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Court of Appeals  
Division II  
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NO. 51557-1-II

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

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IN RE THE DETENTION OF

JOEL REIMER,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Joel Reimer's CR 59 and CR 60 motion for a new trial.

2. The trial court erred in denying Mr. Reimer's motion to reconsider.

3. Mr. Reimer is entitled to a new commitment trial because his assigned attorneys provided ineffective assistance.

4. In violation of due process, Mr. Reimer was denied access to materials that deprived him of the ability to meaningfully assist in his defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court denied Joel Reimer's post-trial motion alleging ineffective assistance of counsel. Mr. Reimer's trial attorneys failed to maintain open communication, allowed the prosecution to liken him to a mafia boss, inserted prejudicial misstatements into cross-examination, argued to the jury it would be criticized by the public for finding in favor of Mr. Reimer, failed to call witnesses who could assist in Mr. Reimer's defense, and failed to bring motions supported by the law. Did the trial court err in denying the motion where Mr. Reimer's attorneys fail to provide him with effective assistance of counsel?

2. Was Mr. Reimer denied a constitutionally fair trial when he was deprived of extensive legal documents that would have allowed him to meaningfully assist in his defense?

C. STATEMENT OF THE CASE

Joel Reimer has been confined at the Special Commitment Center (SCC) for over 25 years. In 2014, the prosecution failed to sustain its burden to show Mr. Reimer still met the criteria for indefinite civil commitment, and a full evidentiary trial was held before a jury. In October 2016, the jury committed Mr. Reimer. CP 1.

Less than 10 days after the new commitment order was filed, Mr. Reimer, through counsel, moved for a new trial under CR 59. CP 5-11. However, Mr. Reimer and his attorneys had suffered a complete breakdown in communication and trial counsel could not allege the ineffective assistance of counsel grounds that Mr. Reimer wanted heard by the court. RP (12/05/16) 1403-06.<sup>1</sup>

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<sup>1</sup> All verbatim report of proceedings referred to by date are contained in the record for Mr. Reimer's direct appeal from the commitment trial, which is pending under cause number 49881-2-II. The volume of verbatim report transcribed for this cause number is referred to simply as "RP."

The trial court agreed to appoint new counsel for Mr. Reimer. RP (12/05/16) 1406. The court denied the CR 59 motion without prejudice for new counsel to renew. RP (12/05/16) 1415.

The court failed to ensure the appointment of new counsel for almost a year. CP 24. In the interim, Mr. Reimer's direct appeal from the commitment order has been pending in this Court. *See generally, In re Det. of Reimer*, No. 49881-2-II (oral arg. scheduled Jun. 26, 2018). In that appeal, Mr. Reimer alleges he was denied his right to testify during his case-in-chief, the admission of nontestifying expert opinions violated evidentiary rules and was the result of prosecutorial misconduct, and the "more likely than not" standard is constitutionally deficient. Op. Br., No. 49881-2-II (filed Aug. 3, 2017).

Shortly after new trial-level counsel was finally appointed, counsel renewed the CR 59 motion in October 2017 alleging ineffective assistance of counsel and denial of a fair trial. CP 28-187 ("Restated motion"). The motion was supported by declarations and pro se motions drafted by Mr. Reimer. *Id.* Although it had denied the initial CR 59 motion without prejudice to renew, the court denied the renewed motion as untimely. RP 11; CP 192.

Mr. Reimer filed a motion to reconsider alleging a CR 60 right to a new trial in addition to CR 59. CP 193-94. The trial court denied the motion to reconsider. CP 199.

Mr. Reimer now appeals the trial court's rulings on his CR 59 and CR 60 motion. CP 200.

D. ARGUMENT

**1. The motion for a new trial was timely under CR 59 or CR 60 in light of the circumstances of this case.**

Civil Rule 59 and Civil Rule 60 afford the opportunity to move for relief due to ineffective assistance of counsel following a civil trial. Mr. Reimer initially raised the restated motion for a new trial alleging ineffective assistance of his prior counsel under CR 59. Civil Rule 59 provides that motions for a new trial should be brought within 10 days following entry of the judgment, order, or other decision. CR 59(b). The order of commitment was entered on October 27, 2016. CP 1. The initial motion for a new trial was filed by Mr. Reimer's commitment trial counsel on November 4, 2016—within 10 days of the commitment order. CP 5-22.

At the hearing on the timely-filed motion for a new trial, Mr. Reimer's commitment trial counsel withdrew and new counsel was

appointed. RP (12/05/16) 1406; *see* CP 25 (court told Mr. Reimer new counsel would be appointed). New counsel was appointed because Mr. Reimer and trial counsel had an irreconcilable breakdown in communication that included trial counsel's failure to move for a new trial on the bases desired by Mr. Reimer. RP (12/05/16) 1403-06. Trial counsel could not allege ineffective assistance of counsel as to themselves. RP (12/05/16) 1408-11. Yet, the trial court did not file Mr. Reimer's motions because he was represented by counsel. RP (12/05/16) 1410.

