

No. 34157-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joseph Richmond,

Appellant.

Kittitas County Superior Court Cause No. 14-1-00247-4

The Honorable Judge Scott Sparks

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE ALLOWED MR. RICHMOND TO INTRODUCE EVIDENCE CORROBORATING HIS SELF-DEFENSE CLAIM.

- A. This court should follow *Jones* and *Iniguez*, and review *de novo* the trial judge's decision excluding Dr. Predmore's expert testimony.

Constitutional claims are reviewed *de novo*. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). The Supreme Court has issued conflicting opinions on the standard applied to discretionary decisions alleged to violate an accused person's constitutional rights. The better approach is to review such matters *de novo*.

In *Jones*, the court applied the *de novo* standard to a trial judge's decision excluding evidence. *Id.* There, as in this case, the defendant argued that the trial court's discretionary decision infringed his right to present a defense. *Id.* Similarly, the Supreme Court has reviewed *de novo* a decision denying a severance motion and granting a continuance. *State v. Iniguez*, 167 Wn.2d 273, 280-281, 217 P.3d 768 (2009). The *de novo* standard applied because the defendant argued a constitutional violation. *Id.*

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones*, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*—the defendant alleged a

violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez*. Cases applying the abuse-of-discretion standard have not grappled with the rationale supporting the *Jones* and *Iniguez* decisions. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017).

For example, the *Dye* court did not cite *Iniguez* or *Jones* or address the rationale underlying those decisions. *Dye*, 178 Wn.2d at 548. The petitioners in *Dye* did not ask the court to apply a *de novo* standard,¹ and presented the court with “no reason... to depart from [an abuse-of-discretion standard].” *Id.*² Similarly, the *Clark* court did not suggest that *Jones* and *Iniguez* were incorrect or harmful, and did not overrule those decisions. *Clark*, 187 Wn.2d at 648–49.³ As in *Dye*, the Respondent in *Clark* argued

¹ *See* Petition for Review, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 7/11/17) and Supplemental Brief available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 7/11/17).

² By contrast, the Respondent in *Dye* did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20Obrief.pdf> (last accessed 7/11/17).

³ Although the *Clark* court cited *Jones*, it did not acknowledge its deviation from the standard applied in *Jones*. *Id.*

for the abuse-of-discretion standard, and the *Clark* Petitioner did not ask the court to apply a different standard.⁴

If applied in the manner suggested by *Clark* and *Dye*, the *de novo* standard becomes meaningless. An abuse of discretion resulting in the exclusion of relevant and admissible defense evidence will always violate the right to present a defense. *Jones*, 168 Wn.2d at 719. Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import. *Id.*

The trial court's error in this case should be reviewed *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. Respondent cites only one case in support of the boilerplate assertion that the admission of evidence is reviewed for an abuse of discretion. Brief of Respondent, p. 26 (citing *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195, 199 (2010), *overruled by State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012)).

Bashaw did not address an alleged constitutional violation. *Bashaw*, 169 Wn.2d at 140. It does not undermine appellant's argument.

Respondent fails to address *Jones* and *Iniguez*, cites no authority applying abuse-of-discretion to evidentiary errors with constitutional implications, and makes no mention of the constitutional dimension of Mr. Richmond's argument. Brief of Respondent, p. 26. These failures may be

⁴ See Respondent's Supplemental Brief, p. 16, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 2/10/17); Petitioner's Supplemental Brief, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (last accessed 2/10/17).

treated as concessions, and the court can assume that Respondent found no relevant authority after diligent search. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *In re Det. of Herrick*, 198 Wn. App. 439, 448 n. 24, 393 P.3d 879 (2017).

The Court of Appeals should follow *Jones* and *Iniguez* and review the errors *de novo*.

