

**NO. 45348-7-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**In Re the Personal Restraint**

**of**

**DERON ANTHONY PARKS,**

**Petitioner.**

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

Petitioner is entitled to relief under RAP 16.4 because trial counsel's failure to interview and call three exculpatory witnesses denied petitioner effective assistance of counsel under Washington Constitution, Article 1, § 22, and under United States Constitution, Sixth Amendment.

### ***Issues Pertaining to Assignment of Error***

Does a trial counsel's failure to interview and call three exculpatory witnesses a defendant identifies deny that defendant effective assistance of counsel when the jury more likely than not would have acquitted the defendant had the jury heard the testimony of the three witnesses?

## STATEMENT OF THE CASE

### *Factual History*

On October 1, 2009, Vancouver Police Officer Sandra Aldridge responded to a 911 call in which Deborah Thomas claimed that about 10 months previous her son Christopher Thomas had been sexually assaulted. RP 97<sup>1</sup>. At the time, Christopher, who was born on January 1, 1993, was incarcerated in the Clark County Juvenile Detention facility on allegations that he had violated his probation from his most recent convictions for second degree assault and taking a motor vehicle without permission. RP 87. After receiving this report, Officer Aldridge went to the Juvenile Detention facility to speak with Christopher. RP 98. Initially, Christopher believed that Officer Aldridge was there to interrogate him about a burglary he, his brother Zach Thomas and their friend Tim Delisle had committed at the petitioner Deron Parks' house. RP 86-87.

The burglary of the petitioner's house had occurred on February 17, 2009, and the petitioner reported it to the police upon discovering what had happened. RP 55-56. The day after making his initial report, the petitioner again contacted the police and told them that a neighbor had reported hearing

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<sup>1</sup>“RP” refers to the verbatim report of the jury trial held in this case on October 4, 2010, and October 5, 2010. “RH” refers to the continuously numbered verbatim reports of the reference hearings held on September 23, 2015, and October 23, 2015.

breaking glass the previous day and had seen two young men leaving the petitioner's house. *Id.* The neighbor further reported having seen these two young men at the petitioner's house on previous occasions. *Id.* The petitioner went on to tell the police that based on this information, he had walked down to a local skate park, and had confronted "Scottie" and "Tim," and they admitted committing the burglary. *Id.* According to the petitioner, Christopher Thomas was also one of the young men he confronted at the skate park, and Christopher Thomas, along with the others, had threatened to "mess up his life" if he reported the burglary. RP 108-109.

Once Officer Aldridge explained to Christopher Thomas that she was there to talk about an alleged sexual assault with him as the victim and not about the burglary of the petitioner's house, Christopher Thomas made his first claim to the police that the petitioner had raped him. RP 98-99. According to Christopher, this assault occurred late one evening in either December of 2008 or 2007, after he had gone to celebrate his birthday at the house of a friend of the petitioner's know to Christopher as "T." RP 65-68. Christopher claimed that the petitioner and two females were present, that the petitioner had given him beer, that he had drank too much and passed out, and that he had awoken to find the petitioner anally raping him. RP 68-71. Christopher went on to claim that once he woke up, he went to the bathroom to urinate, that when he came out the petitioner was gone, and that he had

then run home. RP 78-79. Finally, Christopher claimed that a few weeks later he told his brother's girlfriend Mariah Flenory what happened, that she had later told her mother, and that his claims had eventually made it to the police. RP 81-82. Based upon Christopher's claims, Officer Aldridge also interviewed Mariah Flenory, as well as a number of other potential witnesses. RP 98.

### ***Procedural History***

By information filed July 29, 2010, the Clark County Prosecutor charged the petitioner Deron Anthony Parks with one count of second degree rape against Christopher Thomas and one count of furnishing liquor to a minor. CP 1-2. The state also charged the petitioner with indecent liberties without forcible compulsion against Tim Delisle and delivering a narcotic drug to Tim Delisle. *Id.* However, the court dismissed these latter two charges at the beginning of the jury trial in this case when Tim Delisle appeared pursuant to the prosecutor's subpoena, took the witness stand outside the presence of the jury and denied that the petitioner had ever given him drugs or touched him in a sexual manner. RP 11-28.

Following the dismissal of the two counts involving Tim Delisle (II and III), the case proceeded to trial before the jury, with the state calling four witnesses: Mariah Flenory, Detective Barry Folsom, Christopher Thomas, and Officer Sandra Aldridge. RP 29, 47, 60, 94. These witnesses testified

to the facts included in the preceding factual history. *See* Factual History.

