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SUPREME COURT No.: 911029

COA NO. 312569 - III

SUPREME COURT OF WASHINGTON

MARCO PINDTER-BONILLA, Appellant,

v.

STATE OF WASHINGTON, Respondent,

Petition for Review

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I. The Petitioner & The Court of Appeals' Opinion

Marco Pindter-Bonilla was convicted in Kititas County of Unlawful Possession of a Controlled Substance and Reckless Driving. He appealed his conviction to Division III of the Court of Appeals. In an unpublished opinion, the appellate court affirmed Mr. Bonilla's convictions. A copy of this opinion is attached as Appendix A (hereinafter "Opinion").

II. Issues Presented for Review

A. Whether the Court of Appeals' decision that Mr. Bonilla could not satisfy the first prong of *Strickland* even though his trial counsel failed to investigate and raise the only viable defense to his charge of possession of a controlled substance and failed to make any showing of strategic reasons for that failure impermissibly conflicts with this Court's holdings in under this Court's decisions in *Townsend* and *Davis*.

B. Whether the Court of Appeals' decision that Mr. Bonilla had conceded knowledge and therefore would not have won on an "unwitting possession" defense conflicts with this Court's holding in *Shipp* and *Johnson*.

III. Statement of the Case

A. Brief Summary

Petitioner, Marco Pindter-Bonilla, was convicted of Unlawful Possession of MDMA (Ecstasy) and Reckless Driving. On appeal, Mr. Bonilla argued that his counsel provided ineffective assistance when, among other things, he failed to investigate—the relevant facts and/or

law—whether he could successfully mount an "unwitting possession" defense. Instead of advancing such a defense, trial counsel advanced no discernable defense to the VUCSA charge, resulting in Mr. Bonilla's automatic deportation.

In an unpublished opinion (the "Opinion"), the Court of Appeals rejected each of Mr. Bonilla's arguments and affirmed his convictions. *State v. Pindter-Bonilla* , No. 31256-9-III (Sept 30, 2014). Mr. Bonilla now submits this petition for review under Washington State Rules of Appellate Procedure ("RAP") 13.4(b)(1).

B. RELEVANT FACTS

On August 18, 2012, Mr. Bonilla, who was 18 years old, drove from his home in Everett to see his hospitalized grandfather in Eastern Washington. *Pindter-Bonilla*, No. 31256-9-III *2. On his drive back home, he stopped at a McDonald's to eat.

Mr. Bonilla would later testify that, before leaving the McDonald's parking lot, he saw a small baggie on the ground and picked it up. *Id.* Inside that baggie, was a crushed up, partial pill. Mr. Bonilla examined it and believed that the pill resembled ecstasy. *Id.*

He came to this conclusion because he had seen other kids around school with the drug before, but also testified that he had never used the

drug before. After picking up the baggie, Mr. Bonilla placed it in his pocket and continued home. *Id.*

On his way home, Washington State Patrol Trooper Jay Farmer observed Mr. Bonilla traveling at a high rate of speed in his BMW 325 on I-90. *Id.* Trooper Farmer activated his lights and pulled Mr. Bonilla over. Mr. Bonilla pulled his car to the side of the road.

Almost immediately after contacting Mr. Bonilla, Trooper Farmer arrested Mr. Bonilla, advised him of his rights, and then searched his person. *Id.* At that time, Trooper Farmer located the baggy of ecstasy. *Id.* After Trooper Farmer asked about the contents of the baggy, Mr. Bonilla told Farmer that he found it on the ground in a McDonald's parking lot and that he believed it to be ecstasy. *Id.* Trooper Farmer arrested Mr. Bonilla. Kititas County Prosecutors charged Mr. Pindter-Bonilla with Unlawful Possession of a Controlled Substance and Reckless Driving. *Id.*

At trial, Mr. Bonilla articulated that his English was not very good and, on several occasions, expressed confusion about questions that were being asked. *Id.*at 4-7. This confusion was especially noticeable when he was questioned about the crushed up ecstasy pill located in his pocket. During cross examination, for example, he stated that he knew he had ecstasy but later stated that he was going to throw it away because he "wasn't sure what it was." *Id.* at 6-7. Despite the serious impact his

statements, Mr. Bonilla's trial counsel never requested an unwitting instruction, even after trying to argue lack of knowledge during closing. *Id.* at 7-8. Of course, the State immediately objected to the argument because the defense never requested an unwitting possession instruction.

