

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41556-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
OF
DANIEL MARSHALL AGUIRRE,
Petitioner.

REPLY BRIEF

Sheryl Gordon McCloud
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Petitioner,
Daniel Marshall Aguirre

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I. INTRODUCTION

The state's Response argues that defense trial counsel did discharge his duty to transmit the plea offer to Mr. Aguirre. Response, pp. 5-6. It continues that Mr. Aguirre might not have understood that plea offer's significance, but that would have been due to Mr. Aguirre's own deficits – the mental and emotional problems that he returned home with, from Iraq – rather than due to his lawyer's deficits. Response, p. 7 (“Perhaps these symptoms affected Aguirre's ability to understand or remember information. If that was the case, that cannot be blamed on his trial counsel.”). Even if this view of the facts is correct, relief is still warranted: defense trial counsel has a duty to transmit not just the plea offer, but its consequences and its significance, to the client, in a way that the client can understand, so that the client can make an informed decision about whether to accept or reject that offer. Thus, if the offer was transmitted as the state claims it was, in a way that left Mr. Aguirre unable to appreciate its significance – particularly the fact that it relieved him of exposure to life in prison – relief is still warranted.

Section II.

If this Court does not believe that relief is warranted based on Mr. Aguirre's now unchallenged assertion that he did not understand

the consequences of the plea, we are left with a material factual dispute over whether the plea was transmitted to Mr. Aguirre effectively or not. The only way to resolve that factual dispute is with an evidentiary hearing. The state appears to agree. Response, p. 8. Section III.

The state next argues that each bit of new evidence gleaned from Mr. Aguirre's Army Separation Hearing was insufficient to meet Washington's newly discovered evidence standard. Its Response argues that the evidence might have post-dated the trial, but it contradicted the complainant's trial testimony in only minor respects and it was merely impeaching, rather than substantive. Response, pp. 10-12. The state, however, fails to consider the cumulative effect of all of these new and different Laughman statements. It also downplays the most important new statement, that is, Laughman's statement that she and Aguirre both wanted to break up at the time of the alleged rape. That new statement undermines the state's entire theory of the case (though the state disputes this point). Response, p. 13. And an admission that undermines the state's entire theory of the case, and reveals the supposed victim's own bias, is evidence of bias – and evidence of bias is always admissible. The newly discovered evidence was

therefore relevant, admissible, substantive and not solely impeaching, and, hence satisfies the test for newly discovered evidence warranting reversal. Section IV.

Finally, the state claims that Mr. Aguirre's character and circumstances – the matters that trial counsel failed to bring to the sentencing court's attention – are irrelevant. It asserts that sentencing must be based on the crime of conviction, and, basically, that is all. That notion, however, completely contradicts not just the general purposes of sentencing but the specific goals of the SRA, which include "proportionate punishment" and consideration of not just the "seriousness of the offense" but also the "offender's criminal history"; and which mandate that the court "[p]romote respect for the law by providing punishment which is just." The U.S. Supreme Court has interpreted sentencing goals just like these to require consideration of the defendant's individual history and circumstances. Defense counsel's failure to bring that mitigating history to the sentencing court's attention therefore constituted deficient performance. Section V.

II. THE STATE ARGUES THAT TRIAL COUNSEL DISCHARGED HIS DUTY TO TRANSMIT THE PLEA OFFER TO MR. AGUIRRE BUT ACKNOWLEDGES THAT MR. AGUIRRE DID NOT UNDERSTAND ITS SIGNIFICANCE DUE TO HIS OWN MENTAL AND EMOTIONAL DEFICITS; EVEN IF THIS IS CORRECT, RELIEF IS STILL WARRANTED

The state agrees that trial counsel had a duty to transmit both the plea offer and its significance to Mr. Aguirre. Response, p. 5. It seems to agree that the most significant fact about that plea offer is that it allowed Mr. Aguirre to avoid exposure to lifetime imprisonment. Response, p. 5. It argues, instead, based on an affidavit from trial counsel, that the plea offer was transmitted to Mr. Aguirre. Response, pp. 5-6.