After the close of the state's case, the petitioner took the stand on his own behalf and denied ever giving alcohol to Christopher Thomas or to ever touching him in a sexual manner. RP 102-118. He did testify that he had been present at his friend Tyler's house in December of 2008 on an occasion in which Christopher Thomas came over during the evening. RP 110-111. However, he denied seeing Christopher drink any alcohol, and he stated that when he left, Christopher and a number of other people were still present in the living room. *Id.*

After the close of the petitioner's case, the state called Christopher Thomas for brief rebuttal. RP 120-121. The court then instructed the jury without objection from either party, and parties presented their closing arguments. RP 122, 123-135, 135-148. Following deliberation in this case, the jury returned verdicts of guilty on both counts. RP 150-153. The court later imposed a sentence of life in prison on the rape charge with a minimum mandatory time to serve that was within the standard range. CP 5-23. The court also sentenced the petitioner to 365 days on the furnishing charge, concurrent to the sentence on the rape charge. *Id.* After imposition of sentence, the petitioner filed timely notice of appeal. CP 24-43.

On direct appeal appointed counsel presented three arguments unrelated to the issues in this brief. CP 44-56. In addition, the petitioner

prepared and filed a Statement of Additional Grounds (SAG) in which he argued that trial counsel's failure to call exculpatory witnesses to testify on his behalf denied him effective assistance of counsel. CP 56. This court rejected counsel's and petitioner's arguments in an unpublished opinion and stated the following concerning the petitioner's SAG argument:

Because these arguments are not supported by credible evidence in the record, we cannot review them. *See* RAP 10.10(c) (an appellate court will not consider an argument made in a statement of additional grounds for review if it does not inform the court of the nature and occurrence of the alleged errors). If material facts exist that have not been previously presented and heard, and require vacation of the conviction, then Parks's recourse is to bring a property support personal restraint petition. *See* RAP 16.4.

CP 56.

This court issued a Mandate terminating direct appeal on December 4, 2012. CP 44-56. A little over four months later the petitioner filed a Personal Restraint Petition arguing in part that trial counsel's failure to interview and call three exculpatory witnesses he had identified to her denied him effective assistance of counsel. *See* Personal Restraint Petition filed 4/22/13. The petitioner supported this argument, as well as three other arguments, with his own affidavit as well as with the affidavits of the three witnesses he claimed trial counsel failed to interview and call after he identified them to her. *See* Exhibit 3 (9/23/15 Declaration of James L. Hettrick with 1/22/13 Affidavit attached); Exhibit 4 (1/18/13 Affidavit of

Kristofer Bay); and Exhibit 5 (7/6/12 Affidavit of Richard Rolph).

By order entered July 15, 2014, this court denied the petitioner's PRP and entered an Order Terminating Review. *See* Order Terminating Review. The petitioner subsequently filed a Motion for Discretionary Review, which the Washington Supreme Court granted in part. *In re Parks*, 349 P.3d 819, (Mem)-820 (Wash. 2015). The Supreme Court held as follows:

That the Petitioner's Motion for Discretionary Review is granted only on the issue whether his counsel was ineffective for failing to interview exculpatory witnesses. In the appeal of his conviction, the Petitioner argued that his constitutional rights were violated because his attorney did not have his witnesses present to testify at the trial. In its opinion affirming the trial court, the Court of Appeals noted that Parks's arguments regarding his witnesses were not substantiated by the record and indicated that Parks's recourse was to bring a properly supported personal restraint petition. Parks subsequently submitted this timely personal restraint petition. In support of his ineffective assistance of counsel claim, Parks provided affidavits from himself and three people who claim that they would have testified on his behalf. Without determining that the petition was frivolous, the Court of Appeals rejected the petition on the merits by an order entered by the Acting Chief Judge. Therefore, this matter is remanded to the Court of Appeals for the purpose of directing the trial court to hold a reference hearing and then further considering the merits of Petitioner's claim that his counsel was ineffective by failing to interview exculpatory witnesses.

*In re Parks*, 349 P.3d 819, (Mem)-820 (Wash. 2015)

Pursuant to the Supreme Court's order this court remanded the Petition to the Clark County Superior Court for a reference hearing to answer the following questions:

- (1) what testimony James Lee Hetrick, Kristofer James Bay,

and Richard Rolph would have provided if they had testified,

(2) whether Petitioner asked his counsel to contact these individuals,

(3) whether these individuals attempted to contact counsel,

(4) whether counsel had any legitimate tactical reasons for not presenting these individuals as witnesses, and

(5) any other factual issue bearing on counsel's alleged failure to interview these witnesses.

CP 61.

The Clark County Superior Court held hearings on this order on September 23, 2015, and October 23, 2015. RH 1. During these hearings the state called the petitioner's trial counsel as it's only witnesses. RP 12-41. During the remainder of the two hearings the defense called eight witnesses, including Kristofer Bay, Richard Rolph, and James Hettrick, as well as Gary Rice, a private investigator petitioner's trial attorney had originally used in this case. RP 43-55, 57-68, 71-81, 110-122. Pursuant to this court's first question, the trial court entered the following findings concerning "what testimony James Lee Hettrick, Kristofer James Bay, and Richard Rolph would have provided if they had testified."

#### TESTIMONY OF JAMES HETTRICK

H-1. James Hettrick (Hettrick) is a 24 year old man, 17 or 18 at the time of the incident. He was acquainted with Parks through Chris Bay (whom he had known for years). In 2008, he lived with his mom and attended High School.

