clark has also moved to quash the personal restraint petition because it was missing a document that she declares was included in her original pleading, and she moves to quash the order of dismissal based on the alleged conflict of interest. But Ms. Clark fails to cite precedent establishing that quashing the petition is the appropriate remedy, and she fails to establish a conflict of interest. The motions to quash are denied.

or cite facts demonstrating why additional review of such claims is warranted. This court generally does not consider such unsupported arguments. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Finally, Ms. Clark contends that the petition that was transferred from the superior court is not true and accurate because it does not include a copy of a letter she sent to the bar association complaining about the trial judge. But she fails to provide any evidence supporting this contention, and thus she fails to establish any basis for review.

The motion for discretionary review is denied.

Michael E Johnston
COMMISSIONER

September 5, 2019

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VIA U.S. MAIL (confirmation copy and envelope enclosed)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

	:	PETITION NO. 75330-4-I
LINDA RENAE CLARK, Petitioner,	:	SUPREME COURT NO.
	:	MOTION FOR DISCRETIONARY REVIEW
v.	:	
STATE OF WASHINGTON, Respondent.	:	

COMES NOW Linda Renae Clark, Pro Se Appellant, and moves the Court for relief as designated below.

Pursuant to the Order of Dismissal from the Court of Appeals dated March 25, 2019 (but not received until April 5, 2019 (Exhibit A)), Ms. Clark hereby motions this court for discretionary review of this Order of Dismissal for the following reasons.

1. Judge David Mann has a conflict of interest and therefore his judgment of Ms. Clark's petition must not stand.
2. The Order of Dismissal does not address Ms. Clark's petition in its entirety.
3. The Petition as filed with the Court of Appeals by the Superior Court of Skagit County does not represent a true and accurate copy as originally filed by Ms. Clark.

Conflict of Interest

According to the Code of Judicial Conduct:

RULE 2.11
Disqualification

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(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

1. The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

***

3. The judge knows that he or she, individually ..., has an economic interest in the subject matter in controversy or in a party to the proceeding.

Judge David Mann has been paid by the Respondent, the State of Washington, since at least 2017. According to Washington State Salaries, in 2017, Judge Mann was paid $175,400 by the State of Washington (Exhibit A). It can be reasonably expected that his income increased in 2018 to accommodate a change in cost of living. Therefore, since Judge Mann depends on his livelihood from the State of Washington it can reasonably be argued he has a personal bias or prejudice concerning the state's case and his Order of Dismissal must be quashed.

As shown below, Judge Mann's Order is nearly identical to the Response filed by the State of Washington in this matter. He has taken absolutely nothing in Ms. Clark's Petition into consideration. Nor did he consider the Petition in its entirety.

Response	Order
The leads from the dogs and the German shepherd's collar were missing from where they had been hanging. (Response page 8)	The State's evidence showed the dogs along with their leads and collars went missing on November 6, 2014. (Order page 6)
She contended the trial court denied her motion and ordered her to the office of assigned counsel to obtain conflict counsel. (Response page 11)	Clark argues that [t]he [sic] trial court unreasonably denied her request to proceed pro se, instead ordering her to obtain conflict counsel. (Order page 3)
The defendant's request to proceed pro se must be unequivocal in the context of the record as a whole. (Response page 13)	A defendant's request to proceed pro se must be unequivocal in the context of the record as a whole. (Order page 3)
Here, Clark's request for self-representation came after trial when she was dissatisfied with trial counsel. (Response page 13).	Her request was initially raised after trial, based on her claims of ineffective assistance of trial counsel. (Order page 3)
On December 4, 2016, the trial court addressed	On December 4, 2016, the trial court asked