On appeal, Mr. Bonilla argued that his trial counsel was ineffective for not investigating or properly raising the unwitting possession defense. *Id.* at 10. The Court of Appeals of the State of Washington, Division III held that Mr. Bonilla had not sufficiently shown that his counsel failed to investigate the viability of the defense and therefore failed to establish the first prong of the *Strickland* analysis for ineffective assistance of counsel. *Id.* at 12.

Mr. Bonilla now seeks review of his case because the Opinion irreconcilably conflicts with various decisions of this Court.

IV. WHY THIS COURT SHOULD ACCEPT REVIEW

The Court should accept review of this petition because the Court of Appeals' decision in the present case conflicts with several decisions by this Court. In applying the first *Strickland* prong (deficient performance), the court of appeals held that Mr. Bonilla's trial counsel was not ineffective for failing to raise an unwitting possession defense. Its reasoning, however, fails to properly apply the first prong of *Strickland*, which requires trial

counsel's decisions to investigate to be reasonable in light of the relevant facts and law. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 720-33, 101 P.3d 1 (2004); *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001).

Relatedly, in holding that counsel's decision to not pursue an unwitting possession defense was reasonable, the Opinion applied Washington's "knowledge" statute in a way that conflicts with this Court's precedent set in *State v. Shipp*, 93 Wn.2d 510, 512-16, 610 P.2d 1322 (1980), and *State v. Johnson*, 119 Wn.2d 167, 174-75, 829 P.2d 1082 (1992). Applied correctly, a reasonable jury could have found that Mr. Bonilla lacked subjective knowledge of the contents of the pill under *Shipp* and *Johnson*.

Thus, because unwitting possession was Mr. Bonilla's only viable defense (to an offense that would ensure his deportation), defense counsel was ineffective for not raising it in trial. Though this Opinion is unpublished, it represents a growing trend in the law in Washington regarding both the unwitting possession defense and what is takes to prove knowledge under Washington's criminal laws. Under RAP 13.4(b)(1), this

court may therefore exercise its discretionary powers and grant review of the case to resolve these conflicts.[1]

A. THE OPINION CONFLICTS WITH *TOWNSEND* AND *DAVIS' REASONABLENESS STANDARD*

1. THE CONTROLLING TEST FOR INEFFECTIVE ASSISTANCE CLAIMS

The Sixth Amendment to the United States Constitution guarantees the right to legal counsel in criminal trials. The Washington Constitution also grants an accused, in a criminal prosecution, the right to appear by counsel. CONST. art. I, § 22. Washington courts follow the rule announced in the United States Supreme Court's seminal decision of S*trickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052 (1984). Under *Strickland*, courts apply a two-prong test, whether (1) counsel's performance failed to meet an objective standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-92.

As a general rule, in a claim of ineffective assistance of counsel, the court presumes that counsel's actions were reasonable. *Townsend*, 142 Wn.2d at 843. But, this presumption fails if no reasonable attorney would have done (or not done) what trial counsel did in a particular case. If, for

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[1] RAP 13.4(b)(1) states that "[a] petition for review will be accepted by the Supreme Court only [...] [i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court."

example, there "was no possible advantage to be gained by defense counsel's failure . . . except to increase the likelihood of petitioner's conviction," the first prong of *Strickland* is satisfied. *Id.* Similarly, counsel is deficient if trial counsel acted based upon a misunderstanding of the law, or without investigating important factual issues in the case. *Id.* at 847.

The Washington State Constitution requires that counsel's assistance be somewhere within a wide range of professionally competent assistance. *In re Davis*, 152 Wn.2d at 714. In *Davis*, this Court provided guidance as to when a decision can be assumed to reasonable. Failure to object to improper witness statements, for example, may actually be an effort to prevent placing additional emphasis on the testimony. *Id.* at 714. Similarly, a decision to waive opening statements may be geared towards hiding unfavorable facts or intended to avoid pointing out the weakness of a particular case. *Id.*at 715. Failure to object during closing argument is common "absent egregious misstatements." *Id.*at 717.

A defense attorney also has a duty to make a reasonable investigation before trial or make a reasonable decision that makes particular investigations unnecessary. *Id.* at 721. Failing to do so is particularly egregious when a defense attorney does not consider potentially exculpatory evidence. *Id.* A reasonable investigation includes investigating

all reasonable lines of defense, "especially the defendant's most important defense." *Id.* at 721.