H-2. Hettrick attended court in a wheel chair due to injuries to his legs suffered in a vehicular accident. He also described having “mild brain trauma.” He was on pain medication during his testimony.

H-3. In 2008, Hettrick “hung out” with Bay “quite a bit.” He also frequently “hung out” with Parks.

H-4. In December, 2008, Hettrick attended a party at Tyler’s house, in the Rose Village area of Vancouver, Washington. He arrived around 8:00 PM. At the party, Parks cooked teriyaki chicken. Hettrick is not exactly sure of the date in December, 2008, that this particular party occurred.

H-5. In his declaration of January 22, 2013, Hettrick wrote that the victim Christopher Thomas (whom he had never met before), arrived at Tyler’s house around 9:30 p.m. Thomas was quiet, sat by himself, and commented to others that he (Thomas) had taken “oxy” and Vicodin before he came to Tyler’s.

H-6. Around 10:00 p.m. (Possibly as late as 10:30 pm), Parks asked Bay for a ride to Mojo’s, a bar in downtown Vancouver.

H-7. Thomas indicated that he would be staying at Tyler’s house that night.

H-8. Hettrick left Tyler’s residence with Bays and Parks. Bays dropped off Parks at Mojo’s, and then took Hettrick to his (Hettrick’s) home. In Exhibit #3, Hettrick states that Parks did not return to Tyler’s house that night.

H-9. Hettrick did not return to Tyler’s home that evening.

H-10. Hettrick’s statement (Exhibit #3) indicates that Thomas still ‘came around’ Parks until months later when Park’s home was burglarized.

H-11. Hettrick’s statement (Exhibit #3), which he testified was truthful, indicates that he heard Thomas say that he (Thomas) would claim that Parks raped him if Parks reported Thomas’s involvement in the burglary of Parks home to the police.

H-12. Hettrick was never contacted by Police or Park's lawyer or an investigator prior to the trial. He does not recall when he was first contacted to make a statement.

H-13. Hettrick does not know which night/date the rape was alleged to have occurred.

H-14. Hettrick would have been available to testify and would have testified had he been contacted or asked to testify. He was not in hiding.

H-15. Not being aware of the allegations of rape against Parks, Hettrick never attempted to contact anyone regarding his knowledge of the events of December, 2008.

#### TESTIMONY OF KRISTOFER BAY

B-1. Kristofer Bay (Bay) was acquainted with Defendant Parks. Parks served as a caregiver for Bay's mother's boyfriend. Bay was acquainted with Parks in 2008. Bay was 17 at that time. He was also familiar with Christopher Thomas. Hettrick was a friend and co-worker of Bay's.

B-2. Bay lived at his grandmother's house in 2008. He attended high school and worked. He had a girlfriend. He "hung out" with Parks at that time, but cannot recall how often (it was not daily). He did not hang out with Christopher Thomas.

B-3. He saw Thomas at a party at Tyler's house, but did not see him for months after that night.

B-4. Bay recalls a party at Tyler's house in 2008, which was attended by Parks, Hettrick and others. He recalls Parks cooking at the party. He recalls that he left around 10 or 10:30 that evening with Hettrick and Parks. He dropped off Parks at Mojo's (a Main Street bar) and then went to his grandmother's for the night. He did not see Parks again that evening after 10:30 pm. He does not know where Parks went after he dropped him off.

B-5. Bay first heard of the charges against Parks after Parks was convicted.

B-6. Bay was not contacted by Parks, an attorney, law enforcement, or an investigator. Bay was never contacted to provide a statement for trial or to testify at trial.

B-7. Bay would have testified at trial if contacted. He was living in Vancouver, WA, and available to testify. He was not avoiding contact with anyone.

B-8. He was asked to provide a sworn statement two years ago. He does not recall who asked him to provide a statement, or how he was asked to provide a statement.

B-9. Bay spoke with Hettrick after they were contacted to provide statements for Parks. They spoke about what to write in their statements.

B-10. Bay testified that his statement was true and accurate “as far as I can remember.” He stated that his memory was a little foggy, but “better now.”

#### TESTIMONY OF RICHARD ROLPH

Rolph-1. Richard Rolph is currently 30 years old, a father, and is employed as a plumber. He has known and been a friend of Parks for ten years. He is familiar with Bays, Hettrick, and Tyler, and had hung out at Tyler’s house on occasion. He was there at some time in 2008, and feels that Thomas may have been there, too. He is “familiar” with Chris Thomas. He is aware of the group of kids Thomas hangs out with, and feels that they are “trouble.” He considered Thomas and Tim as the leaders of the group.

Rolph-2. He recalls being with Parks at a skate park in Vancouver, WA, and seeing Thomas and the group of kids. Parks confronted the group, accusing them of burglarizing Parks’ house. Thomas and the group responded that they would make Parks “pay” if he “went to the cops.”

