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Division II  
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No. 50582-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN M. HODGES,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

The Honorable Elizabeth Martin, Judge

REPLY BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

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**A. ARGUMENT IN REPLY**

**1. HODGE'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT INVESTIGATION NECESSARY TO THE DEFENSE.**

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove (1) defense counsel's representation was deficient, i.e., it was below an objective standard of reasonableness under the circumstances and (2) the deficient representation prejudiced him, i.e., a reasonable probability exists the outcome would have been different without the deficient representation. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

The presumption that a defense attorney has acted reasonably is rebutted if “no conceivable legitimate tactic explains counsel's performance.” *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). A “reasonable probability” under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence

standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; see also *Jones*, 183 Wn.2d at 339.

Ineffective assistance of counsel claims cannot be based on defense counsel's legitimate strategic or tactical decisions. *McFarland*, 127 Wn.2d at 335–36. Appellate review of counsel's performance starts from a strong presumption of reasonableness. *State v. Bowerman*, 115 Wash.2d 794, 808, 802 P.2d 116 (1990); see also *State v. Nichols*, 161 Wash.2d 1, 8, 162 P.3d 1122 (2007) (“In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight.”) (quoting *In re Pers. Restraint of Rice*, 118 Wash.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992)).

The right to the effective assistance of counsel includes the right to reasonable investigation by counsel. *State v. Lopez*, 190 Wash.2d 104, 115-116, 410 P.3d 1117 (2018) (citing *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Jones*, 183 Wn.2d at 339–40.) Here, Wally Clark contacted Mr. Hodges’ first attorney by email and then by text message, stating that he received the debit card and personal identification number associated with the card from Dean Solomon in exchange for drugs, and that he then gave the card to Mr. Hodges. CP

154. Mr. Hodges told his attorney about the potentially exculpatory information, but counsel did not bother to investigate the matter, did not subpoena Mr. Clark to testify, and did not determine whether he could admit them through some witness at trial other than Mr. Clark. Instead, defense counsel appears to have simply ignored the email and text. Mr. Hodges' defense attorney provided ineffective assistance of counsel by failing to conduct reasonable investigation at a time when it could have been critical to the defense.

Defense counsel provided deficient performance by completely failing to investigate the messages to Mr. Clark. There is no conceivable tactic served by this failure. Counsel's performance fell below an objective standard of reasonableness. *Jones*, 183 Wn.2d at 339.

Trial counsel's prejudicially deficient performance extended to production of witness testimony as well.

Competent counsel has a duty to reasonably investigate. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The presumption of counsel's competence can be overcome by showing a failure to investigate: " 'Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts and introduction of expert evidence.' " *Hinton v. Alabama*, 134 S. Ct. 1081, 1088, 188 L.Ed. 2d 1 (2014) (quoting *Harrington v. Richter*,

562 U.S. 86, 106, 131 S. Ct. 770, 178 L.Ed. 2d 624 (2011)). Courts 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. *Jones*, 183 Wn.2d at 340. "But courts will not defer to trial counsel's unformed or unreasonable failure to interview a witness." *Id.*

Though the decision to call a witness is generally a matter of trial strategy, the presumption of counsel's competence can be overcome by showing a failure to adequately investigate or subpoena necessary witnesses. *State v. Maurice*, 79 Wash.App. 544, 552, 903 P.2d 514 (1995). Reasonably competent counsel could have anticipated that the State would argue and try to prove that Mr. Hodges was not truthful when he testified that he received the debit card from Wally Clark in exchange for alcohol. RP at 272. The State also produced testimony about the confrontation at Tower Green that was at significant odds with Mr. Hodges' testimony regarding the use of the card. 2RP at 226-28, 3RP at 277. It was logical and reasonable for defense counsel to have called Mr. Clark (or other person at the party at which Mr. Hodges received the debit card) to testify about the circumstances regarding the agreement by Mr. Clark to let Mr. Hodges use the card in exchange for two bottles of Fireball whiskey. 3RP at 272. Furthermore, it was incumbent upon

defense counsel to call Mr. Hodges' daughter, who was present at Tower Green, and the Tower Green manger Brenda Zimmerman to rebut the testimony of the officers that Mr. Hodges gave the officers the debit card. 2RP at 228.

