

No. 50216-0-II

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

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IN RE THE PERSONAL RESTRAINT PETITION OF:

**AARON G. CLOUD,**

PETITIONER.

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**REPLY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION**

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## A. INTRODUCTION

In this PRP, Aaron Cloud challenges his convictions for assault, drive by shooting, and unlawful possession of a firearm. He raises several claims of ineffective assistance. The State responds that counsel was not deficient, but was instead a master tactician. A review of the entire trial record soundly defeats the State's assertion.

Cloud also challenges two instructions given in his case, as well as counsel's failure to challenge those instructions at trial and on appeal. The State responds that counsel had no duty to challenge either instruction because both were correct and proper statements of law. The State is incorrect. The instructions were incorrect statements of the law that lowered the State's burden of proving the facts necessary to a constitutional conviction.

## B. ARGUMENT

1. Ineffective Assistance of Counsel: Failing to Offer the Warrant
2. Ineffective Assistance of Counsel: Failing to Argue an Alternative Suspect

Mr. Cloud raises two IAC claims based on trial counsel's performance asserting: (1) counsel deficiently failed to prove that Cloud had an arrest warrant; and (2) counsel failed to argue an alternative suspect. The State posits that the facts do not support Cloud's claims. The State is incorrect. Cloud discusses each claim in the order set forth above.

*The Closing Arguments Demonstrate the Unreasonableness of Counsel's Failure to Introduce the Warrant into Evidence*

Cloud ran from the police. The State asked jurors to infer guilty knowledge from Cloud's flight. There was another plausible inference. Cloud fled because he had an outstanding warrant.

Defense counsel's trial theory was that Cloud fled for the latter, not former reason. Counsel introduced Cloud's statement to a police officer where Cloud mentioned the warrant to the arresting officer. But, counsel failed to offer the warrant.

The State argues that defense counsel pulled off a master stroke of trial strategy putting the prospect of the warrant before the jury, without allowing jurors to see the warrant (including the purportedly damaging fact that Cloud had a prior conviction) itself. The obvious flaw in the State's logic is that jurors were not offered any support for Cloud's self-serving claim. Because defense counsel presented no evidence to bolster Cloud's statement, the State easily eviscerated the defense argument.

During closing, the State made much of Cloud's flight as proof of his guilty knowledge:

...the evidence has shown that he's the white male with the shaved head in the passenger seat of the Jetta who fled from officers after yelling to the driver, "Go, go, go," and ran and didn't want to be apprehended so badly that he chewed himself up trying to escape containment, looking down the barrel of an officer's gun who's screaming at him, "I might shoot you because I don't know if you have a weapon anymore." He chose to run through blackberry bushes, still running away from the police. He was

tackled, he was captured, but that shows you how badly he did not want to answer for what he had done just a few minutes ago.

RP 617. As the State's *Response* argues, defense counsel argued that Cloud ran, not because he had just assaulted the victim, but because he had a warrant.

He knew there was a warrant out for his arrest, and he ran for that purpose. So there are two potential reasons that you could take into consideration of why he ran and what that means in this case.

RP 649. But what the State neglects to mention is how the State attacked that argument as not founded on any proof:

Mr. Houser just finished up explaining to you, and I -- I don't think he intended to, but he's not telling you the law correctly. He's telling you that any piece of evidence may cause reasonable doubt or any lack of piece of evidence. There's a part missing from that analysis, there's a part that as jurors, as judges of the facts, that was not also included with that explanation, speaking of something missing. *What's missing is that evidence needs to relate to a fact that must be proven.*

RP 657 (emphasis added).

This point, underscored by the instruction telling jurors that counsel's arguments are not evidence, made defense counsel's argument not only unpersuasive, but unsustainable because it was premised on an unproven fact. Because defense counsel failed to offer the warrant to prove that there was a factual basis for Cloud's statement, the prosecutor was able to effectively argue in rebuttal that defense counsel's argument should not only be rejected, but should not only be considered because it was not based on evidence admitted at trial.

Counsel's failure is similar to the failure to offer proof in support of a claimed alibi. "The need to develop all relevant facts in the adversary system is

both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.” *United States v. Nixon*, 418 U.S. 683, 709 (1974); *see also Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988). *See also Hendersen v. Sargent*, 926 F.2d 706, 711-12 (8th Cir. 1991) (reversing conviction where counsel presented alibi, but failed to present evidence that victim's husband, or possibly another man with ties to the victim, had killed her because “[t]he decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial” (internal quotations omitted)).

Defense counsel’s failure was deficient and Cloud was prejudiced because the jury was deprived of evidence upon which it could have based its conclusion that Cloud fled for a reason other than the shooting.

*Counsel’s Failure to Argue an Alternative Suspect.*

The State’s *Response* argues that the evidence supporting the conclusion that someone other than Cloud was the shooter was weak; that while the potential other suspect was present in the car and was identified by one witness as having a shaved head like Cloud, evidence was presented that Cloud possessed and pointed the gun from the passenger side of the car and no such evidence implicated the other suspect. In sum, the State argues that the evidence only placed the alternative suspect at the scene.

But, the point is not whether there was more proof against Cloud than against the alternative suspect. Cloud only needed to create a reasonable doubt in the mind of one juror.

Cloud's defense theory was that he did not shoot the victim. But, the evidence was overwhelming that the shots came from the car in which Cloud and the alternative suspect were riding. More importantly, the description given at the time of the crime was that the shooter is a white male with shaved head. There were two people who met that description in the car.

By agreeing not to argue the alternate suspect theory, defense counsel essentially agreed to a limit the strength of the defense. By limiting the strength of the defense, counsel decreased the chance of acquittal.

Cloud was entitled to a full defense, instead of the tepid defense he received.

3. Challenges to the Inference Instruction
4. Challenges to the Recklessness Requirement

The essence of Cloud's arguments in support of his third and fourth claims is that the instructions impermissibly lowered the State's burden of proof, allowing the jury to convict Cloud on less evidence than was constitutionally required.

The State argues that the instructions were entirely proper.

The inference of recklessness instruction required only proof that a gun was fired from a vehicle. From that fact alone, a jury could infer recklessness. It is easy to imagine numerous situations where firing a gun from a car is, in fact, not

reckless. But, the instruction would nevertheless permit a conviction in those circumstances.

The recklessness instruction was even more flawed. The State was required to prove that the gun was recklessly discharged. The instructions only required an awareness of a risk of bodily harm from the discharge of the firearm.

The end result was that the instructions made convicting Cloud easier than the law required.

### C. CONCLUSION

Mr. Cloud's conviction was the result of two fundamental errors. His counsel did not fully defend. The instructions allowed the State to obtain a conviction on less proof than should have been permitted.

This Court should reverse and remand for a new trial.

DATED this 13<sup>th</sup> day of July, 2017.

Respectfully Submitted:

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