- B. Dr. Predmore should have been allowed to testify that Higginbotham had a great deal of methamphetamine in his system, and that the drug likely made him aggressive and irrational.⁵

Mr. Richmond had a constitutional right to present admissible evidence that was even minimally relevant. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 22; *Jones*, 168 Wn.2d at 720; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). To corroborate his self-defense claim, he offered evidence that Higginbotham had consumed “a super-high level” of methamphetamine (enough to kill an ordinary person), and that taking the drug in that quantity likely made him aggressive and irrational. CP 68-77; 167-169. The court excluded the evidence as irrelevant. RP 170-175. This violated Mr. Richmond’s constitutional right to present a defense. *See* Appellant’s Opening Brief, pp. 16-20.

Respondent concedes that evidence need only be minimally relevant, that evidence is relevant if it has any tendency to “prove, qualify, or disprove an issue,” and that the proponent need only show a logical nexus

⁵ Respondent argues at length about Dr. Stanilus’s testimony, which is not at issue in this appeal. Brief of Respondent, pp. 26-34.

between the evidence and the fact to be established. Brief of Respondent, pp. 34-35. The evidence was admissible under these standards.

The primary issue at trial was whether Mr. Richmond used lawful force in self-defense. Higginbotham's methamphetamine use, the level of methamphetamine in his system, and the likely effects of the drug were all at least minimally relevant to show that Higginbotham was the aggressor and that Mr. Richmond acted in self-defense. CP 68-77, 167-169. The evidence provided some corroboration for Mr. Richmond's testimony. CP 68-77, 167-169.

Respondent does not dispute this. Instead, Respondent's argument appears to be that the evidence was irrelevant unless Mr. Richmond knew of Higginbotham's methamphetamine use. Brief of Respondent, pp. 37-38. But Mr. Richmond did not offer the evidence to show the reasonableness of his apprehension.⁶

Evidence of this sort can be relevant to a self-defense claim even if the accused person lacks knowledge of it. The Supreme Court has long held, for example, that

[w]hen a defendant seeks to excuse the killing on the ground of self-defense, it is competent for him to show the general reputation and character of the deceased for a quarrelsome disposition. The character of the deceased may be shown whether the defendant knew of it or not, because such testimony has a tendency to support the defendant's contention that the deceased was the aggressor.

⁶ Except insofar as the methamphetamine made Higginbotham appear aggressive and irrational. CP 71.

State v. Adamo, 120 Wash. 268, 270, 207 P. 7 (1922).

Evidence of the decedent’s “quarrelsome disposition” is indirect proof that the decedent acted aggressively – even if the accused person knew nothing of that “quarrelsome disposition.” *Id.*; see also *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997) (alleged victim’s violent reputation ordinarily admissible in self-defense cases “to support the inference that the victim was the aggressor,” even if unknown to defendant);⁷ *State v. Cloud*, 7 Wn. App. 211, 217–18, 498 P.2d 907 (1972) (“If the deceased’s reputation for violence was unknown to the defendant at the time of the affray, it is admissible nonetheless to corroborate a defendant’s claim that the deceased was the aggressor.”)

Indeed, even the *Hutchinson* case, upon which Respondent relies, affirms the admissibility of evidence of this sort. See Brief of Respondent, pp. 35-36 (citing *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998)). The *Hutchinson* court noted that “a defendant may introduce evidence of the victim’s violent disposition to prove the victim acted in a violent manner at the time of the crime.” *Id.*, at 886. Had the defendant offered such testimony, it would have been admissible *Id.*

⁷ In *Callahan*, the Court of Appeals upheld a decision excluding the evidence based on the absence of a witness who could testify to the alleged victim’s reputation in a neutral community. *Id.*, at 935 (“For purposes of reputation testimony, the criminal justice system is neither neutral nor sufficiently generalized to be classified as a community.”)

The “reputation” here is not of a person’s character, but rather the reputation of a drug: when ingested in sufficient quantities, methamphetamine can make a person aggressive and irrational. CP 68-77; 167-169.⁸ Evidence that Higginbotham had enough methamphetamine in his system to kill most people was at least minimally relevant, because it had some tendency to show that he was the likely aggressor in the conflict. CP 68-77; 167-169.

