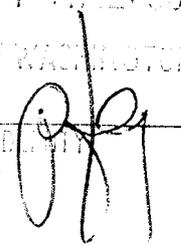


FILED  
COURT OF APPEALS  
BY

03-1-04956-7

STATE OF WASHINGTON

BY 

No: 33176-4-II

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

---

STATE OF WASHINGTON  
Respondent,

v.

ANTHONY GENE HAND,  
Appellant.

---

**OPENING BRIEF OF APPELLANT**

---

Appeal from the Superior Court of Pierce County,  
Cause No. 03-1-04956-7  
The Honorable Thomas J. Feltnagle, Presiding Judge

---

Sheri Arnold  
WSBA No. 18760  
Attorney for Appellant

P. O. Box 7718  
Tacoma, Washington 98406  
email: SLARNOLD2002@yahoo.com  
(253)759-5940

**TABLE OF CONTENTS**

	<u>Page</u>
<b>I. ASSIGNMENT OF ERROR</b> .....	1
<b>II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR</b> .....	1
<b>III. STATEMENT OF THE CASE</b> .....	1-20
<b>IV. ARGUMENT</b> .....	20-34
A. Failure of Mr. Hand’s attorney to obtain an expert to examine the signature on the November 12, 2003 Scheduling Order constituted ineffective assistance of counsel. ....	22
B. The failure of Mr. Hand’s attorneys to obtain the transcript of the November 26, 2003 hearing before trial constituted ineffective assistance of counsel. ....	24
C. The failure of Mr. Hand’s attorneys to investigate and prepare the statutory affirmative defense of “uncontrollable circumstances” constituted ineffective assistance of counsel. ...	28
1. There was evidence to suggest that Mr. Hand is impaired. ....	30
2. Counsel were aware of the evidence of impairment. ....	30
3. Evidence of Mr. Hand’s impairment was easily accessible to counsel. ....	31
4. Dr. Arenas’ testimony supported the statutory affirmative defense of uncontrollable circumstances.” ....	32

V. CONCLUSION ..... 34

**TABLE OF AUTHORITIES**

Page

**Table of Cases**

**Federal Cases**

*Douglas v. Woodford*, 316 F.3d 1079 (9<sup>th</sup> Cir.2003) . . . . . 20

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052,  
80 L.Ed.2d 674 (1984) . . . . . 14

**State Cases**

*In re Woods*, 143 Wn.2d 400, 114 P.3d 607 (2005) . . . . . 14

*State v. Carver*, 122 Wn. App. 300, 93 P.3d 947 (2004) . . . . . 19

*State v. Fredrick*, 123 Wn. App. 347, 97 P.3d 47 (2004) . . . 15, 20

*State v. Huddleston*, 80 Wn. App. 916,  
912 P.2d 1068, *review denied*,  
130 Wn.2d 322, 899 P.2d 1251 (1995) . . . . . 14

*State v. Maurice*, 79 Wn. App. 544, 903 P.2d 514 (1995) . . . . . 15

*State v. McFarland*, 127 Wn.2d 322, 334-335, 337, 899 P.2d  
1251 (1995).....21

*State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d  
816 (1987).....21

**Other Authorities**

RCW 9A.76.010 . . . . . 20

RCW 9A.76.170 . . . . . 19

**I. ASSIGNMENT OF ERROR**

Mr. Hand received ineffective assistance of counsel.

**II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did Mr. Hand receive ineffective assistance of counsel where he maintained that the signature on the November 12, 2003 Scheduling Order was not his own, but his counsel failed to obtain expert analysis of the handwriting?

2. Did Mr. Hand receive ineffective assistance of counsel where his attorney failed to obtain the transcript of the November 26, 2003 hearing in which Mr. Prince explained to the court that Mr. Hand's failure to appear on November 19, 2003 was a result of a "communication failure"?

3. Did Mr. Hand receive ineffective assistance of counsel where his attorney failed to investigate his mental health issues that might have supported an affirmative defense of "uncontrollable circumstances"?

**III. STATEMENT OF THE CASE**

***First CrR 3.5/3.6 Hearing***

Anthony Hand was charged on October 23, 2003, with one count of unlawful possession of a controlled substance committed while he was armed

with a throwing star. CP 1-3. On November 26, 2003, Mr. Hand appeared before Hon. Lisa Worswick on a motion to quash two bench warrants that had been issued for his failure to appear at an omnibus hearing on November 19, 2003, one warrant from this case and one warrant from Pierce County Case Number 03-1-03436-5. 11/26/03 RP 3.

At that hearing, defense counsel Michael Prince stood in for John Chambers, who was Mr. Hand's appointed attorney. *Id.* Mr. Prince told the court:

Good afternoon, Your Honor, Michael Prince standing in for Mr. Chambers who has jury duty today. Mr. Chambers and Mr. Hand had, I believe, set over the omnibus hearings a week on a day when Mr. Chambers was very busy with a number of things in court.