Once counsel withdrew, the court agreed to file Mr. Reimer's pro se post-trial motions. RP (12/05/16) 1410-13. The court also denied the timely CR 59 motion but explicitly stated it was denied without prejudice for Mr. Reimer's new counsel to renew the motion. RP (12/05/16) 1415.

When new counsel was finally appointed, it filed the restated motion for a new trial, alleging ineffective assistance of trial counsel and attaching Mr. Reimer's pro se motions. CP 28-187. This restated motion for a new trial was timely because the initial motion for a new trial was timely filed and the trial court denied the initial motion

without prejudice for newly appointed counsel to renew it. *See* RP (12/05/16) 1415.

Alternatively, the restated motion is timely under CR 60. CP 193-94 (motion to reconsider citing CR 60). Civil Rule 60 provides that motions must be made “within a reasonable time” and, in certain cases, within one year from entry of the judgment, order, or other decision. Mr. Reimer’s restated motion for a new trial was filed within one year of the commitment order and shortly after new counsel was appointed. *Compare* CP 28 (restated motion filed Oct. 23, 2017) *with* CP 1 (commitment order filed Oct. 27, 2016). Thus, the motion was timely under CR 60. *See Luckett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999) (motion filed within a reasonable time when considering factors such as moving party’s good reasons for not filing sooner and lack of prejudice to nonmoving party).

The restated motion for a new trial was timely on either basis. The trial court erred in denying the motion as untimely. RP 11; CP 192, 199.

**2. This Court should engage in de novo review.**

The Court should review the denial of the CR 59 and CR 60 motion de novo because the trial court made no factual findings and the

the evidence is entirely documentary. “[W]here the record both at trial and on appeal consists entirely of written . . . material . . . and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses . . . then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.” *State v. Smith*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969). Where the evidence below is documentary, this Court is entitled to make its own examination of the record. *Id.* at 719. Moreover, claims of ineffective assistance are reviewed de novo. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Therefore, the Court should conduct de novo review.

**3. Because trial counsel was ineffective, the trial court erred in denying the motion for a new trial.**

a. Mr. Reimer was entitled to the effective assistance of counsel at his initial commitment trial.

Individuals subject to indefinite, involuntary commitment under chapter 71.09 RCW are entitled to effective assistance of counsel. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009); *see* U.S. Const. amends. VI, XIV; Const. art. I, § 22; *see also* RCW 71.09.050(1). Attorney performance is measured for reasonable effectiveness. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); *see Moore*, 167 Wn.2d at 122 (applying *Strickland* standard in civil commitment context). To succeed in his claim that trial counsel was ineffective, Mr. Reimer must show counsel's performance fell below an objective standard of reasonableness and these deficiencies prejudiced Mr. Reimer. *Moore*, 167 Wn.2d at 122; *Strickland*, 466 U.S. at 687-88.

While under the first prong—counsel's deficiency—courts presume that defense counsel was not deficient, the presumption is rebutted if there is no legitimate tactical explanation for counsel's performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The prejudice standard is not overly onerous. Under the second prong, if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694. Mr. Reimer "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Rather, he must show only "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability

sufficient to undermine confidence in the outcome. *Id.*; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 693).

Trial counsel’s multitudinous deficiencies prejudiced Mr. Reimer at his commitment trial.

b. Trial counsel acted unreasonably by failing to maintain open communication with Mr. Reimer.

To provide effective assistance, a trial attorney must have open communication with his client. *United States v. Nguyen*, 262 F.3d 998, 1003-04 (9th Cir. 2001); *Brown v. Craven*, 424 F.2d 1166, 1169-70 (9th Cir. 1970). Mr. Reimer’s writ of mandamus sets forth several bases upon which communication with his trial attorneys had failed. CP 148-66.

For example, trial counsel failed to communicate with Mr. Reimer regarding conditional release negotiations between counsel and the prosecution. CP 150. It is unreasonable for counsel to fail to communicate with their client regarding plea negotiations. The right to the effective assistance of counsel extends to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed.2d 398 (2012); *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed.2d 379

(2012). “[C]ounsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant’s case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty. *State v. Edwards*, 171 Wn. App. 379, 394, 294 P.3d 708 (2012) (citing *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987) (collecting cases from other jurisdictions holding that defense counsel’s failure to advise a client of a plea bargain offer amounts to ineffective assistance)).

Counsel also failed to provide effective representation because they provided no means for Mr. Reimer to communicate his complaints. CP 157-58, 160, 162, 171-72. Counsel deprived Mr. Reimer of a means of communication with his attorneys, thereby denying the open communication required for effective representation.