The state, however, continues that there may be no true factual conflict. It takes the position that Mr. Steele did transmit the plea offer to Mr. Aguirre, but that if Mr. Aguirre was unable to grasp its significance, that was because of Aguirre's own severe mental deficits plaguing him upon return from Iraq (and memorialized in his Army medical records, attached as Appendix L to the Declaration of Appellate Counsel Sheryl Gordon McCloud). Response, p. 7 (asserting that Mr. Steele transmitted the plea offer to Mr. Aguirre, and if Mr. Aguirre did not understand it, it was because of his own deficits not his lawyer's ineffectiveness).

Since the state appears to accept the PRP's factually-supported allegations about Mr. Aguirre's mental and emotional deficits upon return from Iraq, and apparently acquiesces in Mr. Aguirre's claim that he did not understand the consequences of the plea that the prosecutor offered (regardless of whether the offer was transmitted to him or not), the *Rice* decision requires that those un rebutted allegations must now be taken as true.¹

Those allegations alone require relief, even without an evidentiary hearing. The reason is that a defense lawyer must provide the client with enough information and accessible advice about the consequences of pleading guilty versus going to trial that the client can make an informed decision. As the Court explained in *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010), "Counsel has a duty to assist a defendant in evaluating a plea offer." (Numerous citations omitted).

If the client is unable to understand the advice, it is not accessible; it does not enable the client to "evaluat[e] the plea offer" and make an informed decision; and hence it is not effective transmission of the plea agreement's significance. *State v. Holm*,

¹ *In re the Personal Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992).

91 Wn. App. 429, 435, 957 P.2d 1278 (1998) (attorney must provide “sufficient information to enable the client to make an informed judgment whether or not to plead guilty”), *review denied*, 137 Wn.2d 1011, 978 P.2d 1098 (1999). *Accord In re the Personal Restraint of McCready*, 100 Wn. App. 259, 263-64, 996 P.2d 688 (2000) (“failure to advise a defendant of the available options and possible consequences during plea bargaining constitutes ineffective assistance of counsel.”). *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987) (attorney has ethical obligation to discuss plea negotiations with his client).

Thus, even if the state’s view of the facts is correct, relief is warranted. It seems undisputed that Mr. Aguirre did not have “sufficient information to enable [him] to make an informed judgment whether or not to plead guilty.”

III. THE STATE AGREES THAT TRIAL COUNSEL HAD A DUTY TO TRANSMIT BOTH THE PLEA OFFER AND ITS SIGNIFICANCE TO MR. AGUIRRE; THE ONLY WAY TO RESOLVE THE FACTUAL CONFLICT OVER WHETHER THAT OCCURED IS WITH A REFERENCE HEARING

The state argues, alternatively, that Mr. Aguirre really did know about the plea and appreciate its significance. The Response bases this argument on an affidavit from trial counsel that the plea offer and

its full significance were transmitted to Mr. Aguirre. Response, p. 6.

If this Court does not grant relief based on what seems to be the undisputed fact that Mr. Aguirre really did not understand the consequences and significance of any plea offer, then it is left with a conflicting set of material facts on whether the plea offer was transmitted at all. Under the controlling authority of the state Supreme Court's decision in *Rice*, this factual dispute – over whether the plea and its full significance were transmitted – must be resolved with a reference hearing.²

The state claims that this might not be necessary, because according to trial counsel Mr. Steele, Mr. Aguirre insisted that he was innocent and would not take a deal. But even if Mr. Steele's assertions are credited, a criminal defendant's protestations of innocence are not conclusive in this context. They are a factor to consider in determining whether the failure to provide sufficient advice and counsel caused prejudice; but they are not the only factor. See *Mask v. McGinnis*, 233 F.3d 132, 142 (2d Cir. 2000), *cert. denied*, 534 U.S. 943 (2001); *Cullen v. United States*, 194 F.3d 401, 407 (2d Cir. 1999) (“Though Cullen's insistence on his

² *In re the Personal Restraint of Rice*, 118 Wn.2d 876, 886.

innocence is a factor relevant to any conclusion as to whether he has shown a reasonable probability that he would have pled guilty, it is not dispositive.”).