Rolph-3. After December, 2008, but prior to the skate-park threats, Rolph was with Parks and Thomas on a least 3 or 4 occasions, but never noticed any animosity between the two of them.

Rolph-4. Rolph knew that Parks was charged “with something in 2008,”but wasn’t sure what was “going on.”

Rolph-5. Rolph never contacted Parks, law enforcement, investigators, or any attorneys regarding the charges against Parks.

Rolph-6. After he was convicted, Parks phoned Rolph and asked him to provide a statement about the incident when Thomas and the other kids threatened Parks at the skate park.

Rolph-7. Rolph, who has bad hand-writing, dictated a statement to his girlfriend Jennifer Frye. Frye wrote down Rolph’s statement verbatim. No one told Rolph what to include in his statement.

Rolph-8. Rolph’s statement was notarized on July 6, 2012 (Exhibit #5).

Rolph-9. Rolph indicates that his statement “reflects what actually happened.”

Rolph-10. Rolph’s statement does not include any threats made by Thomas, Tim, or the group of young men, either at the skate park or anywhere else. Rolph testified that he didn’t remember to “write it into the statement” because there was “too much stuff going on.”

Rolph-11. He testified that he “wrote what he could” and didn’t think the threats “would help Parks.”

Rolph-12. No one (other than Parks, after he had been convicted) contacted Rolph in regards to the case. Rolph was available and would have testified at trial if called.

CP 80-84.

As to this court’s second question, petitioner’s trial counsel testified that petitioner had identified each of these witnesses to her, that he had outlined their potential testimony and that he had asked her to contact them.

RH 32-33. Although petitioner did not initially have their telephone numbers he gave trial counsel this information later. *Id.* In fact, petitioner's trial counsel remembered (1) writing a portion of this information on pages one and three her standard intake sheet upon the petitioner providing her the information, and (2) that a portion of that information was obscured by a post-it note that he been placed on the first page of the intake sheet prior to scanning. RH 33. The trial court admitted a copy of that intake sheet as Exhibit 1 at the reference hearing. *See* Exhibit No. 1.

This court's third question to the trial court was whether or not Kristofer Bay, Richard Rolph, and James Hetrick had ever tried to contact trial counsel during the pendency of this case. CP 61. The court found that they had not. CP 86. In fact, each of the three witnesses testified that no one attempted to contact them during the pendency of the case, that they were not even aware of the prosecution until after the defendant had been convicted, that they were living locally, and that they would have been willing to provide testimony in the defendant's case had then been asked. *Id.*

This Court's fourth question was whether or not "counsel had any legitimate tactical reasons for not presenting these individuals as witnesses." CP 61. Although the trial court in this case did not directly answer the question, it did note that trial counsel did not claim any such tactical reasons. *See* CP 86-88. In fact, in her testimony, trial counsel explained that she was

quite sure she provided the names and telephone numbers of the three witnesses to her investigator Gary Rice and that he had been unable to find them. RH 21. However, when Mr. Rice was called to testify he produced both his notes from his investigation into the case as well as his billing statement, from which he concluded that counsel had neither identified any witnesses nor asked him to find and interview them. CP 88-89. In fact, the trial court provided the following findings concerning Mr. Rice's testimony in regards to his work on this case for trial counsel. CP 88-89. As the first part of the trial court's answer to the fifth question concerning "any other factual issues bearing on [trial counsel's] failure to Interview Hettrick, Bay and Rolph," the trial court entered the following findings:

Rice-1. Gary Rice has been a private investigator in Vancouver, WA, since 1990. Prior to 1990, he worked for various law enforcement agencies (local, state, and federal) for over 10 years. He has worked on thousands of cases in Clark County since 1990.

Rice -2. Rice was appointed by the Court and "employed by [trial counsel]" in 2010 to work as an investigator on the Parks rape case. He was to be paid by Clark County for his services. Rice has no recollection of the case or what specific work he did on the case.

Rice-3. Rice has reviewed his billing information (Exhibit #2) but cannot remember any details about any of the entries (e.g. he has no recollection of what discovery he reviewed or who he called or sent emails to on September 20, 2010). Rice is a "stickler for accuracy" and always records his time and what work he had done on a case.

Rice-4. Rice's practice is to document meetings with attorneys, make notes of people to be contacted along with pertinent

information, and then make note of the actual contact.

Rice-5. Rice stated that “if it’s not in the billing statements, it never happened.”

Rice-6. Exhibit #2 accurately reflects the work that Rice performed on the Parks case.

Rice-7. Had Rice been asked to locate a specific witness, it would be reflected in his billing statement. He stated that “there should be a note sheet in the file, with an entry, and it would be attached to the final . . .”

Rice-8. There are no entries in Exhibit #2 indicating that Rice was asked to find any witnesses.

Rice-9. His review of Exhibit #2 tell him that he “was never instructed to find anyone.”

Rice-10. Rice did not review any case notes on the Parks case prior to the Reference Hearing.

Rice-11. Rice obtained his case notes during a recess in the hearing. He stated that it was his practice to always write the names of witnesses that he had been given by an attorney in his case notes.