The excluded testimony would have corroborated Mr. Richmond’s account. It would have helped jurors determine the facts, especially given the conflicting testimony. The fact that the state’s witnesses described Higginbotham as “frustrated” rather than “aggressive towards Mr. Richmond” only shows why the testimony was so critical to the defense case. *See* Brief of Respondent, pp. 38.

The expert’s testimony would have been helpful to the jury. *See Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). ER 702

⁸ *See also* Christopher Haas, *Owner and Promoter Liability in “Club Drug” Initiatives*, 66 Ohio St. L.J. 511, 522 (2005); Michelle Kommer, *Protecting Children Endangered by Meth: A Statutory Revision to Expedite the Termination of Parental Rights in Aggravated Circumstances*, 82 N.D.L. Rev. 1461, 1470 (2006); Ells et al., American Prosecutors Research Institute, *Behind the Drug: The Child Victims of Meth Labs* (2002)); *see also* *State v. Hopkins*, 113 Wn.App. 954, 956, 960, 55 P.3d 691 (2002); Dr. Mary Holley, *How Reversible Is Methamphetamine-Related Brain Damage?*, 82 N.D.L. Rev. 1135, 1139 (2006); Joan E. Zweben et al., *Psychiatric Symptoms in Methamphetamine Users*, 12 Am. J. Addictions 181, 184-85 (2004); Dr. Jane Carlisle Maxwell, *Methamphetamine: Epidemiological and Research Implications for the Legal Field*, 82 N.D.L. Rev. 1121, 1129 (2006); Edythe London et al., *Mood Disturbances and Regional Cerebral Metabolic Abnormalities in Recently Abstinent Methamphetamine Abusers*, 61 Archives of General Psychiatry 73 (2004).

favors admissibility in doubtful cases. *Miller v. Likins*, 109 Wn.App. 140, 148, 34 P.3d 835 (2001). An expert need not have absolute certainty: the standard for admission is reasonable certainty. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 607, 260 P.3d 857 (2011).

Instead of engaging with these standards, Respondent merely repeats the state's theory of the case and asserts that the evidence "could not help the jurors decide any of the relevant facts." Brief of Respondent, p. 40. This is not true: the evidence had at least minimal relevance because it tended to show that Higginbotham was the aggressor. CP 68-77; 167-169.

The evidence was relevant and admissible. By excluding it, the trial court violated Mr. Richmond's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

Respondent does not suggest that the error was harmless. Brief of Respondent, pp. 34-41. The conviction must be reversed and the case remanded with instructions to admit the excluded evidence. *Id.*

II. THE COURT SHOULD NOT HAVE GIVEN AN AGGRESSOR INSTRUCTION BECAUSE THERE WAS NO EVIDENCE OF AN UNLAWFUL PROVOKING ACT.

An aggressor instruction is unwarranted absent evidence that the defendant engaged in an unlawful act, other than the alleged assault itself, that was reasonably likely to provoke a belligerent response from a reasonable person. *See* Appellant's Opening Brief, pp. 21-29. In this case, there was no evidence of such an act.

Even under Respondent’s version of events, Mr. Richmond’s actions did not warrant an aggressor instruction. According to Respondent, Mr. Richmond broke off from the verbal confrontation with Higginbotham, went inside his house, and returned with a board. Brief of Respondent, p. 43. Respondent’s position is that “Mr. Richmond’s actions ‘created’ a ‘necessity’ for defense because he came back outside armed.” Brief of Respondent, p. 44. This reflects a misunderstanding of the applicable standard.

When facing off against a trespasser, anyone has the right to stand in their own yard with a weapon. *See, e.g., State v. Wooten*, 87 Wn. App. 821, 945 P.2d 1144 (1997). In *Wooten*, the defendant fought with the victim, then went into her house and retrieved a gun. The Court of Appeals reversed her murder conviction because the trial judge refused to give a “no duty to retreat” instruction. The court reasoned as follows:

A reasonable jury could have believed Wooten's testimony that (1) Hansen's threat meant that she would have been shot in the near future, (2) she thought that it was necessary to return outside to diffuse the situation, and armed herself to do so out of fear of Hansen, and (3) based upon Hansen's actions at her car, Wooten reasonably believed that Hansen was about to shoot her. But without a “no duty to retreat” instruction, the jury could have concluded that self defense was nevertheless not applicable because flight was a reasonably effective alternative to Wooten's use of force.