I believe there was a communication failure between Mr. Chambers and Mr. Hand. I believe Mr. Hand thought the hearing was a week later, when actually it was six days later. Mr. Chambers was able to get a hold of Mr. Hand after the hearing and set it for the next day.

Mr. Chambers and Mr. Hand regret their mistake. I would move the court to quash the warrant issued for both of these cases.

11/26/03 RP 4.

When Prosecutor Wasankari asked the court for an increase in bail in both cases (*Id.*), Mr. Prince stated:

The defense would object based on the fact that Mr. Hand is very willing to appear at his future court hearings. After speaking with Mr. Chambers on this, I believe that Mr. Chambers was just as much at fault. It seems he was running around like a chicken with his head cut off and was just caught up in everything that was going on. Mr. Hand has spoken to Mr. Chambers, expressed his desire to make sure he's doing everything. He would like the court to be aware of this fact.

11/26/03 RP 4-5.

The court did not increase bail, stating, "It sounds like there was a miscommunication, misunderstanding." 11/26/03 RP 5. The court cancelled both warrants. *Id.*

Nevertheless, on March 11, 2004, an Amended Information was filed, retaining the original charge and adding one count of bail jumping for failure to appear at the omnibus hearing on November 19, 2003. CP 9-11.

On March 17, 2004, an Order for Withdrawal and Substitution of Appointed Counsel was entered, replacing John Chambers with Adrian Pimentel. CP 14. Prosecutor Odell subsequently reported to the court that he had decided to call Mr. Chambers as a witness on the November 19, 2003 bail jump charge, which was the reason for the change of appointed counsel. *See* 5/19/04 RP 103-105.

The 3.5 hearing began on May 18, 2004 (5/18/04 RP 1-6) before Hon. Beverly G. Grant and continued on the morning of May 19, 2004. 5/18/04 RP 102. The court recessed until the morning of May 20, 2004. 5/19/04 RP 183. The Report of Proceedings on the morning of May 20, 2004 begins with the following discussion on the record:

THE COURT: We have been waiting for him for almost 30 minutes or so.

MR. ODELL: I would agree to that as well.

MR. PIMENTEL: Yes. Did you get that on the record that we have been waiting for him for 30 minutes?

Your Honor, during the recess the Court instructed me to go outside to speak to Mr. Hand so that we could speak in private because he was carrying on confidential conversations in front of the Court. We did as instructed. I went out and I spoke with him and as is consistent with the problem I have been having since the beginning of this representation, is at times Mr. hand is very lucid and then at other times he cannot process even the most simple question and does not understand what I am saying and essentially communication ends and there is no communication between us. Even though he is still speaking and while I was speaking to him outside, he said that he was going to go see his mother and bring her back here to witness what was happening in this Court. And he left about 25 to 30 minutes ago and has not returned.

THE COURT: All right. Mr. Odell.

MR. ODELL: Yes, your Honor, I would ask the Court, I am going to pass forward a motion and order asking the Court to authorize

and issue of bench warrant in 03-1-04956-7, Anthony Gene Hand is the defendant and as Mr. Pimentel has mentioned on the record, he left and has not come back.

THE COURT: Okay, I am going to sign the warrant.

5/20/04 RP 187-188.

After signing the bench warrant, the Court stated it “wanted to entertain the competency issue.” 5/20/04 RP 192. After consulting Court Rules, however, the Court stated that it did not believe that the 3.5 hearing or any discussion of competency could go forward without Mr. Hand being present. 5/20/04 RP 193.

The court concluded:

And so I do not believe that we can continue without him being present. Having said that a warrant has been issued for his arrest. And it is now 10:10 and he has not called or tried to communicate in any way with regards to his whereabouts so for now a warrant issued and until you find him, I guess you will be coming back to have the matter reheard all over again.

5/20/04 RP 193.

On June 1, 2004, Mr. Hand voluntarily returned to the courthouse. CP 43.

On June 2, 2004, Mr. Hand was taken into custody (CP 43) and an Order for Examination by Western State Hospital (15 Day Evaluation) was filed, requesting “an opinion as to the defendant’s capacity to understand the proceedings and to assist in defendant’s own defense.” CP 28-31. No request was made that Western State determine Mr. Hand’s capacity “to have the particular mental state of mind which is an element of the offense(s) charged.” CP 30.

On July 21, 2004, a forensic report regarding Mr. Hand’s competency evaluation was issued by Dr. Ronald Hart (10/20/04 RP 257), and on July 27, 2004, an Order was signed by Judge Grant decreeing that Mr. Hand was “competent to understand the present criminal proceedings against him, and to assist in his own defense.” CP 33-34.