Rice-12. His case notes (Exhibit #7) do not include the names of Bay, Hettrick, or Rolph.

Rice-13. Rice testified that it was “safe to conclude that [trial counsel] did not give me the names of witnesses” and that Rice “did not find” any witnesses.

CP 88-89.

## ARGUMENT

### **PETITIONER IS ENTITLED TO RELIEF FROM RESTRAINT UNDER RAP 16.4 BECAUSE TRIAL COUNSEL'S FAILURE TO INTERVIEW AND CALL THREE EXCULPATORY WITNESSES DENIED PETITIONER THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL .**

In order to obtain relief in a personal restraint petition under RCW 16.4, a petitioner has the burden of showing by a preponderance of the evidence that he was actually and substantially prejudiced by a violation of his constitutional rights. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 94 P.3d 952 (2004). In order to obtain relief on a non-constitutional claim, a petitioner has the burden of showing by a preponderance of the evidence that the non-constitutional error caused a “fundamental defect resulting in a complete miscarriage of justice.” *In re Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990). In addition, under RCW 10.73.090(1) “[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.”

In this case the petitioner makes the former claim, arguing that trial counsel's failure to interview and call three exculpatory witnesses denied him his state and federal constitutional rights to effective assistance of counsel. In addition, petitioner's judgement became “final” for the purposes of RCW

10.73.090(1) when the mandate issued, which was on December 4, 2012. CP 44-56. A little over four months later petitioner filed this Personal Restraint Petition. *See* Personal Restraint Petition filed 4/22/13. Thus, under RCW 10.73.090 the petition is timely, and as the following argument on ineffective assistance demonstrates, he is entitled to relief from restraint.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, petitioner claims ineffective assistance based upon trial counsel’s failure to find, interview and call three exculpatory witnesses he identified to counsel prior to trial. These witnesses were James Lee Hetrick, Kristofer James Bay, and Richard Rolph . Review of the decision in *State v. Jones*, 183 Wn. 2d 327, 352 P.3d 776 (2015), supports his argument that trial counsel’s failure to interview and call these witnesses denied petitioner effective assistance of counsel.

In *State v. Jones*, *supra*, the King County Prosecutor charged the defendant with second degree assault following his participation in a fight on a public street in downtown Seattle with a person by the name of Alford and three of Alford’s friends. There were a number of other witnesses who observed the affray. When called to testify at trial, the majority of these witnesses stated that the defendant chased Alford, tackled him to the ground and then attempted to assault him with a knife. Similarly, Alford’s three

friends testified that they came upon the defendant and their friend on the ground fighting with the defendant attempting to use a knife. They immediately responded by kicking the defendant and restraining him until the police arrived. The police testified at trial that when they arrived Alford's three friends were holding the defendant on the ground restraining him and that the defendant still had a knife in one hand. Neither the defendant nor Alford testified.

At trial one of the state's witnesses by the name of Lori Brown did not testify that the defendant chased Alford and knocked him to the ground. Rather, she testified to the opposite happening. This testimony was confirmed by a defense witness who told the jury that Alford chased the defendant, knocked him down, and that the defendant only pulled out a knife in self defense when Alford's three friends joined the fight and started severely beating and kicking him. The jury apparently believed the state's witnesses and convicted the defendant.

Immediately after the jury returned its verdict, the trial court granted defense counsel's motion to withdraw on the basis that he had provided ineffective assistance by failing to interview Lori Brown in spite of the fact that her name had been on the state's witness list. Following withdrawal of trial counsel, the defendant's new attorney discovered that counsel had also failed to interview a second witness identified in pretrial discovery by the

name of Hamilton. Neither the state nor the defense had called Hamilton to testify at trial. According to the affirmation provided in support of the motion for a new trial, Hamilton would have testified that he saw Alford chase the defendant and knock him to the ground and that he only saw the knife in the defendant's hands after Alford's three friends began beating and kicking him. Defendant's new attorney did not present any evidence as to why original trial counsel had failed to interview these witnesses.

The trial court denied the motion without an evidentiary hearing on the basis that Hamilton's testimony would not have affected the outcome of trial given the fact that his testimony would have been contradicted by at least four of the state's witnesses. Following denial of the motion the defendant appealed, arguing in part that his trial counsel's failure to interview Brown and Hamilton and to then call Hamilton denied him effective assistance of counsel. However, the Court of Appeals affirmed, holding as the trial court did that counsel's failure to interview Brown and Hamilton and failure to call Hamilton as a witness did not cause prejudice because Hamilton's evidence would have been cumulative at best.

The defendant thereafter sought and obtained review by the Washington Supreme Court. After an initial screening, the Supreme Court ordered the trial court to hold a fact finding hearing under RAP 9.11. The Supreme Court's order was "to take additional evidence and to make factual

findings based on that evidence, to enable this court to determine whether defense counsel provided ineffective assistance . . . including but not limited to: (1) whether defense counsel's performance was deficient for failure to interview witnesses; (2) why defense counsel did not interview all the witnesses listed in the discovery; and (3) why defense counsel did not call one of the witnesses listed in the discovery . . . to testify." *State v. Jones*, 183 Wn. 2d at 336-337.