Counsel's failure to produce the witnesses identified in the police reports constitutes deficient performance. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). In *Jones*, defense counsel failed to interview three witnesses identified in police reports, one of whom could have corroborated another witness who testified that Mr. Jones had acted in self-defense in a second degree assault case. Our Supreme Court held counsel was ineffective. *Jones*, 183 Wn.2d at 340-41, 344. See also *Jones v. Wood*, 114 F.3d 1002, 1010-12 (9th Cir. 1997) (failure to investigate witnesses called to the attention of trial counsel as important constitutes ineffectiveness).

There is a reasonable probability that counsel's failure to investigate affected the outcome of Mr. Hodges' trial. A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *Estes*, 188 Wn.2d at 458. Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; see also *Jones*, 183 Wn.2d at 339. In *Jones*, the Supreme Court found that the defense was prejudiced by counsel's failure to interview identified

witnesses because – even though the witnesses testifying in support of the defense theory would still have been outnumbered by those supporting the prosecution – the case was a credibility contest in which each piece of evidence supporting the defense could have tipped the balance in the minds of the jury. *Id.* Similarly, in Mr. Hodges’ case, investigation leading to the successful admission of the emails and production of witnesses especially Wally Clark—to illustrate the precise circumstances of how Mr. Hodges came into the possession of the debit card, could easily have tipped the balance in the jury's minds in concluding that Mr. Hodges was telling the truth. Ms. Zimmerman’s testimony and the testimony of his daughter could have been offered to rebut the officer’s testimony that Mr. Hodges had the card in his possession when police arrived. That fact is relevant because it supports Mr. Hodges’ central defense that he did not know the card was stolen, that he remained on the premise and continued with their golf game rather than leave. Their testimony would show that Mr. Hodges was unsure that the police had been called or that the use of the card was anything other than legitimate.

The facts of the case demonstrate that Mr. Hodges was naive in his choice to use the card, but not that he had knowledge that it was stolen. Most compelling is the fact that Mr. Hodges did not leave Tower Green after being contacted by staff, but instead stayed to finish the round of

miniature golf. This is indicative of factual innocence. It is reasonable that a jury would acquit Mr. Hodges had it heard testimony from Wally Clark about the circumstances of obtaining the card. As noted above, there were several additional witnesses who would have supported Mr. Hodges' testimony who would have been called to testify by diligent counsel. Those include other persons at the social gathering during which Mr. Hodges received the debit card, Ms. Zimmerman, and Mr. Hodges' daughter. Mr. Hodges was prejudiced by his attorney's unreasonable failure to conduct necessary investigation into his defense and to call witnesses discussed above. Accordingly, Mr. Hodges received ineffective assistance of counsel in violation of his rights under the Sixth Amendment and his convictions must be reversed.

**2. HODGES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING**

**a. Counsel failed to argue same criminal conduct**

Mr. Hodges argues that counsel prejudiced him by failing to argue that the convictions for possession of a stolen access device and identity theft were the same criminal conduct for purposes of determining his offender score. "Same criminal conduct" refers to the situation where there are "two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same

victim.” *State v. Vike*, 125 Wash.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a).

Here, the offenses as alleged by the State involved the same victim, occurred at the same place and occurred at the same time, and involved the same criminal intent. Because a “same criminal conduct” finding results in a lower offender score, Mr. Hodges’ trial counsel was ineffective by failing to make the above argument. This Court should therefore vacate Mr. Hodge's sentence and remand for a new sentencing hearing. See *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (“counsel's decision not to argue same criminal conduct as to the rape and kidnapping charges constituted ineffective assistance of counsel”).