**Second CrR 3.5/3.6 Hearing and Trial**

On September 7, 2004, a Second Amended Information was filed, modifying the charge of unlawful possession of a controlled substance to eliminate reference to being armed with a throwing star, and adding a second count of bail jumping on May 20, 2004. CP 36-37.

On October 5, 2004, Mr. Hand filed a handwritten Motion to Dismiss and Memorandum in Support of Defendant’s Motion to Dismiss “pursuant to CrR 3.3,

CrR 8.3(b) and the Speedy Trial Clauses of the State and Federal Constitutions. . . .” CP 39-53.

On October 18, 2004, the CrR 3.5/3.6 hearing took place before Hon. Thomas J. Felnagle. 10/18/04 RP 7. Judge Felnagle granted the motion for suppression of evidence of unlawful possession of a controlled substance. 10/18/04 RP 74.

On October 20, 2004, a Third Amended Information was filed, eliminating the charge of unlawful possession of a controlled substance and retaining the two counts of bail jumping. CP 79-80.

Trial to the jury on charges of bail jumping began on October 19, 2004. 10/19/04 RP 95. The State rested after presenting the testimony of Steven Trinen and Tonya Henderson. 10/19/04 RP 168.

Mr. Trinen was at that time a Pierce County deputy prosecuting attorney. 10/19/04 RP 114. Mr. Trinen explained pre-trial procedure, including signing of scheduling orders, and then was shown several documents with a signature that said “Anthony Hand,” including Plaintiff’s Exhibit No. 3, which is the November 12, 2003 scheduling order for the November 19, 2003 omnibus hearing. 10/19/04 RP 150.

Although Mr. Trinen stated that he didn't know what Mr. Hand's "true signature is" (10/19/04 RP 147) and that he had "no idea who signed them" (10/19/04 RP 151) he testified that the signatures on the documents he had been shown, including Plaintiff's Exhibit No. 3, appeared to be consistent. 10/19/04 RP 150-151.

At the time of trial, Tonya Henderson was the judicial assistant to Judge Beverly Grant. 10/19/04 RP 159. Ms. Henderson testified regarding the abortive CrR 3.5 hearing that started on May 18, 2004. 10/19/04 RP 160. Ms. Henderson testified from her minutes that Mr. Hand had been in court on May 20<sup>th</sup>, then the court recessed for three minutes, and that Mr. Hand did not come back into the courtroom after the recess. 10/19/04 RP 162.

On cross-examination, Ms. Henderson stated that there was no mention in her minutes that Judge Grant instructed Mr. Hand to come back to the courtroom (10/19/04 RP 166), and that she could not recall whether Judge Grant "actually ordered Mr. Hand to go speak to his attorney outside of the courtroom." 10/19/04 RP 167.

A defense motion to dismiss the charges of bail jumping was made following Ms. Henderson's testimony. 10/19/04 RP 168. The motion was denied.

10/19/04 RP 171.

The defense called Mr. Hand's mother, who described her observations and understanding of Mr. Hand's mental health problems, and who corroborated Mr. Hand's testimony regarding the events on May 20, 2005. 10/19/04 RP 173-192.

Mr. Hand testified that the signature on the November 12, 2003 order scheduling an omnibus hearing for November 19, 2003 (Plaintiff's Exhibit 3) was not his own (10/19/04 RP 204) and that he had no knowledge of the November 19<sup>th</sup> hearing. 10/19/04 RP 206.

Mr. Hand also testified that he had attended the November 26, 2003 hearing before Hon. Lisa Worswick in which a "business associate" of John Chambers had appeared and told the court that Mr. Hand's failure to appear on November 19, 2003 "was our office's mixup. We failed to notify the defendant of the hearing." 10/19/04 RP 208-209. Mr. Hand testified that Judge Worswick "just told me, go ahead, you can leave, and didn't raise my bail or nothing and let me leave." 10/19/04 RP 209.

Mr. Hand further testified that On May 20<sup>th</sup>, Judge Grant did not tell him to come back into the courtroom when he and his attorney were done talking, and

that he didn't return to the courtroom that day. 10/19/04 RP 217. He testified that he had an anxiety attack and was unable to return to the courtroom. 10/19/04 RP 217-219.

The defense also called Dr. Hart to testify regarding his examination of Mr. Hand at Western State Hospital. 10/20/04 RP 256. Dr. Hart testified that Mr. Hand had not been diagnosed at Western State as having a social anxiety disorder, and that his diagnoses of Mr. Hand as having methamphetamine dependency and antisocial personality disorder "in and of themselves" did not mean that Mr. Hand was incapable of controlling his behavior. 10/20/04 RP 291.

The State called John Chambers, Mr. Hand's former attorney, as a rebuttal witness. 10/20/04 RP 316. Mr. Chambers testified:

Q. Have you ever signed for the defendant on any of these scheduling orders involved in this case?

\* \* \*

THE WITNESS: I would have to look at them.