Counsel was also unresponsive to Mr. Reimer during the trial preparation process. CP 162. Moreover, counsel failed to communicate with Mr. Reimer during trial. CP 161-62. This caused Mr. Reimer’s unintended absence during his case-in-chief and, in particular, denied him the opportunity to testify in his own defense. CP 161-62 (discussing how he had no means to communicate with counsel from jail where he was held during trial), CP 170-71, ¶¶ 11-12. The lack of

communication with the attorneys who represented him at trial deprived Mr. Reimer of his right to the effective assistance of counsel. *See Nguyen*, 262 F.3d at 1003-04.

Trial counsel acted ineffectively by representing Mr. Reimer during trial despite the lack of communication with their client and for failing to communicate with Mr. Reimer regarding plea negotiations.

- c. Trial counsel acted unreasonably by failing to defend against the prosecution likening Mr. Reimer to mafia boss John Gotti.

Counsel's duty is "to make the adversarial testing process work in the particular case." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986) (quoting *Strickland*, 466 U.S. at 690). Trial counsel moved pretrial to restrict the prosecution from comparing Mr. Reimer to mafia boss John Gotti, which was irrelevant and caused unfair prejudice. CP 32 (citing RP (10/11/16) 185-89). The trial court reserved ruling. *Id.* And the prosecution proceeded to liken Mr. Reimer to John Gotti at trial. CP 32-34; RP (10/18/16) RP 798-801. Yet, trial counsel failed to object. *Id.*

Thus, trial counsel enabled the prosecution in likening Mr. Reimer to a mafia boss and convicted murderer. CP 32-34. Having objected to the analogy pretrial, there can be no tactical basis for

counsel's failure to object when the evidence arose during trial. The deficiency prejudiced Mr. Reimer's appearance to the jury. Counsel acted ineffectively.

d. Trial counsel acted unreasonably by inserting prejudicial misstatements into cross-examination.

Trial counsel further prejudiced Mr. Reimer's case by inserting misinformation into cross-examination. CP 34-35. After the prosecution called Mr. Reimer as a witness, respondent's counsel cross-examined him. Trial counsel asked Mr. Reimer about his "recent" poor behavior at the SCC. RP (10/18/16) 889-91. While Mr. Reimer was able to deny that he had acted poorly, counsel's questioning implied to the jury that he had. Moreover, by phrasing the question in the negative, trial counsel missed the opportunity to cast Mr. Reimer in a favorable light (highlighting his compliant behavior) and furthered the negative images drawn out by the prosecution (e.g., likening Mr. Reimer to John Gotti). Trial counsel's deficiency was prejudicial

because it concerned a central issue in the case—whether Mr. Reimer could follow rules or whether he was likely to reoffend if released.

- e. Trial counsel acted unreasonably by drawing the jury’s attention to the media and publicity during closing argument.

Counsel owes a duty of zealous advocacy to their client. In closing argument, trial counsel told the jury that if it returned a verdict in favor of Mr. Reimer they “will be criticized. There is no doubt.” RP (10/21/16) 1340-42. Counsel reminded the jury that there was a reporter in the courtroom, informed the jury the reporter would be writing her third story about this case, and recalled to the jurors that they would have to return home and face their neighbors and families. *Id.*

With this argument, Mr. Reimer’s counsel made more onerous the jury’s decision to not commit Mr. Reimer. Counsel played on the jurors’ fears and emotions to encourage them not to acquit Mr. Reimer. There is no legitimate tactical reason to persuade a jury to decide against counsel’s own client, particularly on grounds other than “probative evidence and sound reason.” *State v. Fedoruk*, 184 Wn. App. 866, 890, 339 P.3d 233 (2014) (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). The argument was

incompatible with the jury's actual duty. This argument was objectively unreasonable, lacked zealousness, and prejudiced Mr. Reimer. *See* CP 35.

f. Trial counsel acted unreasonably by failing to call witnesses.

In addition, trial counsel acted deficiently by failing to call witnesses identified by Mr. Reimer and who were favorable to his case. CP 35, 185.

Trial counsel bears the duty to conduct reasonable investigation into witnesses and records. *Strickland*, 466 U.S. at 691 (counsel has duty to make reasonable investigations); *State v. Jones*, 183 Wn.2d 327, 339-40, 352 P.3d 776 (2015) (counsel's failure to interview witnesses constitutes deficient performance); *Wiggins v. Smith*, 539 U.S. 510, 523-24, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (counsel's failure to expand investigation to readily available records is deficient).