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Clark's request for counsel. (Response page 11)	Clark whether she intended to represent herself or wanted conflict counsel. (Order page 4)
Clark subsequently filed a motion for self-representation. Six days later, when new counsel was going to appear, Clark did not address her request to represent herself and did not complain of the new counsel appearing on her case. (Response page 12)	Clark again moved to proceed pro se. But when new conflict counsel appeared at a hearing on December 30, 2015, Clark allowed counsel to proceed. (Order page 4)
Regardless, she represented herself on the other motions. (Response page 13)	She also continued to represent herself on her other motions. (Order page 4)
Clark also fails to establish that this was a constitutional error that resulted in actual and substantial prejudice. (Response page 13)	Clark has not met her burden to show that her post-trial request for self-representation was a constitutional error that resulted in actual and substantial prejudice. (Order page 4)
Clark contends the trial court deprived her of the right to a speedy trial citing American Bar Association Standard 12-2.1. (Response page 14)	Clark, citing American Bar Association Criminal Justice Section Standard 12-2.1 argues that the trial court denied her right to a speedy trial. (Order page 4)
In *Barker*, the United States Supreme Court devised a balancing test for determining when a criminal defendant's right to a speedy trial is violated. The Court identified four major factors to consider in this balance: the length of the delay, the reason for the delay, whether or not the defendant asserted the right, and the prejudice to the defendant. (Response page 15)	In Barker v. Wingo...the United States Supreme Court established a balancing test to determine whether an unconstitutional delay has occurred. The test considers the length of the delay, the reasons for the delay, whether the defendant complained about the delay, and any prejudice to the defendant. (Order page 4)
Generally, no set time is applicable, we examine the facts to determine whether a reasonable time has elapsed. (Response page 15)	Generally, no set time is applicable; we examine the fact to determine whether a reasonable time has elapsed. (Order page 5)
She cites the filing of the case on December 24, 2014, her first court appearance on or about January 26, 2014, and trial commencing October 20, 2015. (Response page 14)	In support of her claim, Clark notes that the case was filed on December 24, 2014, that her first court appearance took place on or around January 16, 2015, and that trial commenced on October 20, 2015. (Order page 5)
Clark fails to mention the agreed continuances of the trial date and the impact on speedy trial...On March 6, 2015, the trial was continued by agreement to May 4, 2015...On March 20, 2015, the trial was continued by agreement to August 23, 2015.... On May 29, 2015 the trial was continued by agreement to August 24, 2015.... On July 17, 2015, trial was set for October 19, 2015.... On October 19, 2015, the jury trial began with jury selection. On October 21, 2015, the jury returned the	But Clark fails to acknowledge that the trial was continued by agreement on March 6, 2015, March 20, 2015, and May 29, 2015. On July 17, 2015, trial was set for October 19, 2015. Jury selection began on October 19, 2015, and the jury returned the verdicts two days later. (Order page 5)

verdicts. (Response page 14)	
The reason for extension of the trial date was agreed continuances. There was no assertion by the defendant of the right to speedy trial in advance of trial. Clark alleges no prejudice. (Response page 15)	It is apparent that the primary reason for the ten-month delay between filing and trial was the agreed continuances. Moreover, Clark did not assert this right in advance of trial. Nor does she allege prejudice. (Order page 5)
Clark's claim of insufficiency of the evidence is a mix of claims regarding lack of certain types of evidence, contentions she has evidence inconsistent with trial testimony and claims that she was improperly denied a necessity defense. (Response page 15)	Clark argues that the evidence was insufficient to sustain the jury's burglary conviction. (Order page 5)
Evidence is sufficient to support a conviction if, viewed in light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. (Response page 16)	Evidence is sufficient to support a conviction if it permits any reasonable juror to find the essential elements of the crime beyond a reasonable doubt when viewed in the light most favorable to the State. (Order page 5)
A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. (Response page 16)	A petitioner who challenges the sufficiency of the evidence admits the truth of all of the State's evidence as well as all reasonable inferences that can be made from it. (Order page 5)
Circumstantial evidence and direct evidence are equally reliable. (Response page 16)	Circumstantial evidence and direct evidence are deemed equally reliable. (Order page 5)
This evidence was sufficient for a rational trier of fact to find that Linda Clark had taken the dogs and burglarized the property … (Response page 19)	This court defers to the finder of fact on "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." (Order page 6)
Clark contends the prosecutor's closing argument improperly argued the defendant must have taken the leads from the dogs from the garage. (Response page 19)	Clark argues that prosecutorial misconduct during closing argument warrants a new trial. (Order page 7)
Clark also claims that the prosecutor improperly impugned defense counsel by arguing the dogs could not have cut the fence, grabbed the collars and leashes and escaped. A prosecutor can "argue that the evidence does not support the defense theory." **[Even though defense counsel offered not even a scintilla of evidence to corroborate this theory]** This argument was based upon the evidence. (Response page 19)	Clark further contends that the prosecutor impugned the closing arguments of defense counsel by arguing that it was "ridiculous" to believe the dogs clipped the fence and escaped with their leashes and collars on their own. … Viewed in context, it is apparent that the prosecutor was arguing inferences from the evidence, not expressing a personal opinion about Clark's guilt. (Order page 8)
Clark also fails to show that these arguments were so flagrant and ill-intentioned that reversal is required because the resulting	Clark has not shown that the prosecutor's comments were improper or prejudicial. (Order page 8)