Q. All right. While I'm organizing this, is there ever a circumstance where you would sign for the defendant?

A. Yes.

Q. And how would you do that?

A. On different occasions, when you meet with the prosecutor, a date's arrived at, and if you're – if you've done it, like, on not a regular court date, sometimes you'll discuss the case – for example, this morning, we set a case for the 28<sup>th</sup>, next week. Sometimes the defendants are not present, and I would sign my name in there, and I would write, will notify the defendant, and I would time it and date it at that time. That's the only time that I would ever put anything in that signature line.

\* \* \*

Q. All right. Mr. Chambers, would you ever let any other person sign for the defendant on a scheduling order?

A. Under the circumstances that I explained earlier, if I have one of my associates, either Mr. Prince or someone, Mr. Heslop, from our office, covering that, they would sign, perhaps in that notation also, but I personally never do that, no.

11/20/04 RP 318-320.

Mr. Chambers testified that he could not recall if Mr. Hand was present on November 12, 2003 when the order scheduling the November 19, 2003 appearance was signed, and that he had no recollection of November 12, 2003.

10/20/04 RP 317.

Mr. Chambers testified that there was a signature on the defendant's signature line on the November 12, 2003 Scheduling Order and that he had not forged or written it there. 10/20/04 RP 318. On cross-examination, Mr. Chambers stated that he was not certain that the signature on the November 12, 2003 document was that of Mr. Hand. 10/20/04 RP 320.

The jury returned verdicts of guilty on both charges of bail jumping. 10/20/04 RP 373-374.

**Post-Trial**

On November 22, 2004, Mr. Hand's counsel, Stephen Oelrich, appeared before the court to express concern about the fact that there was not an order for a competency examination entered in this case even though such an order had been entered in two concurrently pending cases. 12/03/04 RP 3.

At that time, the court directed the State "to inquire of Western State

Hospital whether or not the interview – the in-person interview had been completed.” *Id.* After learning that the interview had not been completed, an order requiring a competency evaluation for this case was prepared and signed by the court on November 23, 2004. *Id.*; CP 86-89. Once again, no request was made for evaluation of Mr. Hand’s mental state, i.e., “the capacity of the defendant to have the particular mental state of mind which is an element of the offense(s) charged . . . .” CP 88.

On December 3, 2004, the court received a “Court Notification of Delay” from Western State Hospital informing the court that it was unable to submit its report for “another four weeks” and that it intended to coordinate the evaluation of Mr. Hand “for all three cause numbers,” identified as 03-1-04956-7 (this case) and two others (03-1-03436-5 and 04-1-02206-3). CP 90.

The report from Western State, signed by Indra A. Finch, Ph.D. and Sarah Leisenring, M.D., was filed with the court on January 5, 2005. CP 91-118. Under “Reason for Referral” is found the following information referring to Cause No. 03-1-03436-5:

Additionally, handwritten into court order under, “A description of the nature of the examination:” was “Evaluate as to whether

defendant has capacity/competency to distinguish between his different cases and dates he must appear for hearings” and under ‘A diagnosis of defendant’s mental condition:’ was handwritten in “Purported diagnosis of Bipolar, Social Anxiety, Paranoia by SSI Psychologist – Past Observance of Antisocial Personality Disorder.”

CP 91.

The Report also states: “On 11/23/04, we received a third order to do an evaluation for Cause No. 03-1-04956-7 [this case] but we did not receive any of the discovery,” and continues:

On that date [12/07/04], Dr. Finch left a voicemail with the prosecutor’s office to request discovery on Cause No. 03-1-04956-7, . . . as well as the copy of the SSI evaluation reference in the court order for Cause No. 03-1-03436-5. The following day (12/08/04), the undersigned requested these materials but was informed that the prosecutor’s office did not have a copy of the referenced SSI evaluation. A voicemail was then left for defense counsel, Stephen Oelrich, requesting the SSI evaluation and all

other mental health records on the defendant. As of the date of this report [12/30/04], we have not received a return call from Mr. Oelrich.

CP 92.

The Report continues:

Additional efforts were made to locate the defendant's mental health records. As stated above, the court order noted an SSI evaluation that had purportedly been completed on the defendant. This record was requested from the prosecutor and defense counsel, but not received. Mr. Hand informed us that his mother had copies of all his medical and mental health records, however, in consultation with her, I was advised that she did not have any of these records. Ms. Hand supplied the contact information for the SSI evaluation (Silverio Arenas, Ph.D.) and for Greater Lakes Mental Healthcare. Telephone messages were exchanged between Dr. Arenas and Dr. Finch (12/14/04 and 12/16/04), and Dr. Finch spoke with Dr. Arenas on 12/29/04. A copy of the court order was faxed to Dr. Arenas on 12/14/04 and 12/20/04. By the date of this

report, the SSI evaluation has not been received, although Dr. Arenas indicated that he would send it soon. In the event these materials are received after this report is submitted to the Court and the information substantially alters the opinions expressed, we shall submit an addendum to the Court.