A trial attorney who fails to consider alternate defenses constitutes deficient performance when the attorney "neither conducts a reasonable investigation nor makes a showing of strategic reasons for failing to do so." *Id.* at 722 (citing *Rios v. Bocha*, 299 F.3d 796, 805 (9th Cir. 2002)). In *Davis*, trial counsel failed to raise a critical defense. After noting the importance of that defense, this Court analyzed whether trial counsel was aware of that defense and if so, whether his decision to not pursue it was reasonable. *Id.* at 733 (stating that given various experts' conclusions and the petitioner's own refusal to adopt any defense requiring that he admit killing the victim, "defense counsel made a reasonable, informed strategic choice to forgo a mental illness defense in the guilt phase of the trial").

2. THE OPINION HELD MR. BONILLA TO AN UNFAIRLY HIGH STANDARD IN ESTABLISHING HIS INEFFECTIVE ASSISTANCE CLAIM.

The appellate court concluded that Mr. Bonilla could not establish deficient trial counsel performance under *Strickland* for failure to investigate an unwitting possession defense because the record was silent as to trial counsel's knowledge or investigation. *Pindter-Bonilla*, No. 31256-9-III *11. In doing so, the Opinion did not sufficiently consider

whether this failure could possibly fall within the "wide range of professionally competent assistance." Instead, it placed the unduly difficult burden on Mr. Bonilla to point to a record demonstrating what his counsel did not do or somehow show what his counsel knew at the time to show why the failure was unreasonable.

3. THE OPINION LOWERS THE STANDARD OF REASONABLENESS BELOW WHAT THIS COURT PERMITTED AND SENDS A MISLEADING SIGNAL REGARDING THE DUTY THAT TRIAL COUNSEL OWES TO DEFENDANTS.

By finding that Mr. Bonilla did not satisfy his burden based on the circumstances of his case, the Opinion distorts prior rulings from this Court regarding the reasonableness standard under the first prong of the *Strickland* analysis.

First, the Opinion concludes that trial counsel had no notice, actual or constructive, that the unwitting possession defense was viable. *Pindter-Bonilla* , No. 31256-9-III *13. That conclusion was based on Mr. Bonilla's statement that he "knew" the substance in the baggy was ecstasy merely because he knows other youth who take drugs. *Id.* (citing *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000)).

In other words, the court of appeals held that no reasonable juror could have found lack of knowledge because, in one statement, Mr. Bonilla claimed to know that the crushed up pill was ecstasy. This reasoning clearly

fails, however, because a reasonable juror could have rejected knowledge in light of the other evidence.

A reasonable juror could have, for example, rejected this statement based in part on Mr. Bonilla's inability to understand the word "knowledge," either because his poor language skills or his lack of understanding of the word's legal meaning. Or, a reasonable jury could have believed Mr. Bonilla's story that he has never used ecstasy himself, that he found the crushed pill on the ground, and was simply guessing that the pill was ecstasy.

In either such case, a reasonable juror could have found a lack of subjective knowledge about what substances, if any, the pill contained. Thus, if trial counsel did in fact conclude that constructive possession was *not* a viable defense, he must have rejected it based upon a lack of understanding of the facts (i.e. how Mr. Bonilla claimed to come into possession of the pill), or the applicable law (i.e. what constitutes actual knowledge under Washington Law, *see* argument below).

Second, the Opinion conflicts with this Court's determination that trial counsel, rather than the defendant him or herself, must either conduct reasonable investigation into all lines of defense or "make a showing of strategic reasons for failing to do so." *In re Davis*, 152 Wn.2d at 722. It was unfair and unrealistic to require Mr. Bonilla to show why his counsel failed

to raise the most viable and important defense. That the "record [was] silent as to what Marco Pindter-Bonilla's counsel knew and investigated" is symptomatic of the trial counsel's ineffectiveness. *Pindter-Bonilla* , No. 31256-9-III *11.

Third, the Opinion fails to appreciate why it was so important for Mr. Bonilla's case to raise an unwitting possession defense: because it was quite simply the only defense that a reasonable jury could have believed. Without an unwitting possession defense, the State proved its case, regardless of Mr. Bonilla's testimony: he did not deny possession, or that the pill actually contained ecstasy. Yet, instead of raising doubt about Mr. Bonilla's actual knowledge, trial counsel argued that trace quantities of a controlled substance did not constitute possession, a proposition the court had clearly and recently rejected. *Id.* at 12 (citing *State v. Smith*, 174 Wn. App. 359, 298 P.3d 785 (2013)).