Mr. Reimer provided counsel with over 20 witnesses who would support his case. CP 35. These witnesses included "multiple nurses, security staff, residential staff, treatment staff and community support." *Id.* Mr. Reimer also asked counsel to call his significant other, Denise Ashley, as a witness. *Id.* Counsel, however, failed to call these

witnesses. CP 35; CP 171, ¶ 14 (counsel ignored Reimer’s witness list); CP 173-74, ¶ 17 (same).

These witnesses supported Mr. Reimer’s argument that he did not require total confinement and that he had a release plan that mitigated any risk to the community if he was released. CP 35 (citing Mandamus declaration of Reimer, ¶ 30, pp.12-13). Thus, counsel’s failure to investigate or present these favorable witnesses prejudiced Mr. Reimer’s defense.

- g. Trial counsel acted unreasonably by not pursuing pretrial motions or otherwise presenting available legal arguments.

Finally, trial counsel also acted deficiently by failing to pursue legal arguments at Mr. Reimer’s request.

First, Mr. Reimer requested trial counsel move to strike “the age factor” and prepared his own pro se motion. CP 178-79, ¶ 30; CP 181-82 (Reimer’s pro se motion to strike age factor). In this motion, Mr. Reimer argued the prosecutor sought to present evidence that L.L. was years younger than the age upon which Mr. Reimer’s plea to third degree child molestation was based. CP 181 (Reimer believed L.L. was 15; prosecution sought to present L.L. as having been 12 years old). Moreover, there was evidence L.L. had recanted, but Mr. Reimer was

unaware of this fact before he entered a guilty plea. CP 182.

Accordingly, Mr. Reimer wished to move to exclude evidence of L.L.'s age from the commitment trial. Trial counsel failed to bring the motion.

Trial counsel also unreasonably failed to argue that, at age 21, Mr. Reimer's brain was insufficiently developed. CP 179. He advised trial counsel he had the brain of a 16-year-old locked in the body of a 21-year-old. *Id.* Trial counsel should have been aware of extensive United States Supreme Court case law showing young adults temporarily lack volitional control while their brains continue to develop into their mid-twenties. *E.g.*, *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

“An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Hinton v. Alabama*, 571 U.S. 263, \_\_\_, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014). Counsel acted deficiently by failing to advance available legal theories that would have aided Mr. Reimer's defense.

h. Reversal is required.

Alone or in the aggregate, these several deficiencies of trial counsel require remand for a new commitment trial.

The prosecution argued the trial court should deny Mr. Reimer's motion because his ineffective assistance of counsel claim must be litigated in a personal restraint petition. CP 189-90 (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). This argument is incorrect. Where the record is sufficient to determine the lack of a trial attorney's effectiveness, the claim can be raised and decided in a post-trial motion and reviewed on direct appeal. *See McFarland*, 127 Wn.2d at 335 (review limited to matters contained in the record). The record before the trial court contained extensive motions, affidavits, declarations and excerpts from the trial court record. The same record is presented to this Court on appeal. It is sufficient to determine the issue raised. *See McFarland*, 127 Wn.2d at 335.

Moreover, a personal restraint petition requires the petitioner to have no other available means for relief. RAP 16.4(d). Because CR 60(b) was available to Mr. Reimer, a personal restraint petition would not have been entertained.

**4. In violation of due process, Mr. Reimer was denied access to materials that deprived him of the ability to meaningfully assist in his defense.**

Mr. Reimer's due process right to a fair trial was denied because documents were withheld from him. *See In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (citing *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979)); *In re Det. of Halgren*, 156 Wn.2d 795, 807-08, 132 P.3d 714 (2006)); CP 30-31.

The Special Commitment Center seized a computer hard drive from Mr. Reimer that contained his legal files and records, including communications with his attorneys. *See generally* CP 53-76; CP 77. On his own and through his attorneys, Mr. Reimer has repeatedly sought return of or access to this hard drive. *E.g.*, CP 54. Among other things, he filed Public Records Act request for documents relevant to his commitment trial.

Because Mr. Reimer was denied access to his legal records, he lacked the ability to meaningfully assist in his defense. *See, e.g.*, CP 100-01 (discussing information contained in withheld records that pertain to claims asserted by prosecution's expert witness); CP 106-07 (discussing withheld materials related to Reimer's Native American treatment defense). By hamstringing Mr. Reimer's ability to assist his

counsel, the withholding of these documents denied Mr. Reimer a constitutionally fair trial. On this additional basis, the matter should be reversed and remanded for a new trial.

E. CONCLUSION

The Court should reverse and remand for a new commitment trial because Mr. Reimer was deprived of constitutionally effective counsel and because the trial was unfair due to the withholding of documents critical to his defense.

DATED this 21st day of June, 2018.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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IN RE THE DETENTION OF	)	
	)	
JOEL REIMER,	)	NO. 51557-1-II
	)	
	)	
APPELLANT.	)	

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X \_\_\_\_\_ 

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## Transmittal Information

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