Hence, as discussed above, if this Court does not grant relief based on the fact that Mr. Aguirre did not understand the significance of any plea offer, then it is left with a conflicting set of material facts that must be resolved with an evidentiary hearing.

IV. THE STATE ARGUES THAT THE COMPLAINANT'S NEW TESTIMONY IS NOT MATERIAL OR SUBSTANTIVE BUT IMPEACHING; SINCE IT IS EVIDENCE OF BIAS, HOWEVER, IT IS SUBSTANTIVE AND MATERIAL

The state continues by arguing that the complainant's new testimony at the Army separation hearing is not material and not substantive, but solely impeaching. Response, pp. 10-12.

It is true that in order to obtain a new trial based on newly discovered evidence, the evidence must be material; it would have to “probably” change the result of the trial; it cannot be “merely” cumulative or impeaching; and it must be evidence that could not have been discovered before the trial, even with the exercise of “due diligence.”³ It is also true that some of the conflicts between

³ See also *In re the Personal Restraint of Benn*, 134 Wn.2d 868, 886, 952 P.2d 115 (1998); *State v. Swan*, 114 Wn.2d 613, 641-42,

Ms. Laughman's trial testimony and her Separation Hearing testimony, alone, were minor.

The state, however, argues that each bit of new evidence gleaned from that Separation Hearing was insufficient – when considered *separately* – to meet Washington's newly discovered evidence standard. The state thus fails to consider the cumulative effect of all of these new and different Laughman statements.

It also downplays the most important piece of new evidence.

That is the fact that at the Separation Hearing, Ms. Laughman admitted for the first time that both she and Mr. Aguirre wanted to end the relationship: "Q: 'Well, he, in fact, wanted to break off the relationship, right?' A: 'We both did.'" Separation Hearing Transcript, p. 46.

The Response contends that this is irrelevant, and that who dumped whom had nothing to do with the trial. Response, p. 13 ("Nothing in the record reflects any claim or argument by the State that Aguirre's jealousy or frustration about the victim's desire to end the relationship motivated the crimes.").

This is incorrect. In fact, Ms. Laughman's new admission

790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

that they both wanted to end the relationship was a critical admission, because if both Aguirre and Laughman wanted to break up, then Aguirre had no reason to try to dominate Laughman to intimidate her into staying with him. But that formed the entire basis for the state's case at trial: the state's theory of the case was that Aguirre and Laughman had been romantically involved, that Laughman wanted to leave, and that Aguirre began trying to dominate her and limit her outside contacts to keep her with him.

This is clear from the state's argument, at trial, that Ms. Laughman was trying to break off the relationship and the whole alleged violent incident was prompted by her threats to leave Aguirre, while the defense argued that Mr. Aguirre actually broke off the relationship right after they had sex and that might have prompted Ms. Laughman's allegations. 2/15/07 VRP:890-902 (state closing, arguing key issue of credibility throughout, and attempting to credit alleged victim Ms. Laughman as the more credible witness); *id.*, VRP:926-30 (defense closing, attacking victim's credibility, and explaining defense theory that after the sex, Aguirre essentially broke up with Laughman – leaving her feeling used and upset, and prompted to report that Aguirre acted illegally rather than just acting like a jerk).