Counsel's decision not to argue same criminal conduct as to the charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

**b. Exceptional sentence downward**

As a result of trial counsel's failure to investigate, Mr. Hodges also received ineffective assistance of counsel regarding his request for an exceptional sentence downward. Trial counsel's failure to investigate resulted in trial counsel's failure to put forward mitigating evidence at

sentencing. Counsel requested an exceptional sentence downward, but presented little in the way of argument to support the request. RP at 425-26. Counsel's argument boiled down to his statement that the amount involved (\$20.00) was very small, that he suffers from substantial medical issues including HIV and abscess hernia mesh implantation that needs medical attention, that he suffers from "secondary health problems" as well, and that the best place for him for medical care is out of DOC custody. RP at 426. Counsel filed a memorandum in support of an exceptional sentence downward, but provided no documentation regarding Mr. Hodges' medical diagnosis or anticipated medical needs and presented virtually no argument in support of the request other than counsel's sentencing request. RP at 426; CP 94-94. The court denied counsel's request for an exceptional sentence downward. RP at 429.

Washington courts have affirmed non statutory mitigating factors supporting an exceptional downward sentence outside the legislative purposes listed in RCW 9.94A.010. See *State v. Garcia*, 162 Wn.App. 678, 256 P.3d 379 (2011), review denied, 173 Wn.2d 1008 (2012). An argument based on Mr. Hodges' medical condition is authorized by caselaw and supported by RCW 9.94A.010. A presentencing report could have shed light on issues related to Mr. Hodge's medical diagnosis and medical issues. Mr. Hodge's trial counsel failed to produce or request

such a report for sentencing. As the American Bar Association's standards clearly state, if no presentence report is available, "defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing." Criminal Justice Standards, Defense Function, Standard 4-8.1 Sentencing, American Bar Association (3d ed.1993).

In *State v. McGill*, 112 Wn.App. 95, 47 P.3d 173 (2002), counsel's failure to cite a case showing the court had authority to impose an exceptional sentence downward was held to be ineffective assistance where the trial court at sentencing expressed the incorrect belief that it lacked the authority to impose an exceptional sentence. Here, counsel filed a three-page Request for Exceptional Sentence Downward and Memorandum that merely recited boilerplate language that a court has the authority to impose an exceptional sentence downward under RCW 9.94A.535. CP 94-95. The memorandum contains no specific argument, nor does it assert a basis for a downward sentence.

Mr. Hodges will not belabor the Court with a regurgitation of the first *Strickland* prong as it is discussed in detail above. Regarding the second prong, prejudice may be established where a trial court cannot make an informed decision nor exercise its discretion because the court is unaware of the bounds of or nature of its discretion. *State v. McGill*, 112

Wn.App. 95, 102, 47 P.3d 173 (2002). Such is the case here. Mr. Hodges' medical status may serve as a discretionary non-statutory mitigating factor pursuant to RCW 9.94A.535(1). There was an extraordinarily brief discussion of Mr. Hodges' health issues at sentencing, otherwise, there was no mention of Mr. Hodges' health conditions at sentencing and no supporting document or expert testimony was proffered. See RP at 426, 428. The Court was thus inadequately informed of the potential non-statutory mitigating factor, and lacked knowledge as to the bounds or nature of its discretion; therefore, the Court did not make a fully informed decision at sentencing. This establishes sufficient prejudice to meet Mr. Hodges' burden under the second *Strickland* prong - that there was prejudice that undermined the appellant's right to a fair proceeding. *Strickland*, 466 U.S. at 686; see also *McGill*, 112 Wn.App. at 95.

The record reflects that Mr. Hodges' counsel provided no such information and was inadequately prepared for sentencing. As argued *supra*, trial counsel failed to argue that the two offenses should be treated as the same criminal conduct for purposes of sentencing, and made only a cursory argument<sup>1</sup> that Mr. Hodges' standard sentence range was oppressively and extraordinarily long for what are essentially *di minimus*

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<sup>1</sup>Counsel's argument at sentencing consisted of approximately one and three-quarters of typed transcript pages. RP at 425-27.

offenses that could easily have been addressed by a compromise of misdemeanors pursuant to RCW 10.22.010.

As noted above, a combination of failures can support an ineffective assistance finding, even if none of the individual failures would support the finding. *In re Brett*, 142 Wn.2d 868, 8824-83, 16 P.3d 601 (2001). Also, the relevant inquiry is “whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. The fundamental issue as it pertains to sentencing here is that there was a failure at virtually every stage of the trial process to investigate and bring to the trial court's attention in a meaningful way the mitigating factors asserted by defense counsel. This undermines the proper function of the sentencing process. Even if this matter is not remanded for new trial, Mr. Hodges respectfully urges this Court to remand the matter for resentencing in light of the mitigating circumstances of this case.