CP 94-95.

On February 23, 2005, the combined competency hearing for all of Mr. Hand's pending cases began. 2/23/05 RP 5-6. Dr. Hart, Dr. Finch, Dr. Leisenring, and Dr. Arenas testified. 2/23/05 RP 9-51; 2/24/05 RP 53-88.

Dr. Arenas, who performed the SSI evaluation on Mr. Hand (2/24/05 RP 77), testified that Mr. Hand "suffers from a psychological/ neuropsychiatric constellation of conditions that impair judgment and his behaviors making him impulsive and unpredictable," that he suffers from a "cognitive disorder," that he has a "personality change due to organic brain dysfunction," that he has a "mood disorder, not otherwise specified with major depressive features, chronic, severe possibly related to brain dysfunction," and that he has "an anxiety disorder, not otherwise specified with generalized features, chronic, severe, possibly related to brain dysfunction." 2/24/05 RP 78-79. Dr. Arenas also testified that the anxiety

disorder from which Mr. Hand suffers is “much more severe” and “more inclusive of other things” than merely being “anxious around people.” 2/24/05 RP 80.

Although Dr. Arenas did not do a “competency examination” on Mr. Hand, he opined that “his competency is not good” and that he didn’t “think he can help his attorney to prepare any kind of defense for him. I don’t think he can really participate to any rational degree in his defense.” 2/24/05 RP 80-81.

In its oral ruling, the court stated that Dr. Arenas “never tied his assertion that Mr. Hand was – did not understand the nature of the charges against him or able to assist in his own defense, to a mental disease or defect. . . . There’s been nothing presented to me that indicates that he’s not able to assist in his own defense.” 2/24/05 RP 98. The court ruled that Mr. Hand was competent to stand trial. 2/24/05 RP 98; CP 121-122.

On March 4, 2005, new defense counsel Dana Ryan and the State appeared before Judge Felnagle and presented a joint motion for continuation of the sentencing hearing to enable Mr. Ryan to prepare a motion for new trial, which the trial court reluctantly granted. 3/04/05 RP 3-8. The Motion for New Trial was filed on March 24, 2005, “based upon the (1) failure to address the issue of a possibly forged scheduling order and (2) newly discovered evidence in the form

of a medical evaluation by Dr. Arenas which was conducted on February 3, 2003.”

CP 124. The motion was denied. 3/25/05 RP 7-8.

At sentencing, the parties agreed that the standard sentencing range was 51 to 60 months, and Judge Felnagle imposed a 55-month sentence, stating:

. . . On the one hand, I don't doubt that there was some confusion with regard to the first bail jump. On the other hand, I find it really, really, questionable to turn on your attorney and blame him for forging your signature onto a document rather than taking any degree of responsibility.

I would have been more comfortable with a defense that said “I just got mixed up, Your Honor, because of my mental illness,” but you have to throw in the fact that your attorney forged the signature and try and blame it all on him. At the same time, I recognize you do have mental health issues. I do recognize you have drug issues. I don't doubt that for a second. I don't doubt they played some role in this.

With regard to the second bail jump, I agree with the State entirely. It ratchets up the degree of concern when you're in the

midst of a trial and your explanation for it was just ludicrous, and the idea that Judge Grant told you that we were going to take a break in the trial but she didn't specifically tell you you had to come back. That's laughable, Mr. Hand. That's just totally ridiculous.

3/25/05 RP 19-20.

Notice of Appeal was timely filed on April 19 and/or April 22, 2005. CP 171-173.

#### **IV. ARGUMENT**

“Effective assistance of counsel is guaranteed by both the federal and state constitutions.” *In re Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). This Court has set forth what an appellant claiming ineffective assistance of counsel must show:

The one asserting ineffective assistance has the burden of showing it. To bear that burden, he or she must show, from the record, deficient performance plus prejudice. To show deficient performance, he or she must show that given all the facts and circumstances, counsel failed to meet an objective standard of

reasonableness. To show prejudice, he or she must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

*State v. Huddleston*, 80 Wn. App. 916, 926, 912 P.2d 1068, review denied, 130 Wn.2d 1008 (1996) (footnotes omitted), citing *State v. McFarland*, 127 Wn.2d 322, 334-335, 337, 899 P.2d 1251 91995), *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Defense counsel has “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d 674. “The presumption of counsel’s competence can be overcome . . . by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses.” *State v. Maurice*, 79 Wn. App. 544, 551, 903 P.2d 514 (1995).

In this case, at least two of Mr. Hand’s attorneys rendered ineffective assistance of counsel by failing to engage in reasonable investigation regarding (1) a signature on a scheduling order that Mr. Hand claimed was not his own;

(2) testimony at a quash hearing; and (3) Mr. Hand's mental health issues.