At the fact finding hearing the defense discovered yet a third witness by the name of Sulva Ooveda who was listed in the police reports and whom defense counsel neither interviewed nor called to testify. During the fact-finding hearing the trial court determined that the prosecutor had interviewed Ms Ooveda at the beginning of trial and that he had actually informed defense counsel that she might have favorable evidence for the defense. During the hearing the defendant's original trial attorney testified that when he learned that Ms Ooveda might have exculpatory information and that he had asked his investigator to interview her. However, the investigator had failed to do so and counsel did not follow up on the matter.

Following the hearing, the trial court concluded that (1) trial counsel had been ineffective in failing to interview Ms Brown, Mr. Hamilton and Ms Ooveda. However, the trial court did not find prejudice "given the testimony of the other State's witnesses who testified that the Defendant Jones first

introduced the knife.” *State v. Jones*, 183 Wn. 2d at 338. In addition, the trial court did not find counsel’s failure to call Hamilton deficient. Rather, the court held that a review of the transcripts of Hamilton’s post-trial defense interviews were “unclear” about when he saw the defendant wield the knife and that he must have mixed up the parties because he believed that Alford had chased the defendant, which was contrary to the testimony of the majority of witnesses who testified at trial. Thus, the trial court found that defense counsel’s failure to call Hamilton was a strategic decision and not ineffective assistance.

In addressing these issues following the reference hearing the Supreme Court first agreed with the trial court that trial counsel’s failure to interview Ms Brown, Mr. Hamilton and Ms Ooveda fell below the standard of a reasonably prudent attorney. The court held:

In this case, trial counsel offered absolutely no reason for failing to interview these three witnesses. With regard to Hamilton in particular, the trial court ruled that the defense lawyer “does not recall” why he failed to interview Hamilton and “does not provide any reason either because it is clear from the incident report there was a 9–1–1 call from him.” The trial court then concluded that the failure to interview all witnesses so identified was “deficient performance.”

We agree. We can certainly defer to a trial lawyer’s decision against calling witnesses if that lawyer investigated the case and made an informed and reasonable decision against conducting a particular interview or calling a particular witness. But courts will not defer to trial counsel’s uninformed or unreasonable failure to interview a witness. As the United States Supreme Court has explained, “[S]trategic choices made after less than complete investigation are

reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”

*State v. Jones*, 183 Wn. 2d at 340 (citations to record and cases omitted).

The court then went on to address the issue of prejudice by reviewing the missing testimony for the three witness. First the court noted that Hamilton would have testified that Alford chased Jones, not the other way around. This testimony would have corroborated Brown’s claims. Second, and more important, Hamilton’s testimony that the defendant only pulled the knife in self defense after Alford’s three friend’s were violently assaulting him would have been very favorable to the defense. Finally the court noted that Hamilton was a disinterested witness.

After reviewing the effect of Hamilton’s potential testimony, the court addressed the prejudice involved in failing to interview Ms Brown and failing to interview and call Ms Ooveda. The court held:

Then there is witness Brown. Although the jury had an opportunity to consider Brown’s testimony, Jones’s trial counsel explained that if he had known about her testimony before trial, he would have made it the centerpiece of his case and the focal point of cross-examination of other witnesses.

Finally, we consider witness Ooveda. The prosecutor specifically told trial counsel on the first day of trial, after interviewing Ooveda, that she may have exculpatory information. VRP (Aug. 21, 2014) at 27–28. Defense counsel still failed to find out what information she might have provided.

*State v. Jones*, 183 Wn. 2d at 343-344 (citations to record omitted).

Based upon these views the court held that counsel's failure to interview clearly identified and accessible witnesses undermined the court's confidence in the jury verdict. Thus, the court reversed the defendant's conviction and remanded for a new trial.

In *Jones*, as in the case at bar, the defense claimed ineffective assistance based upon trial counsel's failure to interview and call three previously identified witnesses. In response to these claims in *Jones* the Washington State Supreme Court remanded to the trial court for a reference hearing to address the defendant's factual claims. In the case at bar the Supreme Court took similar action and remanded this case for a reference hearing.

In *Jones* the police reports had identified the three witnesses defense counsel did not interview or call. In the case at bar the petitioner in his testimony claimed he gave the names and telephone numbers of his three witnesses to trial counsel, along with a summary of their potential testimony. Trial counsel did not dispute this claim at the reference hearing. Neither did she claim any tactical basis for failing to interview them. Rather, she admitted during her testimony that the petitioner had identified these three witnesses by name and later by telephone number, and that she wanted them interviewed. In fact she claimed that she gave this information to her investigator Gary Rice and that ultimately he could not find them.