This was also clear from the trial testimony of both Emily Laughman and Daniel Aguirre. They were both in the Army. They were both trained in combat, and they both held difficult jobs requiring knowledge of the use of force: she was in the military police and had been a guard at both Fort Leavenworth and Guantanamo Bay (2/13/07 VRP:325-26); he had served in Iraq and currently taught hand to hand combat to soldiers (including Laughman) at the NCO Academy. *Id.*, VRP:327-28. At trial, the state elicited testimony from Ms. Laughman that Mr. Aguirre was overprotective and jealous of her, that he tried to limit her contact with peers, 2/13/07 VRP:332-33, *id.*, 393-401, and that he made threats about what he would do to her if she left him. *Id.*, VRP:347-48 (describing Aguirre's supposed threats to her, with the combat knife, to never leave him or break the "circle of trust"). It elicited Ms. Laughman's testimony that Mr. Aguirre had an anger problem, even though he took medication to control his anger, and that his anger, agitation, and jealousy of Ms. Laughman supposedly exploded on the evening of August 26-27 into a series of physical attacks on her, and then forced sex in his bedroom. *Id.* VRP:337-51. The new evidence contradicts all this, because Ms. Laughman's new statement at the Army Separation Hearing shows

that their decision to break up was mutual – not that Mr. Aguirre was doing everything he could, including violence and rape, to prevent it.

That challenges the heart of the state's case, because it undermines its theory about Mr. Aguirre's supposed motive. And evidence that undermines the defendant's supposed motive, the defendant's supposed jealousy, and hence the defendant's supposed impetus for committing a crime of sexual domination against a female victim, by revealing that the complainant fabricated accusations of jealousy and domination, is evidence of her bias.

As discussed in the Opening Brief, evidence of bias is always admissible. "Bias" includes various factors that can cause a witness to fabricate or slant testimony, such as prejudice, self-interest, or ulterior motives. See *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."⁴

⁴ *Id.* at 316-17. See also *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, review denied, 79 Wn.2d 1008

The newly discovered evidence was therefore relevant to bias, admissible, substantive and not solely impeaching, and, hence satisfies the test for newly discovered evidence warranting reversal.

V. THE STATE'S CLAIM THAT THE DEFENDANT'S CHARACTER AND CIRCUMSTANCES ARE IRRELEVANT TO SENTENCING MUST BE REJECTED – IT WOULD TOTALLY STRIP THE TRIAL COURT OF DISCRETION AND THE DEFENDANT OF INDIVIDUALITY

The Response does not challenge any of the facts presented regarding sentencing. It apparently acquiesces in Mr. Aguirre's showing that he served honorably in the U.S. Army, including a tour of duty in Iraq, and that he suffered greatly from his service because of the violence he experienced, the friends he lost in combat, and the emotional toll of his service, especially as a sniper. It does not dispute the fact that Mr. Aguirre served with distinction, exhibited leadership skills, achieved promotions, and was recognized with numerous awards including the Purple Heart. It agrees that his service left him with severe physical, mental and emotional scars.

(1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility."); 5A Karl B. Tegland, WASHINGTON PRACTICE § 607.7 at 320 (5th ed.) ("the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses").

The Response argues instead that this history of service and sacrifice is not a mitigating factor for purposes of sentencing but an aggravating factor. Response, p. 20.

That argument contradicts not just case law, but common sense and decency. In fact, a history of military service – including the portions of it that are terrifying, distasteful, and a source of emotional stress, but honorable nonetheless – is clearly mitigating, rather than aggravating. The U.S. Supreme Court recognized the mitigating effect of such military service as well as the toll it takes on the soldier in a combat zone as recently as a year and a half ago. That Supreme Court decision specifically recognized that a criminal defendant's history of such honorable military service that causes the defendant to suffer from physical and emotional ailments is a mitigating rather than an aggravating factor:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines, as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find *mitigating the intense stress and mental and emotional toll that combat took on Porter*.⁵

⁵ *Porter v. McCollum*, 558 U.S. ___, 130 S.Ct. 447, 455, 175 L.Ed.2d 398 (2009) (citing Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 Soc. Serv. Rev. 212, 232-234 (1927) (discussing the

(Emphasis added.)

The state's position to the contrary – that Mr. Aguirre's honorable and dangerous military service might well be considered an aggravating factor rather than a mitigating one, especially because of the severe physical and emotional scars it left on Mr. Aguirre – flatly contradicts this U.S. Supreme Court precedent.