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prejudice could not have been cured. (Response page 20)	
Clark contends the trial judge should have recused himself after she filed a bar grievance against the trial judge.... Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) requires that a judges [sic] disqualify themselves from hearing a case if that judge is biased against a party of if his impartiality may be reasonably questioned. A trial court is presumed to perform its functions regularly and properly without bias or prejudice. (Response page 21)	Clark argues that the trial court judge erred in refusing to recuse from her case after she filed a bar grievance. Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased or whose impartiality may be reasonably questioned. The trial court is presumed, however, to perform its functions regularly and properly without bias or prejudice. (Order page 8)
Clark contends her conflict attorney was also ineffective by focusing her arguments on a "breakdown in communication" instead of "utilizing the broad category of ineffective assistance of counsel," failing to argue a new trial was merited based upon claimed evidence of the victim lying and failing to argue the prosecutor improperly impugned defense counsel in closing argument. (Response page 23)	Clark argues that her post-trial conflict counsel provided ineffective assistance. Specifically, Clark contends that her conflict counsel was ineffective for (1) improperly narrowing her ineffective assistance of counsel argument to a breakdown in communication, (2) failing to argue a new trial was warranted so she could properly cross examine the alleged victims, (3) failing to argue the prosecutor committed misconduct in closing argument, and (4) failing to argue that a new trial was warranted based on severe violation of her constitutional rights. (Order page 9)
A defendant claiming ineffective assistance bears the burden showing that (1) counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work caused prejudice. ... (Response page 24)	To establish ineffective assistance, Clark must show that counsel's performance was deficient and that prejudice resulted from the deficiency. Counsel's performance is deficient if it fell below and objective standard of reasonableness. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. (Order page 9)
To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." (Response page 24)	Clark also bears the burden of rebutting the strong presumption that counsel's representation was not deficient. (Order page 9)
A claim that trial counsel was ineffective does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. (Response page 24)	When counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance. (Order page 9)
Clark makes no showing the decisions were not tactical or that she was prejudiced by the	Here, Clark has not shown that conflict counsel's decisions were unreasonable in light

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claimed ineffective assistance of conflict counsel. She makes no attempt to show that the outcome of the motions for new trial would have been different had the arguments been made. (Response 24)	of the evidence and arguments presented at trial. Nor does she adequately explain or demonstrate how counsel's representation resulted in prejudice. (Order page 10)
Her claim of ineffective assistance of the conflict counsel fails. (Response page 24)	Because Clark shows neither deficient performance nor resulting prejudice, she fails to establish ineffective assistance of counsel. (Order page 10)

Despite her insistence from the very beginning of this case that SHE DID NOT ENTER THE GARAGE of the Scotts and the charge of burglary was based on the state's insistence that she did, neither the State of Washington nor Judge Mann will acknowledge that someone who walks dogs for a living does not need leads or collars to escort a dog from danger. Ms. Clark has plenty of extra leads for use on a daily basis as she did in November 2014. All she needed to do to take Zalo and Ellie to safety was one of her leads which could easily be transformed into a "slip" lead, not unlike the "slip" leads that many veterinarian offices use for clients who forget to bring a lead to escort their dog or cat into the veterinarian office. If Ms. Clark's public defender had offered up the photos Ms. Clark sent him just prior to trial which showed one or more of the dogs had their collars on and had properly procured the photos taken by the Sheriff's deputy on duty at the time the statement by the State of Washington in its Response that Ms. Clark entered the garage to take the collars can be easily disproved, thereby putting the charges for burglary in doubt.

Based on Ms. Clark's Reply to the State's Response, there is enough of the Scotts' testimony that should have been cross-examined and questioned by Ms. Clark's public defender. In addition, the differences in this testimony show that Ms. Clark's inability to testify on her behalf failed to give the jury a proper understanding of the matter at hand.

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It behooves the State of Washington to continue funneling people into its criminal "justice" system in order that its unemployment rate remain low and employees in law enforcement, the courts, attorneys, judges, etc. stay employed by the state.

Petition not Addressed in its Entirety

Ms. Clark's Petition as filed with the Superior Court included numerous other issues which the Court of Appeals failed to address in its Order of Dismissal. Further, the State of Washington did not provide any objection to these issues. These include, but are not limited to:

1. Ineffective assistance of Mr. Terrillion (Ms. Clark's public defender) specifically due to one or more of the following:
   a. Failed to interview witnesses;
   b. No independent investigation;
   c. No consultation with experts;
   d. Failing to object to prosecutor's closing arguments when she impugned defense's closing;
   e. Failing to adequately present a defense;
   f. Failing to obtain photos taken on day of incident by charging officer;
   g. Presenting evidence in closing argument without presenting evidence during trial to support the evidence;
   h. Failing to cross-examine witnesses;
   i. Failing to present expert testimony;
   j. Failing to investigate prior to trial, which resulted in advancing an unsupported theory of defense during trial;
   k. Per se ineffective for conceding guilt in closing argument;

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i. Conceding guilt to a lesser offense where I did not consent and objected during trial to counsel's strategy;

l. Failing to adequately investigate and cross-examine witnesses;

m. Conduct regarding plea negotiations deficient;

n. Failure to adequately investigate and present a defense;

i. Failing to meet with Ms. Clark prior to trial;

ii. File contained no evidence witnesses were investigated or interviewed;

iii. During trial, counsel did not subject the state's case to a meaningful adversarial testing;

iv. Did not raise or challenge ambiguities and discrepancies in witnesses accounts/testimony;

v. Performed little cross-examination. Did nothing to test the state's case.

Further, even if Ms. Clark was guilty there is no excuse for counsel's failure to investigate.

2. That based on Mr. Terrillion's testimony on June 17, 2016 pertaining to the fact that he plead guilty on my behalf without my permission during his closing arguments that there is presumed prejudice or per se ineffective assistance of counsel and a new trial should be ordered.

3. Right to cross-examine a witness who testified against her;

4. Denied needed expert assistance at trial in violation of the Fourteenth Amendment;

5. Denied the opportunity to obtain any witnesses for her side;

6. Was stripped of her ability to testify on her own behalf.

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Petition is Not True and Accurate

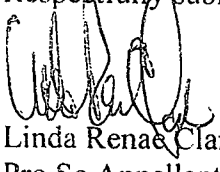
In its Order of Dismissal the Court of Appeals indicated that Ms. Clark did not file a copy of her letter to the Washington Bar Association concerning her grievance against Judge Brian Stiles with her Petition. This letter was absolutely filed with Ms. Clark's petition and the fact that the Court of Appeals does not have a copy means the Petition as filed with the Court of Appeals is not true and accurate.

An Affidavit by Ms. Clark is filed herewith which swears that her letter to the Washington Bar Association was included with the filing of her Personal Restraint Petition.

THEREFORE, Appellant motions this court for discretionary review of the Order of Dismissal.

DATED this 15th day of April 2019.

Respectfully submitted,



Linda Renae Clark
Pro Se Appellant

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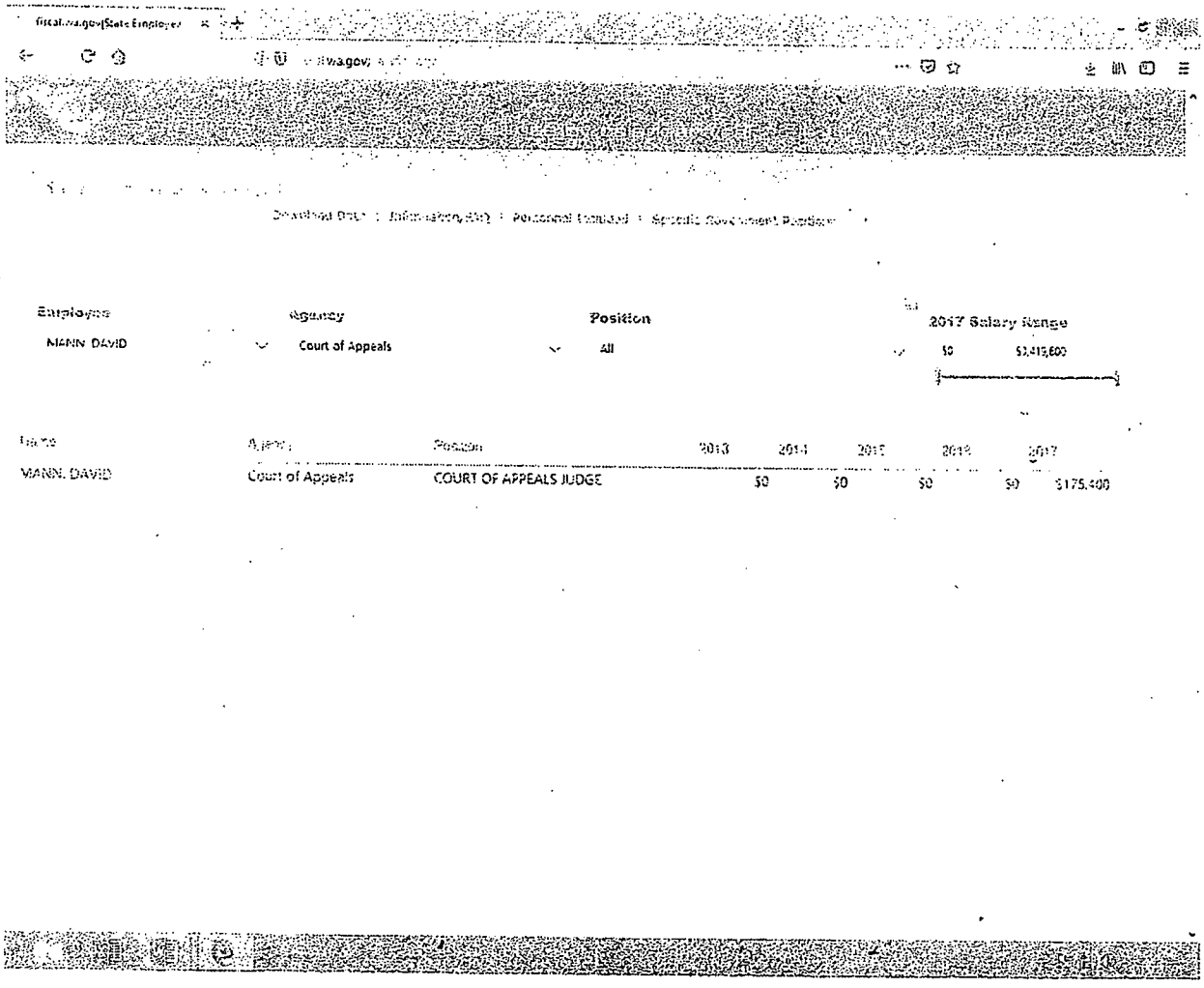

Employee	Agency	Position	2017 Salary Range
MANN, DAVID	Court of Appeals	All	$0 – $2,415,600

Name	Agency	Position	2013	2014	2015	2016	2017
MANN, DAVID	Court of Appeals	COURT OF APPEALS JUDGE	$0	$0	$0	$0	$175,400

RCW 43.03.012

Salaries of judges.

Pursuant to Article XXVIII, section 1 of the state Constitution and RCW **2.04.092**, **2.06.062**, **2.08.092**, **3.58.010**, and **43.03.310**, the annual salaries of the judges of the state shall be as follows:

(1) Effective September 1, 2018:

(a) Chief justice of the supreme court. . . . $193,162

(b) Justices of the supreme court. . . . $190,415

(c) Judges of the court of appeals. . . . $181,263

(d) Judges of the superior court. . . . $172,571

(e) Full-time judges of the district court. . . . $164,313

(2) Effective July 1, 2019:

(a) Chief justice of the supreme court. . . . $213,773

(b) Justices of the supreme court. . . . $210,732

(c) Judges of the court of appeals. . . . $200,603

(d) Judges of the superior court. . . . $190,985

(e) Full-time judges of the district court. . . . $181,846

(3) Effective July 1, 2020:

(a) Chief justice of the supreme court. . . . $223,499

(b) Justices of the supreme court. . . . $220,320

(c) Judges of the court of appeals. . . . $209,730

(d) Judges of the superior court. . . . $199,675

(e) Full-time judges of the district court. . . . $190,120

(4) The salary for a part-time district court judge shall be the proportion of full-time work for which the position is authorized, multiplied by the salary for a full-time district court judge.

[2019 c 5 § 2; 2017 1st sp.s. c 1 § 2; 2015 1st sp.s. c 1 § 2; 2013 c 340 § 2; 2011 c 380 § 2; 2009 c 581 § 2; 2007 c 524 § 2; 2005 c 519 § 2; 2003 1st sp.s. c 1 § 2; 2001 1st sp.s. c 3 § 2; 1999 sp.s. c 3 § 2; 1997 c 458 § 2; 1995 2nd sp.s. c 1 § 2; 1993 sp.s. c 26 § 2; 1991 sp.s. c 1 § 2; 1989 2nd ex.s. c 4 § 2; 1987 1st ex.s. c 1 § 1, part.]

FILED
3/25/2019
Court of Appeals
Division I
State of Washington

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

In the Matter of the Personal Restraint of:	)	No. 75330-4-I
LINDA RENAE CLARK,	)	ORDER OF DISMISSAL
Petitioner.	)	

Linda Clark was convicted of second degree burglary and taking a pet animal in Skagit County Superior Court No. 14-1-00937-1. Clark filed a series of post-trial motions and documents challenging her convictions. On direct appeal, this court rejected Clark's ineffective assistance of counsel claims and affirmed her convictions. See State v. Clark, No. 74934-0-I. The superior court transferred Clark's remaining claims to this court for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2).

Clark alleges (1) the trial court erred in denying her request to proceed pro se, (2) violation of her constitutional right to a speedy trial, (3) the evidence was insufficient to support her conviction, (4) the prosecutor's closing argument was improper, (5) the trial court judge erred in denying her motion to recuse, and (6) ineffective assistance of post-trial counsel.

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In a personal restraint proceeding, the petitioner bears the burden of proof. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999); In re Pers. Restraint of Hagler, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982). To obtain collateral relief by means of a personal restraint petition, Clark must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Clark has not established that she can satisfy this threshold burden, the petition is dismissed.

In Clark's direct appeal, this court recited the following relevant facts:

> Frank and Rebecca Scott owned two dogs: Ellie, a twelve year old German wire terrier, and Zalo, a ten year old German shepherd. The dogs typically slept in the Scotts' house but spent most of their day either in the Scotts' garage or the fenced yard. The dogs wore collars and the Scotts stored their leads in the garage.
>
> In approximately February 2014, the Scotts hired Linda Clark, who owned a dog-walking business, to walk the dogs. Clark was instructed to enter the garage, put the leads on the dogs' collars, and walk them once a day. However, within a month or two, Clark began walking the dogs several times a day of her own accord, sometimes late at night or in heavy rain. Clark also frequently let herself into the garage at all hours to check on the dogs and leave notes regarding what she believed was proper care for them. In addition, Clark replaced the dogs' collars with collars that had her own name and phone number instead of the Scotts'.
>
> In May or June 2014, concerned by Clark's behavior, Frank told Clark that her services were no longer necessary. Clark responded, "[I]f you take me away from these dogs, you're going to regret it." The Scotts contacted the Skagit County Sheriff's Office. Deputy Brad Holmes came to the Scotts' house and observed that both dogs appeared to be in good health for their age and their living conditions were appropriate. Deputy Holmes went to Clark's house and told her "that she cannot go back to the residence for any reason or she could be arrested for trespassing." Clark agreed that she would not go back to the Scotts' property. The Scotts built a heavier fence to keep Clark from coming onto the property.

> However, on the morning of November 6, 2014, the Scotts noticed that Ellie and Zalo were missing. The Scotts' fence had been cut and pieces of the fence were found in the Scotts' garbage can. The dogs' leads were also missing. The Scotts were particularly concerned because Zalo was required to take medication and had not had his medication yet that morning.
>
> Sergeant Jennifer Sheahan–Lee located Clark walking around town and asked if she had seen the dogs. Clark stated that she had last seen the dogs the previous evening. She admitted that she had gone to the Scotts' property and petted the dogs through the fence. A few hours later, Sergeant Sheahan–Lee saw Clark walking a different dog, and approached her to tell her that Ellie and Zalo were missing. Clark denied having the dogs or knowing where they were. After receiving a report that a local citizen had seen Clark with Ellie and Zalo that morning, Sergeant Sheahan–Lee went to Clark's house. When Sergeant Sheahan–Lee told Clark that Zalo had not had his medication that day, Clark then admitted she had the dogs and turned them over Sergeant Sheahan–Lee. Sergeant Sheahan–Lee also noted that both dogs did not appear to be neglected or in need of any care.

State v. Clark, No. 74934-0-I.

1. Request to proceed pro se

Clark argues that he trial court unreasonably denied her request to proceed pro se, instead ordering her to obtain conflict counsel.

A defendant's request to proceed pro se must be unequivocal in the context of the record as a whole. State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995). "This requirement protects defendants from inadvertently waiving assistance of counsel and protects trial courts from 'manipulative vacillations by defendants regarding representation.'" State v. Curry, 191 Wn.2d 475, 482, 423 P.3d 179 (2018) (quoting State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991)).

Here, the record viewed as a whole shows that Clark did not unequivocally assert her right to proceed pro se. Her request was initially raised after trial, based on her

claims of ineffective assistance of trial counsel. On December 4, 2016, the trial court asked Clark whether she intended to represent herself or wanted conflict counsel. Clark agreed with the trial court's recommendation to assign conflict counsel. On December 24, 2015, Clark again moved to proceed pro se. But when new conflict counsel appeared at a hearing on December 30, 2016, Clark allowed counsel to proceed. She also continued to represent herself on her other motions. Clark has not met her burden to show that her post-trial request for self-representation was a constitutional error that resulted in actual and substantial prejudice.

2. Speedy trial

Clark, citing American Bar Association Criminal Justice Section Standard 12-2.1, argues that the trial court denied her right to a speedy trial.[1] Both the federal and Washington state constitutions guarantee a criminal defendant's right to a speedy trial. U.S. Const. amend. VI; Const. art. I, § 22. In Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the United States Supreme Court established a balancing test to determine whether an unconstitutional delay has occurred. The test considers the length of the delay, the reasons for the delay, whether the defendant complained about the delay, and any prejudice to the defendant. State v. Lackey, 153 Wn. App. 791, 800, 223 P.3d 1215 (2009). "Generally, no set time is applicable; we

[1] American Bar Association Criminal Justice Standard 12-2.1(b) states that "[t]he presumptive speedy trial time limit for persons held in pretrial detention should be [90] days from the date of the defendant's first appearance in court after the filing of a charging instrument. The presumptive limit for persons who are on pretrial release should be [180] days from the date of the defendant's first appearance in court after either the filing of any charging instrument or the issuance of a citation or summons. Shorter presumptive speedy trial time limits should be set for persons charged with minor offenses." The ABA Standards are not binding legal authority. Rather, they serve as a source of guidance for policymakers and practitioners.

examine the facts to determine whether a reasonable time has elapsed." State v. Whelchel, 97 Wn. App. 813, 823, 988 P.2d 20 (1999).

In support of her claim, Clark notes that the case was filed on December 24, 2014, that her first court appearance took place on or around January 26, 2015, and that trial commenced on October 20, 2015. But Clark fails to acknowledge that trial was continued by agreement on March 6, 2015, March 20, 2015, and May 29, 2015. On July 17, 2015, trial was set for October 19, 2015. Jury selection began on October 19, 2015, and the jury returned the verdicts two days later.

It is apparent that the primary reason for the ten-month delay between filing and trial was the agreed continuances. Moreover, Clark did not assert this right in advance of trial. Nor does she allege prejudice. Clark fails to establish that the delay amounted to a constitutional violation that resulted in actual and substantial prejudice or circumstances amounting to a complete miscarriage of justice. See In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 145-46, 385 P.3d 135 (2016).

3. Sufficiency of the evidence

Clark argues that the evidence was insufficient to sustain the jury's burglary conviction. Evidence is sufficient to support a conviction if it permits any reasonable juror to find the essential elements of the crime beyond a reasonable doubt when viewed in the light most favorable to the State. State v. Pinckney, 2 Wn. App.2d 574, 579, 411 P.3d 406 (2018). A petitioner who challenges the sufficiency of the evidence admits the truth of all of the State's evidence as well as all reasonable inferences that can be made from it. Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d

99 (1980). This court defers to the finder of fact on "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Ainslie, 103 Wn. App. 1, 6, 11 P.3d 318 (2000).