But for one fact, trial counsel's claims that her investigator Gary Rice could not find the witnesses might potentially exonerate her conduct given her claim that the petitioner did not want to seek a continuance. That one fact was that trial counsel never did give the names to Gary Rice to find and interview. This error in trial counsel's testimony was revealed though the reference court's findings concerning Gary Rice's testimony on this point. The trial court found:

Rice-4. Rice's practice is to document meetings with attorneys, make notes of people to be contacted along with pertinent information, and then make note of the actual contact.

Rice-5. Rice stated that "if it's not in the billing statements, it never happened."

Rice-6. Exhibit #2 accurately reflects the work that Rice performed on the Parks case.

Rice-7. Had Rice been asked to locate a specific witness, it would be reflected in his billing statement. He stated that "there should be a note sheet in the file, with an entry, and it would be attached to the final . . ."

Rice-8. There are no entries in Exhibit #2 indicating that Rice was asked to find any witnesses.

Rice-9. His review of Exhibit #2 tell him that he "was never instructed to find anyone."

Rice-10. Rice did not review any case notes on the Parks case prior to the Reference Hearing.

Rice-11. Rice obtained his case notes during a recess in the hearing. He stated that it was his practice to always write the names of witnesses that he had been given by an attorney in his case notes.

Rice-12. His case notes (Exhibit #7) do not include the names of bay, Hettrick, or Rolph.

Rice-13. Rice testified that it was “safe to conclude that [trial counsel] did not give me the names of witnesses” and that Rice “did not find” any witnesses.

CP 88-89.

Although not stated explicitly, the only reasonable conclusion that can be drawn from these findings is that trial counsel’s five-year-old memory of giving Mr. Rice the names and telephone numbers of the witnesses the defendant identified is not accurate. In making this argument petitioner does not want to cast any aspersions upon trial counsel’s honesty or integrity. Certainly she believes that she gave this information to her investigator almost five years ago. However, the facts as given in Mr. Rice’s testimony and his contemporaneous records support the conclusion that trial counsel is mistaken. In fact, she did not give Mr. Rice the names of the witnesses the defendant identified. Thus, just as trial counsel’s failure to interview the three identified witnesses in *Jones* fell below the standard of a reasonably prudent attorney, so in the case at bar trial counsel’s failure to interview the three witnesses the defendant identified fell below the standard of a reasonably prudent attorney. This establishes the first half of a claim of ineffective assistance of counsel.

As was mentioned above and as was addressed in the *Jones* case, to

prevail on a claim of ineffective assistance petitioner must also show “prejudice.” In other words, petitioner must show that “there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse, supra*. The decision on prejudice in *Jones* reveals that in order to answer this question in the context of a failure to call witnesses a court must carefully examine the facts of each individual case. That examination requires the reviewing court to weigh the strength of the evidence as presented from both sides at trial, weigh the strength of the missing evidence, and then determine whether the addition of the missing evidence “undermines confidence in the outcome” of the original trial.

In *Jones* the court employed this approach by first examining the substance and weight of the evidence presented at the original trial. This evidence was almost exclusively testimonial. In making this analysis the court was careful to recognize that the majority of the witnesses supported the view that the defendant had been the aggressor, that he had pursued and tackled Alford, and that he had at some point pulled out a knife during his confrontation with Alford, which was before Alford’s friends joined the affray. However, the court did not find this evidence overwhelming for three reasons. First, the court recognized that one of the state’s witnesses testified

that Alford had actually been the one who had chased and tackled the defendant. Second the court recognized that the defense had called its own witness who stated that Alford had been the aggressor and had pursued and tackled the defendant. Third, the court noted that in calling Alford's three friends the state was presenting "interested" witnesses. By contrast, the one state's witness who claimed Alford was the aggressor and the one defense witness who made the same claim were both "disinterested" parties.

Having analyzed the evidence from the trial, the court then reviewed the missing evidence the defense should have presented. Once again, the court recognized that this evidence was also purely testimonial, since trial counsel's error had been in not calling the witnesses Hamilton and Ooveda. In analyzing this evidence the court noted they both would have corroborated the claim that Alford was the aggressor and that he had pursued and tackled the defendant. In addition, Hamilton's testimony strongly supported the view that the defendant did not take out a knife until Alford's three friends joined the fight and began beating and kicking the defendant. In fact, Hamilton's description was that the defendant only took the knife out in order to defend himself from a violent attack by Alford's three friends. The court then went on to note that both Hamilton and Ooveda were disinterested parties whose testimony would normally be given more weight than the testimony of interested parties.

Once the court in *Jones* finished its analysis of the missing evidence and added it to the evidence presented at trial it came to the conclusion that the missing evidence was of sufficient weight to undermine the court's confidence in the verdict. As a result the court reversed the defendant's conviction and remanded for a new trial. Similarly, in the case at bar, an analysis of the evidence presented in petitioner's first trial, along with an analysis of the missing evidence, also undermines confidence in the jury's verdict. In fact, a comparison of the weight of the evidence in the case at bar as opposed to the evidence in *Jones* reveals that the evidence in the case at bar was far weaker than that in *Jones*. The following provides this analysis.