**A. Failure of Mr. Hand's attorney to obtain an expert to examine the signature on the November 12, 2003 Scheduling Order constituted ineffective assistance of counsel.**

Mr. Hall steadfastly maintained that he had no knowledge about the November 19, 2004 omnibus hearing and that the signature appearing on the November 12, 2004 Scheduling Order for that omnibus hearing was not his own. "[T]he knowledge element in the current statute . . . is met when the State proves that the defendant has been given notice of the required court dates." *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004), citing *State v. Carver*, 122 Wn. App. 300, 93 P.3d 947 (2004).

In this case, one of only two possible defenses against the bail jumping charge was that Mr. Hand did not "knowingly" fail to appear in court on November 19, 2003. This defense rested on whether the signature on the November 12, 2003 Scheduling Order was, in fact, that of Mr. Hand, or whether it had been placed there by someone else. A reasonably competent attorney would have obtained an expert witness to analyze the signature, for several reasons.

First, expert testimony that the signature was not that of Mr. Hand

would likely have changed the result of the trial on that charge. Second, if an expert advised counsel that the signature was indeed that of Mr. Hand, Mr. Hand's testimony that he did not sign the Scheduling Order would not have been presented. This testimony weighed heavily in the sentence imposed by the court. *See* 3/25/05 RP 19-20.

If an expert had determined that the signature on the November 12<sup>th</sup> Scheduling Order was not Mr. Hand's signature, the charge of bail jumping would have been dismissed because the State would not have been able to prove the knowledge element of the crime or the jury likely would have found him not guilty of bail jumping. No matter whether a handwriting expert would have determined that the signature on the November 12<sup>th</sup> Scheduling Order was or was not that of Mr. Hand, he was prejudiced by his counsel's failure to obtain an expert opinion.

One of Mr. Hand's several appointed attorneys, Adrian Pimental, heard Mr. Hand explain his reason for failing to appear at the November 19, 2003 omnibus hearing for "the first time" in court on May 18, 2004. 5/18/04 RP 8-11. The court admonished Mr. Pimental: "Well, you were his attorney so you will have to investigate that issue now." 5/18/04 RP 11. No such investigation

was undertaken, and no expert was obtained to determine whether the signature on the November 12, 2003 Scheduling Order was, in fact, Mr. Hand's own signature.

Nor was Mr. Pimental the only one of Mr. Hand's attorney's who rendered ineffective assistance of counsel on this issue. No investigation was conducted and no expert was obtained by Stephen Oelrich, who took over Mr. Hand's defense on August 12, 2004. CP 35.

A reasonably competent attorney would have obtained an expert to analyze the signature on the November 12<sup>th</sup> Scheduling Order, and Mr. Hand was prejudiced by his counsel's failure to do so.

**B. The failure of Mr. Hand's attorneys to obtain the transcript of the November 26, 2003 hearing before trial constituted ineffective assistance of counsel.**

Mr. Pimental knew that Mr. Hand had previously appeared in court on the issue of his failure to appear on November 19, 2003 after hearing Mr. Hand testify on May 18, 2004, yet Mr. Pimental failed to investigate even after admonishment to do so by the court. Mr. Pimental withdrew "based upon an assertion of conflict" on August 12, 2004 (CP 35), without having obtained a transcript of the November 26, 2003 warrant quash hearing. Mr. Oelrich was

appointed as Mr. Hand's counsel on August 12, 2004. CP 35.

On September 7, 2004, the court issued an Order Continuing Trial for the stated reason: "Further preparation, investigation is necessary for the adequate representation of [defendant]." CP 38. Trial was then continued until October 18, 2004 (*Id.*), which gave Mr. Oelrich an additional six weeks for trial preparation. During these six weeks, Mr. Oelrich failed to obtain the four-page transcript of the November 26, 2003 hearing. Only after both parties had rested at trial did Mr. Oelrich inform the court:

MR. OELRICH: Well, Your Honor, I've got a transcript from the November 26<sup>th</sup> hearing on its way to me, and that may or may not create an issue.

THE COURT: Would that have anything to do with further testimony so we needed the jury back at 1:30?

MR. OELRICH: It might, Your Honor. And I'd like to –

THE COURT: Would you catch the jury and tell them to come back at 1:30?

MR. OELRICH: I apologize, Your Honor, but it's an issue that I have to look at and read.

\* \* \*

MR. OELRICH: I might be calling – recalling John Chambers to testify as to what transpired at the bail hearing on November 26<sup>th</sup>.

10/20/04 RP 324-325.

After the noon recess, the court asked if the parties were ready to proceed. 10/20/04 RP 327. Mr. Oelrich stated:

Your Honor, I'd just like to state that I have spoken with Mr. Chambers beforehand. The nature of – I was going to ask him if he recalled what transpired around the warrant quash hearing, and even in reviewing an excerpt of the transcript, Mr. Chambers doesn't recall. So, it will be pointless to put him on the stand, and so, at this point, I am just going to rest. We are going to have to proceed without any surrebuttal.