Id.

Arming oneself and standing in one’s own yard to face down a trespasser is neither unlawful nor improperly aggressive. *Id.* Furthermore,

coming outside and standing one's ground with a weapon is not reasonably likely to provoke a belligerent response, especially from a reasonable person. *Id.*

Mr. Richmond made clear that he didn't want Higginbotham on his property and didn't want him to come any closer. RP 287-288, 292, 439, 987-997, 1044, 1046. Higginbotham had no right to be there; he was a trespasser. His companion had threatened to kick Mr. Richmond's door in, and had already taken a crowbar to his shed. RP 270-271, 363-364, 981-982.

Under these circumstances, Mr. Richmond had the right to come out of his house with a board. Higginbotham did not have the right to use force against Mr. Richmond, and thus Mr. Richmond was not the aggressor. *Cf. State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). It is unfortunate that Higginbotham responded to Mr. Richmond by coming further onto the property rather than moving away, as any reasonable person would.

The improper aggressor instruction stripped Mr. Richmond of his right to argue self-defense. *Id.* The instruction was misleading and unsupported. The conviction must be reversed. *State v. McCreven*, 170 Wn.App. 444, 462, 284 P.3d 793 (2012). Mr. Richmond's conviction must be reversed and his case remanded for a new trial. *Id.*

III. THE EXCLUSION OF RELEVANT AND ADMISSIBLE BIAS EVIDENCE VIOLATED MR. RICHMOND’S CONFRONTATION RIGHT AND HIS RIGHT TO PRESENT A DEFENSE.

- A. The trial court should have allowed Mr. Richmond to cross-examine Dresp and Zackuse regarding their use of methamphetamine with Higginbotham.

Mr. Richmond wished to introduce evidence that the state’s two main witnesses used methamphetamine *with Higginbotham* on the day of the alleged offense. RP 184. The evidence was admissible to show bias. *See* Appellant’s Opening Brief, pp. 33-35.

The three were close enough to engage in criminal activity together, and thus Dresp and Zackuse may have slanted their testimony “unconsciously or otherwise” to align with Higginbotham and against Mr. Richmond. *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984).

Bias evidence is always relevant. *State v. Spencer*, 111 Wn.App. 401, 408, 45 P.3d 209 (2002). Even “minimally relevant” bias evidence is admissible under the confrontation clause, and an accused person has “more latitude to expose the bias of a key witness.” *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). Furthermore, the constitutional right to present a defense also guarantees the opportunity to present relevant admissible bias evidence. *See, e.g., Justice v. Hoke*, 90 F.3d 43, 47-48 (2d Cir. 1996).

Because Dresp and Zackuse were key witnesses for the state, Mr. Richmond should have been granted latitude in exposing their potential

bias. *Id.* The evidence was relevant and admissible, and should not have been excluded. *See, e.g., State v. Craven*, 67 Wn.App. 921, 927, 841 P.2d 774 (1992) (addressing admission of gang evidence).

Respondent does not address this argument.⁹ Brief of Respondent, pp. 44-45. Nor does Respondent contend the error was harmless. Brief of Respondent, pp. 44-45. These failures may be taken as concessions. *Pullman*, 167 Wn.2d at 212 n. 4.

B. Appellate counsel erroneously suggested that the trial court prevented Mr. Richmond from impeaching Dresp and Zackuse with evidence of their own methamphetamine use on the day of the incident.

As Respondent points out, the court did not prohibit Mr. Richmond from cross-examining Dresp and Zackuse about the effect of methamphetamine use on their own perception and memory. Brief of Respondent, p. 45. In the Appellant's Opening Brief, appellate counsel incorrectly assigned error to a purported refusal to allow questioning on the subject on the two witnesses' own drug use. Appellant's Opening Brief, p. 2. Assignments of Error Nos. 17 and 19 are withdrawn, as is argument section III.B.2. *See* Appellant's Opening Brief, pp. 2, 35-36.

The other assignments of error and arguments touching on this issue remain intact. The trial court violated Mr. Richmond's confrontation

⁹ Instead, Respondent points out that the court allowed Mr. Richmond to cross examine Dresp and Zackuse about their own methamphetamine use. Brief of Respondent, p. 45. The Appellant's Opening Brief erroneously suggests that the court limited cross-examination on this subject. Appellant's Opening Brief, pp. 2, 8, 30,

right and his right to present a defense by excluding evidence that Dresp, Zackuse, and Higginbotham used methamphetamine together on the day of the incident. The evidence showed bias, as argued in the opening brief and above. *See* Appellant’s Opening Brief, pp. 2-3, 30-35, 36-37.

As noted, Respondent has apparently conceded these issues. Brief of Respondent, pp. 44-45; *Pullman*, 167 Wn.2d at 212 n. 4. Mr. Richmond’s conviction must be reversed and the case remanded with instructions to admit evidence that Dresp and Zackuse used methamphetamine with Higginbotham.

IV. MR. RICHMOND’S SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING HEARING.

Mr. Richmond’s Idaho rape conviction was based on a statute that, *inter alia*, criminalized sex with any female under age 18. CP 111; RP 1195; former I.C. §18-6101 (2004). This is not a crime in Washington, which requires proof of additional elements for child rape. *See, e.g.*, RCW 9A.44.079. Thus, the Idaho offense cannot add to the offender score. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Defense counsel noted the lack of comparability, but did not object to its inclusion in the offender score. RP 1195-1196. This amounts to a nonbinding “stipulation” on an issue of law. *See State v. Cosgaya-Alvarez*, 172 Wn.App. 785, 790, 291 P.3d 939 *review denied*, 177 Wn.2d 1017, 304 P.3d 114 (2013).

Because the “stipulation” is nonbinding, this court should reach the merits of the comparability error. *Id.* Respondent does not address this argument. This failure may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n. 4.

In the alternative, Mr. Richmond was denied the effective assistance of counsel at sentencing. *Thiefault*, 160 Wn.2d at 417. In *Thiefault*, defense counsel failed to object to the trial court’s comparability analysis. Noting that the foreign statute in that case was “broader than its Washington counterpart,” the Supreme Court held that counsel’s deficient performance prejudiced the defendant. *Id.*

Similarly, the Idaho statute here is broader than any comparable Washington statute. Counsel should have objected to inclusion of the conviction in the offender score. *Id.* Proper argument would have resulted in an offender score of four, rather than five, which would have reduced Mr. Richmond’s standard range. Caseload Forecast Council, *2014 Washington State Adult Sentencing Guidelines Manual*, p. 405 (2014).

Respondent does not address Mr. Richmond’s ineffective assistance argument. Brief of Respondent, pp. 45-51. Instead, Respondent quotes from the *current* Idaho statute, rather than the statute in effect at the time of the offense. Brief of Respondent, p. 49. The correct statute for comparison is former I.C. §18-6101 (2004). Under that provision,

Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female under either any one (1) of the following circumstances:
1. Where the female is under the age of eighteen (18) years...

Former I.C. §18-6101 (2004).

If the error is not preserved, Mr. Richmond was denied the effective assistance of counsel. *Thiefault*, 160 Wn.2d at 417. His sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

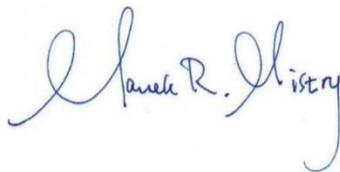
CONCLUSION

Mr. Richmond's conviction must be reversed and the case remanded for trial. Alternatively, his sentence must be vacated and the case remanded for resentencing

Respectfully submitted on September 15, 2017,
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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 15, 2017.



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