**c. Cumulative Ineffective Assistance of Counsel**

Mr. Hodges argues that these alleged instances of ineffective assistance, as well as the multiple other examples of ineffective assistance argued in the appellant's opening brief, taken together, cumulatively deprived him of a fair trial. The cumulative effects of errors may require

reversal, even if each error on its own would otherwise be considered harmless. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

### **3. THE TRIAL COURT ERRED IN DENYING HODGES' MOTION FOR A NEW TRIAL**

A trial court may grant a criminal defendant a new trial “when it affirmatively appears that a substantial right of the defendant was materially affected.” CrR 7.5(a). Mr. Hodges contends that the trial court erred when it denied his motion for a new trial based on alleged ineffective assistance of counsel. At his sentencing hearing, Mr. Hodges, represented by new counsel, moved for a new trial on several grounds, including the argument pursuant to CrR 7.5(a)(8) that substantial justice was not done. RP at 418-19.

A trial court may grant a new trial when ‘substantial justice has not been done.’ An appellate court will not disturb a trial court's decision to grant or deny a new trial unless its decision constitutes a manifest abuse of discretion or a mistake of law. *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). Here, Mr. Hodges' new counsel argued that “substantial justice had not been done” because Mr. Hodges' trial counsel rendered ineffective assistance in a variety of ways, including, *inter alia*, failure to object to the letter by Mr. Hodges admitted as Exhibit 2A, failure to call critical witnesses, and failure to investigate three

transactions involving use of the debit card in the hours before Mr. Hodges received it. RP at 410-14, 418-19. The court denied the motion, stating:

I believe a large part of your argument is ineffective assistance of counsel. I do believe that that's appropriate for review by the Appellate Courts. I cannot conclude that a jury verdict in this case was—that substantial justice has not been done.

RP at 419.

The court is incorrect; failure to provide substantial justice include review by the trial court of the effective assistance of trial counsel. See e.g., *State v. Dawkins*, 71 Wn.App. 902, 906–07, 863 P.2d 124 (1993) (applying abuse of discretion/error of law standard when reviewing trial court decision to deny a motion for a new trial based on ineffective assistance of counsel)

A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. *State v. Roche*, 114 Wash.App. 424, 435, 59 P.3d 682 (2002). A “discretionary decision ‘is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.’” *State v. Quismundo*, 164 Wash.2d 499, 504, 192 P.3d 342 (2008) (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)) (emphasis omitted) (internal quotation marks omitted). “Indeed, a

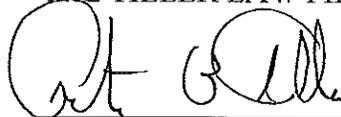
court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.' ” *Id.* (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993)). Here, the trial court incorrectly believed that a motion for new trial was “an appellate issue,” and indicated that it was appropriate for review by an appellate court rather than the trial court. The court abused its discretion by failing to consider the motion for new trial on its merits. The court's failure to weigh the probative value of the motion constitutes a critical error in the case at bar and the court's misapplication of the legal standard constitutes an abuse of discretion. *Quismondo*, 164 Wn.2d at 504. The appellant asks this Court to remand to the trial court for hearing on the merits of his motion for new trial.

**B. CONCLUSION**

For the reasons stated herein and in the appellant’s opening brief, this Court should grant the relief previously requested.

DATED: July 26, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835  
Of Attorneys for John Hodges

**CERTIFICATE**

I certify that on July 26, 2018, a reply brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Jason Ruyf and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

Jason Ruyf  
Pierce County Prosecutor  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2102  
[PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us)

Mr. Derek M. Byrne  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Mr. John M. Hodges  
DOC #975958  
Stafford Creek Correction Center  
191 Constantine Way  
Aberdeen, WA 98520  
**LEGAL MAIL/SPECIAL MAIL**

DATED: July 26, 2018.

THE TILLER LAW FIRM  


PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

**THE TILLER LAW FIRM**

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