10/20/04 RP 327.

It is not surprising that Mr. Chambers didn't recall the warrant quash hearing, because he was not present at the hearing: Mr. Prince stood in for Mr. Chambers, who "ha[d] jury duty" that day. 11/26/03 RP 3. Had Mr. Oelrich

obtained the four-page transcript of the warrant quash hearing during the pretrial period, he would have learned that Mr. Chambers was not in attendance that day. Mr. Oelrich would have discovered that it was Mr. Prince who attended the November 26, 2003 hearing. Mr. Prince could have been called to testify and to support Mr. Hand's defense that he lacked any knowledge of the November 19, 2003 hearing.

Mr. Oelrich knew the charges against Mr. Hand consisted of bail jumping, and he knew, as did Mr. Pimental, that Mr. Hand had previously appeared before the court to have quashed the warrant that had been issued for his failure to appear on November 19, 2003.

As noted by this Court in *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004), the state must "prove only that [Hand] was given notice of his court date. . . ." A reasonably competent attorney would have obtained a copy of the November 26, 2003 transcript (not merely an "excerpt" of the four-page transcript) during the pretrial period in order to prepare Mr. Hand's defense of lack of knowledge.

The failure of two of Mr. Hand's attorneys to obtain the November 26, 2003 transcript could not possibly be considered "trial strategy." Their failure to

obtain the transcript to support the defense against the November 19, 2003 bail jump constituted ineffective assistance of counsel.

**C. The failure of Mr. Hand's attorneys to investigate and prepare the statutory affirmative defense of "uncontrollable circumstances" constituted ineffective assistance of counsel.**

RCW 9A.76.170(2) provides:

It is an affirmative defense to prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

"Uncontrollable circumstances" are defined in RCW 9A.76.010(4), and include, inter alia, "a medical condition that requires immediate hospitalization or treatment . . . ."

"The defense provided in the statute relates to the defendant's inability to attend the date to which [ ]he has been previously given notice." *Fredrick*, 123 Wn. App. at 353, 97 P.3d 47. In *Fredrick*, this Court ruled that merely being "sick" where the defendant presented "no evidence that she was in the hospital

because she was sick **or any other similar barrier to her attendance,**” did not constitute “uncontrollable circumstances.” *Fredrick*, 123 Wn. App. at 352, 97 P.3d 47 (emphasis added).

This statutory affirmative defense should have been raised to the charge of bail jumping on May 20, 2004 because on that date, Mr. Hand had an “anxiety attack” and was unable to go back into the courtroom. Evidence regarding Mr. Hand’s mental health was available through the testimony of Dr. Arenas and Mr. Hand’s other existing mental health records.

“Trial counsel has a duty to investigate a defendant’s mental state if there is evidence to suggest that the defendant is impaired.” *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9<sup>th</sup> Cir.2003) (defendant claimed that attorney failed to uncover evidence of a prior mental health evaluation that suggested the defendant suffered from serious mental problems that would have made him incompetent to stand trial). Here, Dr. Arenas’ report and testimony would have supported both Mr. Hand’s incompetency to stand trial as well as an argument that Mr. Hand’s mental problems created “uncontrollable circumstances” that prevented him from returning to court on May 20, 2004.

1. There was evidence to suggest that Mr. Hand is impaired.

On May 18, 2004, Mr. Pimental expressed his concern “about competency issues” to the court. 5/18/04 RP 12. On May 19, 2004, Mr. Hand stated to the court that he had been “diagnosed with social anxiety disorder,” that he had “been seen by a psychiatrist and . . . ha[d] . . . SSI help[.]” 5/19/04 RP 103. On May 20, 2004, Mr. Pimental told the court that “at times Mr. Hand is very lucid and then at other times he cannot process even the most simple question and does not understand what I am saying and essentially communication ends and there is no communication between us.” 5/20/04 RP 187-188. On that same date, the court expressed its desire to entertain “the competency issue.”

2. Counsel were aware of the evidence of impairment.

In the Forensic Mental Health Report filed by Western State Hospital on January 5, 2005, the author states that on the Order received in Case Number 03-1-03436-5 “was handwritten in ‘Purported diagnosis of Bipolar, Social Anxiety, Paranoia by SSI Psychologist – Past Observance of Antisocial Personality Disorder.’” According to the LINX docket report on Pierce County Case Number 03-1-03436-5, the Order for a competency examination was filed on June 2, 2004, at which time Mr. Pimental was still acting as Mr. Hand’s attorney. Mr. Pimental

thus had knowledge of potential serious mental health issues that might support the statutory affirmative defense of uncontrollable circumstances. Yet Mr. Pimental failed to obtain Mr. Hand's mental health records or contact Dr. Arenas.