A person is guilty of second degree burglary if she enters or remains unlawfully in a building other than a vehicle or a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.030. A person is guilty of taking a pet animal if, with intent to deprive or defraud the owner thereof, she takes away, leads, confines, secrets, or converts any pet animal with a value less than $750. RCW 9.08.070(1)(a). Clark contends that the evidence for these charges was insufficient because (1) the State did not offer certain types of physical evidence commonly associated with burglary, (2) Clark's evidence conflicted with the State's evidence and testimony at trial, and (3) she was denied the opportunity to argue a necessity defense.

The State's evidence showed the dogs along with their leads and collars went missing on November 6, 2014. Police told Clark she had been seen with the dogs. Clark initially did not admit having the dogs. But when told one dog had missed its medication, Clark led police to her garage where the dogs were being held. Police subsequently found that the owners' fence had been cut, and pieces of the wire found in the trash can. Viewed in the light most favorable to the State, a reasonable jury could conclude that Clark committed the crimes. The evidence was sufficient to support Clark's convictions.[2]

4. Prosecutorial misconduct

Clark argues that prosecutorial misconduct during closing argument warrants a new trial. To prevail on a claim of prosecutorial misconduct, the defendant has the burden to establish " 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.' " State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). To establish prejudice, the defendant must prove "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Magers, 164 Wash.2d at 191, 189 P.3d 126 (alteration in original) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

Clark argues that the prosecutor improperly argued that the evidence showed she unlawfully entered the yard and garage to get the dogs. She contends that there was no evidence apart from the victims' perjured testimony to support this portion of the prosecutor's closing argument. However, "[t]his court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the credibility of the witnesses based on the evidence." State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Clark further contends that the prosecutor impugned the closing arguments of defense counsel by arguing that it was "ridiculous" to believe the dogs clipped the fence

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[2] Clark's ability to argue a necessity defense is not relevant to the analysis of whether the evidence admitted at trial was sufficient to support the conviction.

and escaped with their leashes and collars on their own. "The State is entitled to comment upon the quantity and quality of the evidence the defense presents." State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009). Viewed in context, it is apparent that the prosecutor was arguing inferences from the evidence, not expressing a personal opinion about Clark's guilt. Clark has not shown that the prosecutor's comments were improper or prejudicial.

5. Recusal

Clark argues that the trial court judge erred in refusing to recuse from her case after she filed a bar grievance.[3] Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased or whose impartiality may be reasonably questioned. State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). The trial court is presumed, however, to perform its functions regularly and properly without bias or prejudice. Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). Consequently, the party seeking recusal must support the claim with evidence of the judge's actual or potential bias. State v. Dominguez, 81 Wn. App. at 328–29, 914 P.2d 141 (1996).

Clark contends the trial judge was biased against her because the judge (1) failed to intervene when she claimed trial counsel was ineffective, (2) erred in sustaining an objection during closing argument based on insufficiency of the evidence, (3) denied her an opportunity to present a necessity defense, (4) improperly found that no

[3] The bar grievance Clark references was not attached to her petition.

breakdown in communication between herself and defense counsel existed, and (5) failed to Clark has not shown that any of the trial court's rulings were erroneous or unsupported by the record. Her conclusory assertions of bias are insufficient to satisfy her burden.

6. Ineffective assistance of post-trial counsel

Clark argues that her post-trial conflict counsel provided ineffective assistance. Specifically, Clark contends that her conflict counsel was ineffective for (1) improperly narrowing her ineffective assistance of counsel argument to a breakdown in communication, (2) failing to argue a new trial was warranted so she could properly cross examine the alleged victims, (3) failing to argue the prosecutor committed misconduct in closing argument, and (4) failing to argue that a new trial was warranted based on severe violation of her constitutional rights.

To establish ineffective assistance, Clark must show that counsel's performance was deficient and that prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Clark also bears the burden of rebutting the strong presumption that counsel's representation was not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). When counsel's conduct can be characterized as legitimate trial strategy or tactics, it

cannot serve as the basis for a claim of ineffective assistance. State v. Day, 51 Wn. App. 544, 553, 754 P.2d 1021 (1988).

Here, Clark has not shown that conflict counsel's decisions were unreasonable in light of the evidence and arguments presented at trial. Nor does she adequately explain or demonstrate how counsel's representation resulted in prejudice. Because Clark shows neither deficient performance nor resulting prejudice, she fails to establish ineffective assistance of counsel.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Mann, A.C.J.
Acting Chief Judge

Additional material from this filing is available in the Clerk's Office.