In the case at bar the evidence the state presented at trial was, as in *Jones*, exclusively testimonial in nature. In this case the complaining witness testified that ten months previous the petitioner had provided him with alcohol and then raped him during a party. No other witness claimed to have seen that event. The state presented no physical evidence to corroborate the claim. The petitioner adamantly denied the conduct. The petitioner further testified that the complaining witness was making a false allegation in revenge for the petitioner having told the police that the complaining witness had burglarized the petitioner's home. In fact, a police officer who first interviewed the complaining witness testified that the complaining witness thought the officer was there to accuse him of that burglary. At the time the

complaining witness was in custody on another matter. A comparison between the breadth and weight of this evidence in the case at bar to the breadth and weight of the evidence in *Jones* reveals that the state's evidence in the case at bar was far weaker, although both cases solely involved the issue of credibility.

An analysis of the missing evidence from the three witnesses trial counsel failed to interview and call in this case reveals that they would have testified to the following facts. First, they would have testified that on what appeared to be the night of the alleged rape they left the party with the petitioner and took him to another location as he did not have a vehicle. This testimony would have contradicted that of the complaining witness that he woke up to the petitioner raping him. Second, the three witnesses would have testified that the petitioner did not provide the complaining witness with any alcohol contrary to the testimony of the complaining witness. Third, the three witnesses would have testified that they repeatedly saw the complaining witness in the petitioners presence after the alleged event contrary to the claims of the complaining witness. Fourth, two of these witnesses would have testified to having been present when the complaining witness and his two friends threatened to make false allegations against the petitioner if the petitioner went to the police with his claim that they had burglarized his home. Finally, two of these witnesses would have testified that they were

more acquaintances than friends of the petitioner.

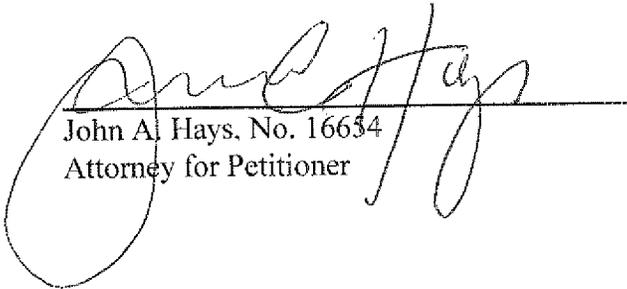
This evidence, had it been presented, would have strongly corroborated the petitioner's claim at trial that the complaining witness had fabricated his claim of rape in order to follow through with his threat once the petitioner identified the complaining witness as one of the persons who had burglarized his home. It would also have contradicted the testimony of the complaining witness on a number of points, particularly that the petitioner was alone with him on the night in question. In the same manner that the missing testimony from *Jones* undermined the court's confidence in the jury's verdict, so the missing testimony in the case at bar undermines confidence in the jury verdict. Thus, in the same manner that the failure to interview and call the identified witnesses in *Jones* caused prejudice and denied the defendant effective assistance of counsel, so the failure to interview and call the identified witnesses in the case at bar caused prejudice and denied the petitioner effective assistance of counsel.

## CONCLUSION

Trial counsel's failure to interview and call James Lee Hetrick, Kristofer James Bay, and Richard Rolph as witnesses for the defense in this case denied the petitioner effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should vacate the petitioner's conviction and remand for a new trial.

DATED this 21<sup>st</sup> day of April, 2016.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Petitioner

## **APPENDIX**

### **WASHINGTON CONSTITUTION ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

### **UNITED STATES CONSTITUTION, SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

#### **RAP 16.4**

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a “restraint” as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a “restraint” if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws

of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090 or .100. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**

**vs.**

**DERON A. PARKS,**  
**Appellant.**

**NO. 45348-7-II**

**AFFIRMATION  
OF SERVICE**

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Supplemental Brief of Petitioner with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik  
Clark County Prosecuting Attorney  
1013 Franklin Street  
Vancouver, WA 98666-5000  
prosecutor@clark.wa.gov
2. Deron A. Parks, No. 344051  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

Dated this 21<sup>st</sup> day of April, 2016, at Longview, WA.

  
\_\_\_\_\_  
Diane C. Hays

**HAYS LAW OFFICE**

**April 21, 2016 - 2:47 PM**

**Transmittal Letter**

Document Uploaded: 3-prp2-453487-Other Brief.pdf

Case Name: In re the Personal Restraint of: Deron A. Parks

Court of Appeals Case Number: 45348-7

**Is this a Personal Restraint Petition?**  Yes  No

**The document being Filed is:**

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Answer/Reply to Motion:  \_\_\_\_\_

Brief:  Other  \_\_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:  \_\_\_\_\_

Hearing Date(s):  \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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**Comments:**

Supplemental Brief of Petitioner

Sender Name: Diane C Hays - Email: [jahayslaw@comcast.net](mailto:jahayslaw@comcast.net)

A copy of this document has been emailed to the following addresses:

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