It also contradicts common sense. A history of honorable service in a war zone which is so stressful and dangerous that it causes lasting injuries is something that other Americans must honor, not disdain.

The state's only other argument is that this evidence about Mr. Aguirre's background, service, and service-related injuries, is irrelevant. The Response claims that “[a] sentence is supposed to reflect the seriousness of the crime” and nothing else. Response, p. 19. Hence, evidence about the defendant's social history, service to country, and physical and mental impairments resulting from such honorable duties, are totally irrelevant. *Id.* Instead,

movement to pardon or parole prisoners who were veterans of the Civil War); and Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. Crim. L. & C. 722, 733-734 (1940) (describing a 1922 study by the Wisconsin Board of Control that discussed the number of veterans imprisoned in the State and considered “the greater leniency that may be shown to ex-service men in court.”)).

according to the Response, the crime of conviction is the only thing that matters. *Id.*

This position contradicts not just the general purposes of sentencing but the specific goals of the SRA, which include “proportionate punishment” and consideration of not just the “seriousness of the offense” but also the “offender’s criminal history”; and which mandate that the court “[p]romote respect for the law by providing punishment which is just.” RCW 9.94A.010 (1)-(2). The U.S. Supreme Court has interpreted sentencing goals just like these – proportionality, justice, and consideration of not just the instant crime but also prior history of the offender – to require consideration of the defendant’s *individual history and circumstances*, including his social history and the obstacles that he has had to overcome. See, e.g., *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) (downward variance to sentence of probation upheld where based largely on defendant’s self-rehabilitation); *United States v. McFarlin*, 535 F.3d 808 (8th Cir. 2008) (downward departure to sentence of probation not unreasonable in part because of post-offense rehabilitation).

In fact, the Supreme Court’s most recent decision on this topic holds that given the goals of the federal Sentencing Guidelines –

which are similar to the SRA's goals of proportionality in sentencing, promoting respect for the law, and consideration of the crime and the offender – sentencing courts must consider any steps that the defendant has taken to overcome past problems and move towards rehabilitation. *Pepper v. United States*, ___ U.S. ___, 131 S.Ct. 1229, 1242, 179 L.Ed.2d 196 (2011) (“[E]vidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of postsentencing rehabilitation may plainly be relevant to ‘the history and characteristics of the defendant.’ 18 U.S.C. § 3553(a)(1). Such evidence may also be pertinent to ‘the need for the sentence imposed’ to serve the general purposes of sentencing set forth in § 3553(a)(2) – in particular, to ‘afford adequate deterrence to criminal conduct,’ ‘protect the public from further crimes of the defendant,’ and ‘provide the defendant with needed educational or vocational training ... or other correctional treatment in the most effective manner.’ §§ 3553(a)(2)(B)–(D). ... Postsentencing rehabilitation may also critically inform a sentencing judge’s overarching duty ... to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the sentencing purposes set forth in § 3553(a)(2)”).

Defense counsel's failure to bring Mr. Aguirre's war-time performance, its scars, and the serious steps he has taken to deal with it all through positive institutional performance and medications – basically, his mitigating history – to the sentencing court's attention constituted deficient performance.

VI. CONCLUSION

For the foregoing reasons, the PRP should be granted, the convictions should be vacated, and Mr. Aguirre should be given a chance to plead to the same deal he was previously offered. Alternatively, the matter should be remanded for resentencing.

DATED this 16th day of May, 2011.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA #16709
Attorney for Petitioner, Daniel Aguirre

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

I certify that on the 16th day of May, 2011, a true and correct copy of the foregoing Reply Brief was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Carol LaVerne
Jon Tunheim
Thurston County Prosecutor's Office
2000 Lakeridge Dr. SW, Bldg 2
Olympia, WA 98502-6045

Daniel Aguirre, DOC #303570
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520



Sheryl Gordon McCloud