Finally, the Opinion did not consider the pros and cons of advancing an unwitting defense under the facts of this case. Under *Davis* and *Townsend*, this is an important factor in determining whether an attorney's decision falls within the range of professionally competent assistance. *Townsend*, 142 Wn.2d at 847. If for example, raising the defense would only increase the chances of conviction, it is reasonable to reject it. If, however, raising the defense poses no risks to the defense, and its only potential effect

on the case is a possible acquittal, defense counsel should raise and argue that defense. Here, the second situation is what we have, but the court of appeals failed to realize, or even analyze it properly under *Strickland.*

B. THE OPINION APPLIES WASHINGTON'S "KNOWLEDGE" STATUTE IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENT SET IN *SHIPP* AND *JOHNSON*

1. IN WASHINGTON, A JURY CAN ONLY FIND "KNOWLEDGE" IF IT FINDS THAT THE DEFENDANT ACTUALLY AND SUBJECTIVELY KNEW THAT A PARTICULAR FACT EXISTS.

In *Shipp*, this Court held unconstitutional an instruction that created a mandatory presumption that if the jury found that the defendant had information which would impart knowledge to a reasonable person, the defendant had knowledge. *Shipp*, 93 Wn.2d at 514. This Court concluded that the a definition of constructive knowledge is constitutional only if the jury is permitted but not required to find knowledge where the defendant had information which would lead a reasonable person in the same situation to believe that the relevant facts exist. *Id.* at 516. The comparison to the ordinary person creates only an inference of subjective knowledge. *Id.* ("[t]he jury must still be allowed to conclude that [the defendant] was less attentive or intelligent than the ordinary person").

This Court reaffirmed *Shipp* in *Johnson*. In part, *Johnson* stands for the proposition that a mistaken reasonable, subjective belief may constitute

knowledge. 119 Wn.2d at 174. However, there still cannot be a mandatory presumption of knowledge based on the receipt of certain information because it would not allow a jury to take into account the subjective intelligence or mental condition of the defendant. *Johnson*, 119 Wn.2d at 174.

Shipp and *Johsnon* stand for the proposition that, to find knowledge under Washington's criminal statute, the jury must find that the defendant actually and subjectively believed that a particular fact was true.

2. The Opinion incorrectly presumed that Mr. Bonilla had sufficient knowledge based on his unchallenged statements

Here, the Opinion states that Mr. Bonilla "could not win on an unwitting possession defense" and, therefore, his trial counsel was not ineffective for failing to request the jury instruction. The appellate court based its conclusion on the fact that Mr. Bonilla testified that he "could tell right away that [the substance] was ecstasy" because he "know[s] a lot of . . . young people [at high school that] do drugs." *Pindter-Bonilla* , No. 31256-9-III *13.

3. The Opinion creates an unconstitutional distortion in the law regarding a defendant's knowledge

The Opinion relies on the statement of the defendant in the record and essentially determines that the defense "could not win on an unwitting

possession defense" as a means of finding trial counsel effective. *Pindter-Bonilla* , No. 31256-9-III *14. Mr. Bonilla's statement, however, reveal only what an objectively reasonable person might know had he made that same statement. In fact, the Opinion disregards the bulk of the evidence in the record—Mr. Bonilla had clear difficulties with the English language and he also made contradictory statements of what he "knew."

Under *Shipp* and *Johnson,* such a mandatory presumption about knowledge is unconstitutional and strips the jury of its authority to find knowledge considering evidence of objective and subjective knowledge. The Opinion also conflicts with *Johnson*'s requirement that mistaken belief may only constitute "knowledge" if it is reasonable. *Johnson,* 119 Wn.2d at 174. Mr. Bonilla's alleged admissions were premised on an illogical, non-sequitur analysis and was not reasonable.

V. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated January 20, 2014

Mitch Harrison
Attorney at Law

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. I am 18 years or older.

3. On the date set forth below, I served in the manner noted a true and correct copy of this Petition for Review on the following persons in the manner indicated below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated January 20, 2014

Mitch Harrison
Attorney at Law

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All:

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