Mr. Oelrich, who took over as Mr. Hand's attorney on August 12, 2004, also had knowledge of this issue before trial, yet he failed to obtain copies of Mr. Hand's mental health records or to contact Dr. Arenas.

3. Evidence of Mr. Hand's impairment was easily accessible to counsel.

The author of the Western State Forensic Mental Health report stated that Mr. Hand's mother supplied the contact information for Dr. Arenas as well as for Mr. Hand's other medical records. CP 95.

A simple inquiry to Mr. Hand's mother would have revealed to Mr. Pimental and/or Mr. Oelrich all information needed to contact Dr. Arenas and collect Mr. Hand's mental health records. Neither attorney investigated the information supplied by Mr. Hand about his previous diagnosis, and the jury never heard Dr. Arenas' testimony, from which they might have inferred that "uncontrollable circumstances" existed on May 20, 2004.

Even after Mr. Oelrich raised the issue post-trial, he did not respond to Western State Hospital's phone message. The Forensic Mental Health Report

states that on 12/08/04, “[a] voicemail was then left for defense counsel, Stephen Oelrich, requesting the SSI evaluation and all other mental health records on the defendant. As of the date of this report, we have not received a return call from Mr. Oelrich.” CP 92. The date of the Report is 12/30/04. CP 91-118.

4. Dr. Arenas’ testimony supported the statutory affirmative defense of “uncontrollable circumstances.”

On January 18, 2005, Dana Ryan was substituted for Mr. Oelrich. CP 119. Dr. Arenas was contacted by Mr. Ryan and testified by telephone at Mr. Hand’s competency hearing on February 24, 2005.

Dr. Arenas testified that Mr. Hand “suffers from a psychological/neuropsychiatric constellation of conditions that impair judgment and his behaviors making him impulsive and unpredictable,” that he suffers from a “cognitive disorder,” that he has a “personality change due to organic brain dysfunction,” that he has a “mood disorder, not otherwise specified with major depressive features, chronic, severe possibly related to brain dysfunction,” and that he has “an anxiety disorder, not otherwise specified with generalized features, chronic, severe, possibly related to brain dysfunction.” 2/24/05 RP 78-79.

Failing to investigate Mr. Hand’s mental health issues of which the

attorneys were both aware and which might have supported an affirmative defense to the charge of bail jumping, cannot be described as “trial strategy”: it was simply substandard performance by two separate attorneys.

The failure to investigate Mr. Hand’s mental health issues was prejudicial to Mr. Hand. During closing argument, the prosecutor stated that “the one expert that the defense brought into court,” referring to Dr. Hart from Western State Hospital, did not support their claim” (10/20/04 RP 347), and that “anxiety alone, does not equal lack of control over your own behavior.” (10/20/04 RP 348). The prosecutor further argued that Mr. Hand didn’t voluntarily come back to court until June 2<sup>nd</sup>, even though Mr. Hand testified that the anxiety diminished by the afternoon of May 20. 10/20/04 RP 349.

However, as Dr. Arenas testified and wrote in his report, Mr. Hand’s mental conditions are not only severe, but are permanent. CP 131-138 (Mr. Hand is in need of life-long mental services); 3/24/04 RP 78-87 (Mr. Hand suffers from a “psychological/neuropsychiatric constellation of conditions” that impair both his judgment and his behavior). Dr. Arenas’s testimony may have convinced the jury that the statutory affirmative defense of “uncontrollable circumstances” applied to Mr. Hand’s May 20, 2004 failure to return to the courtroom.

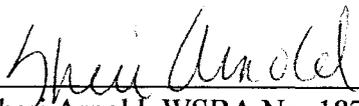
Two of Mr. Hand's attorneys failed to follow-up or investigate Mr. Hand's mental health issues – of which they both had knowledge – even though such mental problems would have supported the statutory affirmative defense. The evidence of Mr. Hand's serious mental health problems was readily and easily available to them, yet they did nothing to obtain it. Mr. Hand received ineffective assistance of counsel, and the errors were so serious as to deprive Mr. Hand of a fair trial.

**V. CONCLUSION**

The Court should reverse and dismiss the bail jumping charges against Mr. Hand because he received ineffective assistance of counsel that deprived him of a fair trial.

DATED this 5<sup>th</sup> day of February, 2006.

Respectfully submitted,

  
\_\_\_\_\_  
Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 1st, 2006 she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, WA. 98402, and by U.S. mail to and appellant, Anthony G. Hand, DOC # 705628, Washington State Penitentiary, 1313 North 13<sup>th</sup> Ave., Walla Walla, Washington 98362, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on February 1st, 2006

Norma Kinter  
Norma Kinter

FILED  
COURT OF APPEALS  
DIVISION III

06 FEB - 1 PM 12:56

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY