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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 34326-0-III

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**COURT OF APPEALS, DIVISION NO. III**
**OF THE STATE OF WASHINGTON**

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The State of Washington,

Respondent,

v.

Michael John Levasseur,

Appellant.

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# Appellant's Reply

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## A. INTRODUCTION

COMES NOW Appellant Michael John Levasseur, and submits this Reply to the State's Response Brief:

Herein, Mr. Levasseur replies that the trial court did in fact direct counsel to follow up on mental health issues; while the court was *also* concerned with bond and whether treatment may impact the need therefor, the purpose of bond is to assure the Defendant's reappearance before the Court. Bond is not a mechanism to ensure mental health treatment, and if this is the State's argument on appeal, then it would be separate grounds for review – i.e. whether the trial court erred by linking bond to mental health treatment.

The State argued in response that trial counsel's decision to focus on self-defense was a reasonable and legitimate trial stratagem. This, however, improperly re-frames the issue on Appeal. The ineffective assistance is the failure to investigate, not the advancement of self-defense at trial.

Similarly, the State argues in response that there was no ineffective assistance at sentencing because trial counsel asked for a low-end sentence and focused on other factors as a tactic at sentencing. Again, this improperly re-frames the issue on appeal; the State is confusing the criteria of the *Strickland* prongs. The ineffective assistance is found again in the failure to

investigate mental health issues; the prejudice is found in the inability of the trial court to make an informed decision where the trial judge is not aware of the bounds of his discretion.

Mr. Levasseur now Replies as follows:

## B. ARGUMENT & AUTHORITY

### 1. The Trial Court Directed a Mental Health Investigation.

The State makes too much of their argument that the single mention of mental health does not amount to a direction to investigate. The Court's statement must be "unpacked" into component parts for full understanding.

> I'm concerned about what I understand from last time to be potentially some untreated, some untreated mental health issues, whether that's PTSD or some other thing, so if you can get to the bottom of that with the Veteran's organization, indicate that they're prepared to, you know, monitor treatment or otherwise assure the stability of a residence and assure that he's able to get treatment, if that's what he needs, at least be evaluated, I'll absolutely reconsider bond.

RP at 15:12-22. Mr. Levasseur does not argue that there was no connection between the mental health treatment and imposition of bond. However, the issue of bond did not hinge on whether Mr. Levasseur could obtain mental health treatment.

The Court was concern as it related to bond was primarily whether Mr. Levasseur could show a stable address; this was needed to establish a community tie. Mr. Levasseur informed the Court that he potentially had a

place to park his RV with Ms. Dana Hughes. RP at 12:15-13:1. The Court then stated: "... none of that's been verified to me yet, so that doesn't mean very much as far as ties to the community..." *Id.* at 13:2-7.

The residence/community ties issue was indeed something that the Dept. of Veteran's Affairs could assist Mr. Levasseur with, and the Court noted this:

> Well, in point of fact, nothing has changed since the last time we were here, there's been no new information provided to the Court, so I'll maintain bond. That said, if you are able to verify the information that you're repeating, Mr. Morgan, that is that there is a Veteran's organization that is prepared to provide a space for Mr. Levasseur's motor home, prepared to vouch for him in providing that space, this is where he shall reside...

RP at 14:17-15:2. Immediately after, the Court *also* noted the issue about untreated mental health problems (quoted above). RP at 15:12-22.

The State argues that the trial court did not direct an investigation into mental health. This is unconvincing in light of the Court's statements on the record:

(1) "I'm concerned about what I understand from last time to be potentially some untreated [...] mental health issues, whether that's PTSD or some other thing..." RP at 15:10-14.

(2) "...if you can get to the bottom of that with the Veteran's organization, indicate that they're prepared to [...] monitor treatment... and assure that he's able to get treatment, if that's what he needs, at

least be evaluated, I'll absolutely reconsider bond." RP at 15:14-21.

(3) "... I am concerned about the... potential and untreated mental health condition... and I think that does create a risk for the community... So, I'm going to direct that Mr. Levasseur appear [...] at arraignment, and that way **if defense Counsel has kind of run those things down, we can talk about it.**" RP at 17:1-12 (emphasis added).

(4) "...if Defendant can demonstrate adequate housing and mental health services through a VA related agency..." [the Court would reconsider bond]. RP at 16:17-21.

(5) "...if they're [VA services] out there and they're prepared to provide those services... then **I'll want at least your** [...] **statement as an officer of the Court, Mr. Morgan, that you checked that out**..." [and obtained a name, place, and assurance of no contact with the victim]. RP at 16:21-17:7 (emphasis added).

In short, the Court (1) acknowledged there was a mental health issue; (2) asked Defense Counsel to follow up with the VA; (3) indicated the Court expected an answer at the next hearing; and that the mental health concern was a possible safety risk to the community; (4) reiterated the need for mental health services; and (5) directly informed Defense Counsel that if the services exist, the Court wanted a statement to that effect.

It is difficult to see how the trial court "gave the defendant the *option* of doing certain things..." *See State's Brief* at 24. It is also difficult to see how the trial court "...did not see anything that would indicate that mental

health was an issue." *Id.* To the contrary, the Court was concerned enough about the mental health aspects of this case that the judge tied the untreated mental health concerns to a community safety issue. *See* RP at 17:1-12.

Mr. Levasseur argues that the trial court directed a mental health investigation by raising the mental health concern *sua sponte*; asking Defense Counsel to "get to the bottom of" the issues with the VA; indicating a mental health evaluation may be needed; suggesting Defense Counsel "run those things down"; and asking for Defense Counsel's "statement as an officer of the Court" as to whether the VA services existed and could be provided to Mr. Levasseur.

This were not statements "clearly made in the context of conditions of release and nothing more." *See State's Brief* at 24. These were statements that indicated the Court had a mental health concern and wanted Defense Counsel to follow up on that concern. Mr. Levasseur argues that this is direction from the Court, and that it is *per se* ineffective to fail to follow such direction.

### 2. The State Misapprehends Appellant's Reasonable Trial Strategy Argument

*Strickland* is divided into two prongs; a performance prong and a prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Levasseur argues that the failure to investigate

overcomes the presumption of effective representation. *See State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Mr. Levasseur also argues that the failure to investigate is *per se* ineffective assistance of counsel, and thus no inquiry into the reasonableness of that failure is required.

The deficiency that Mr. Levasseur advanced was the failure to investigate; but in response, the State argues that Mr. Levasseur attacks the reasonableness of the self-defense strategy. *See State's Brief* at 24-25. Mr. Levasseur's position should have been apparent, both from the titling of that section of the Appellant's Brief ("...Trial Counsel's *failure to investigate* was not reasonable, nor a legitimate stratagem."), as well as the related assignment of error ("the conclusion improperly imparts that self-defense was a sound trial tactic *to the exclusion of diminished capacity*.") *See Appellant's Brief* at 3, 12 (emphasis added). This is also related to the assignment of error immediately preceding it, which Mr. Levasseur argued "improperly assumes that trial counsel was aware of Appellant's mental health treatment." *Id.* at 3.

If trial counsel was *aware* of the mental health issue and (as stated in the Findings and Conclusions (CP at 634)) subsequently *ignored* them, then the State might have a colorable argument that self-defense to the

exclusion of diminished capacity was a reasonable trial strategy[1]. But this is not the case at bar – herein, there is no evidence that trial counsel took any steps to *become aware* of the mental health issues. Thus, the trial Court's conclusion that the Defendant has the burden "to show his attorney *ignored* his medical and mental treatment by the VA" does not track with the issues Mr. Levasseur raised in his Motion for New Trial. *See* CP at 634 (emphasis added).

The State is correct that trial counsel was not *obligated* to argue mental health. *See State's Brief* at 28. However, trial counsel *was* obligated to make an effort to investigate. *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) ("Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult.); *In re Brett*, 142 Wn.2d 868, 880, 16 P.3d 601 (2001) ("When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly.")

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[1] In such a case, however, the analysis would be a more complex question of whether it was reasonable to essentially advance one affirmative defense over another.

Reliance on *Cross* is misplaced. *In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014). In *Cross*, the Defendant entered an *Alford* plea to three counts of first degree aggravated murder after withdrawing his NGRI plea; following a competency hearing, the Court then held a penalty-phase trial on imposition of the death penalty. *Id.* at 676. While *Cross* raised a lack of pretrial investigation IAC claim, the Court properly rejected it because Cross' attorney did retain a mitigation expert, and did conduct an investigation into mental health. *Id.* at 699-700. In fact, Cross' mitigation defense was "based on Cross's poor mental health." *Id.* at 692.

The cited passage in the Respondent's brief regarding argument of specific injuries does no work for the State. There was no such duty in *Cross* because the specific injury at issue (a brain injury) was "inconclusive" and supported by only "scant and uncertain" evidence. *Id.* at 709. Moreover:

> Trial counsel was unable to locate any medical records suggesting Cross suffered from brain damage at the time he committed the murders. In fact, the state's investigation indicated that Cross's brain injury was more likely the result of Cross's jail suicide attempt. Thus, counsel could reasonably have made a strategic determination to focus on other mitigating evidence.

*Id.* In sum, the *Cross* Court rejected a similar IAC claim, but for wildly different reasons than are raised in Mr. Levasseur's case.

### 3. The Record Supports a Finding that No Investigation Occurred.

A pretrial and trial record with little information about Mr. Levasseur's mental health is precisely what the Court should expect to find where the claimed IAC issue is failure to conduct a mental health investigation. To ask otherwise essentially requests that Mr. Levasseur prove a negative by providing evidence of something that never occurred. But nevertheless, the record below supports a finding that no investigation occurred. There are three reasons:

First, Mr. Levasseur points to the change of judge, prosecutor, and defense counsel following arraignment. *See* CP at 6, 17-18; RP at 4:1, 22:10, 51:5. While certainly not dispositive on its own, this intimates that the situation was ripe for a lack of communication. The judge that directed the evaluation was not the trial judge. Defense counsel that heard the Court's concern was not the trial counsel. The prosecutor who heard the Court's concern was not the trial prosecutor. It is easy to see how the Court's concerns were never investigated.

This leads to the second reason the record supports such a finding – that there is no "statement as an officer of the Court" that defense counsel "got to the bottom of" the mental health issues or made any attempt to "run those things down." *See generally,* RP.

Finally, even assuming that trial counsel did conduct an investigation and made a reasonable determination that self-defense to the exclusion of diminished capacity was a trial strategy, there is nothing in the record showing that Mr. Levasseur's extensive mental health records were raised at sentencing.

There are other indicia in the record as well, but they follow a similar pattern. For example, there is no evidence of a motion for a 10.77 evaluation; no motion for use of public funds to acquire the VA records; and no witness list (and thus, no mental health expert) appears to have been filed by the defense.

The available evidence in the record points to the conclusion that no investigation was done. The State does not advance the argument that trial counsel knew of and discounted the mental health evidence. Rather, the State argues that the available evidence is scant. But yet it remains, and remains unchallenged.

#### 4. The State Misapprehends Appellant's Sentencing Argument

As with the arguments concerning ineffective assistance at trial, the deficiency Mr. Levasseur complains of is the failure to investigate. It makes little difference whether this is found in failure to follow the Court's directive, or (even if not a *directive*) the failure to investigate despite that

trial counsel knew or should have known investigation was needed. These *caused* the *additional* deficiency of failing to introduce mitigating factors.

Regarding the performance prong of *Strickland*, the State argues that trial counsel could have legitimately focused on other factors, and that a sentencing focus on mental health would have been inconsistent with the argued self-defense theory. This is true, but ignores the underlying issue. Had investigation occurred, the resulting information so clearly establishes a diminished capacity defense that it should have been argued to the jury, which in turn would resolve the inconsistency the State identifies.

Another issue with the State's argument is that it suggests that mitigating factors must be consistent with arguments at trial. This is clearly not the case, as some statutory mitigating factors hinge on evidence that would be inadmissible at trial. *See, e.g.,* RCW 9.94A.535(1)(a), (b), (g), (h), and (k)[2].

It is clear that the parties differ on the prejudice prong. The State argues that no prejudice exists because there is no showing that there is a reasonable probability the sentence would have differed. *See State's Brief*

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[2] There are certain circumstances where these could be introduced at trial, but certainly not for all offenses. For example, subsection (1)(a) regarding the victim as provocateur, may rely on such evidence properly introduced in a murder trial, but similar evidence would be improper in an assault trial. Other subsections, like (1)(g) or (k) clearly cannot hinge on testimony developed at trial because they require consideration of the sentence. *See e.g.,* WPIC 1.02 ("You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.")

at 34. Mr. Levasseur argues, however, that no such showing is required because he meets his prejudice prong burden by showing that trial counsel's deficient performance deprived the trial Court of the ability to exercise discretion:

> McGill's ineffective assistance argument is based on his counsel's failure to cite this case law to the trial court and use it to argue for an exceptional sentence down. The State urges us to reject this argument based on *State v. Hernandez-Hernandez.* ... We disagree. A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.

*State v. McGill*, 112 Wn.App. 95, 101-02, 47 P.3d 173 (2002). This is sufficient to meet the showing of prejudice under *Strickland.* Mr. Levasseur need only show a *reasonable probability* that the outcome would have been different – i.e. "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Where trial counsel never investigated mental health issues and therefore did not raise mental health as mitigating factor at sentencing, and the mental health information available to counsel would have established such a mitigating factor, the Court's lack of awareness of its authority to consider that evidence shows a probability sufficient to undermine confidence in the imposed sentence.

### 5. The Trial Court Abused its Discretion in Denying a New Trial

Mr. Levasseur appeals the trial Court's denial of his Motion for New Trial based on the manifest unreasonableness of the Court's determination(s), and argues alternatively that even if not manifestly unreasonable, the decision was based on untenable reasons. Responsive argument to the State's brief is divided by the relevant trial court finding below:

#### a. Finding D (Willfulness)

What the State identifies as willful acts are the product of Mr. Levasseur's mental health disorder. In 2009, being aware of Mr. Levasseur's prior assaults upon the "slightest provocation," Dr. Pagarian wrote:

> I did tell him that he should talk with his Veterans Service Officer to re-adjust his VA disability, and I would verify his problems to state that **he has had this history of assaults because of his head injuries** and that he cannot possibly tolerate some stressors in his work situation without getting in trouble."

CP at 552 (emphasis added). More specifically, Mr. Levasseur was reacting, rather than responding. The distinction between the two is important *qua* a willful act. Willfulness requires some level of control – i.e. the behavior

must be voluntary. But the evidence in Mr. Levasseur's case indicates involuntary action:

> He does appear to be suffering from symptoms of post-traumatic stress disorder, **including affective numbing and rage reactions**, and it will be important to address these in time. The immediate concern is his rage. **What he calls anger is more accurately termed rage, which is an anxiety response.** While he does not believe he has much control over this, his ability to leave at times when he feels the anxiety gradually build and his ability to discriminate between his response to a male or a female when he feels an "instant" trigger, indicates that **he does have some capacity to manage this. ... He will also need to develop behavioral responses to triggering events to help him more adaptively respond, rather than reacting, including learning grounding techniques.**

CP at 571-72 (emphasis added). Mr. Levasseur's actions were not willful. The trial Court's abuse of discretion arises from basing the determination of willfulness on Mr. Levasseur's detailed and complete testimony regarding the incident, rather than the volumes of medical evidence supporting the conclusion that the acts were the involuntary products of Mr. Levasseur's mental disorders.

**b. Conclusion A (Awareness of Mental Health Issue)**

This issue is tied to the argument concerning lack of evidence in the record. As argued above in Section 3, this is precisely what one would expect. Essentially, the unreasonable grounds herein are that the Court's

Conclusion shifts the burden and requires Mr. Levasseur to prove a negative.

**c. Conclusion B (Sound Trial Tactic)**

The manifestly unreasonable error here is that the Court made a decision concerning the reasonableness of self-defense as a trial tactic, but the challenge presented was to the failure to investigate. This is additionally an untenable grounds for the exercise of discretion – i.e. the conclusion decided a question not before the Court.

**d. Conclusion D (*Fedoruk* Analysis)**

The State argues extensively that this case and *State v. Fedoruk,* 184 Wn.App. 866, 339 P.3d 233 (2014), can be distinguished, identifying seven points of contention:

(1) Dissimilar Mental History. However, as in *Fedoruk*, Mr. Levasseur's prior assaults *were* the product of his mental disorder. CP at 552. An NGRI finding is not required to establish the required nexus for a diminished capacity defense.

(2) Raising Mental Health Defense. Here, this is the complained-of deficiency; in context to *Fedoruk*, this works for the Appellant, not the State.

(3) Past Involuntary Commitments. The State alleges Mr. Levasseur has no such history, and is thus dissimilar to Mr. Fedoruk. However, Mr.

Levasseur was committed three times in Iraq, though it is unclear whether this was voluntary or involuntary. *Id.* at 514; *See also Id.* at 406 (Hospitalization on one occasion was under guard). Commitment in a combat zone is far more similar to involuntary than voluntary commitment, particularly when under guard.

(4) No Mental Health Issues at Trial. The State correctly identifies that Mr. Levasseur did not present with any apparent mental health issues during trial, while Mr. Fedoruk needed to be forcibly medicated. This is true, and is a place where *Fedoruk* has different facts. But Mr. Levasseur's high cognitive function is not at issue – his behavior in court has nothing to do with his disorder, which involves very, very different stimuli.

(5) Commitment to Self-Defense. Here, too, this case differs from *Fedoruk,* but again, this is the complained-of deficiency.

Mr. Levasseur's mental disorder is *different* from Mr. Fedoruk's, but this does not make it less severe. The similarity in the severity of the disorders arises from their nexus to the resulting acts.

## C. CONCLUSION

Whether the trial Court directed an evaluation is likely immaterial because of the "knew or should have known" standard in *Brett*. The trial Court unquestionably raised the mental health issues to counsel's attention.

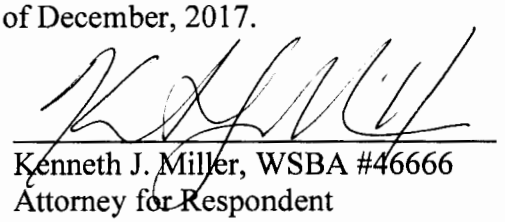
The Court's comments on the mental health treatment issue indicate that the Court expected some kind of response to the issues, and that response never came.

If the failure to investigate here is *per se* deficient performance (or *per se* ineffective assistance), then the reasonableness of trial tactics does not factor into the analysis. But even under such an analysis, Mr. Levasseur prevails because the failure to investigate cannot be reasonable. Even if trial counsel was not obligated to argue mental health, trial counsel was still obligated to investigate the issue.

Lack of investigation is the crux of the issue. Had the mental health issues not been brought to counsel's attention by the Court, this would be a very different case. Similarly, if investigation had occurred, and the records had been inconclusive (as in *Cross*), this would be a very different case. But here, trial counsel knew, or should have known, that there was a need for Mr. Levasseur to, in the trial Court's words, "at least be evaluated." Had even a cursory investigation been done, trial counsel would have discovered years of medical evidence demonstrating that Mr. Levasseur lacked the capacity to control his behavior.

Mr. Levasseur respectfully requests that This Court reverse his conviction for Assault 2nd Degree and remand this matter to Ferry County Superior Court for a new trial.

Respectfully submitted this 14th day of December, 2017.



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