

FILED

JUN 14 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34326-0-III

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

The State of Washington,

Respondent,

v.

Michael John Levasseur,

Appellant.

Appellant's Brief

Kenneth J. Miller, WSBA #46666
Andrew J. Chase, WSBA #47529
Attorneys for Respondent

PO Box 978
Okanogan, WA 98840
509-861-0815 (P)
509-557-6280 (F)
Ken@MillerChaseLaw.com
Andy@MillerChaseLaw.com

Table of Contents

A. Introduction	1
B. Issues For Review	2
C. Statement of the Case	3
D. Summary of Argument.....	8
E. Argument & Authority	9
1. Appellant Received Ineffective Assistance of Counsel at and Before Trial.	9
2. Appellant Received Ineffective Assistance of Counsel at Sentencing.....	18
3. The Trial Court Should Not Have Permitted Trial to Proceed Without Evaluation Results.	22
4. The Trial Court Erred in Denying Appellant’s Motion for a New Trial.....	26
F. Conclusion.....	31
Appendix A: Statutory Texts	36

Table of Authorities

United States Supreme Court

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	passim
---	--------

Washington Supreme Court Cases

<i>In re. Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001)	22
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010).	11, 27
<i>State v. Crawford</i> , 159 Wn.2d 86, 147 P.3d 1288 (2006).....	10
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10, 12
<i>State v. Sissouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012)	23
<i>State v. Wicklund</i> , 96 Wn.2d 798 (c, 638 P.2d 1241 (1982).....	24

Washington Appellate Cases

<i>State v. Fedoruk</i> , 184 Wn.App. 866, 339 P.3d 233 (2014).....	passim
---	--------

<i>State v. Gough</i> , 53 Wn.App. 619, 768 P.2d 1028 (1989)	15, 28, 30
<i>State v. Hernandez-Hernandez</i> , 104 Wn.App. 263, 15 P.3d 719 (2001).....	20, 21
<i>State v. McGill</i> , 112 Wn.App. 95, 47 P.3d 173 (2002).....	19, 20, 21

Statutes

RCW 10.77.050	22
RCW 10.77.060	23
RCW 7.21.010	13
RCW 9.94A.535.....	18, 19

Constitutional Provisions

<i>U.S. Const.</i> , 14 th Amendment	24
<i>U.S. Const.</i> , 6 th Amendment	9

Court Rules

CrR 3.2.....	25
RPC 1.16.....	13

A. INTRODUCTION

COMES NOW Appellant Michael John Levasseur, and appeals his conviction from the Ferry County Superior Court. Mr. Levasseur was convicted following a jury trial of one count of Assault in the Second Degree. Following trial, Mr. Levasseur appealed, and concurrently motioned Superior Court for a new trial on grounds of ineffective assistance of counsel.

The basis of the appeal and motion for new trial was that trial counsel had failed to conduct an investigation into Mr. Levasseur's mental health records. These records are quite extensive and substantiate ample grounds for a diminished capacity defense that zeros in on the precise factual and legal issues present in this case. Mr. Levasseur suffers from Post-Traumatic Stress Disorder caused by a Traumatic Brain Injury suffered during combat deployment in Iraq. As a result, Mr. Levassuer has difficulty controlling his behavior when confronted, stressed, or anxious, and the likely result is physical confrontation.

The Ferry County Superior Court denied the motion for new trial. Herein, Mr. Levasseur argues that his conviction must be overturned because of ineffective assistance of counsel; that for similar reasons, the Ferry County Superior Court's denial of his motion for new trial was

improper; and finally, that this Matter should be remanded to Superior Court for a new trial.

B. ISSUES FOR REVIEW

1. Whether Appellant received ineffective assistance of counsel, thereby undermining the reliability of the trial by which he was convicted.
2. Whether Appellant received ineffective assistance of counsel by reason of counsel's failure to introduce mental health records as mitigating evidence at sentencing.
3. Whether the Trial Court, having knowledge of Appellant's mental health issues, and having directed trial counsel's investigation and an evaluation, violated Appellant's right to due process.
4. Whether the Trial Court erred in denying Appellant's Motion for a New Trial.

Assignments of Error Pertaining to Issues for Review

- i. Appellant assigns error to Finding of Fact "D" in the Trial Court's *Hearing, Findings of Fact, Conclusions of Law And Ruling* (See CP at 633-37); to wit: the conclusion of a willful act is unsupported by the record.

- ii. Appellant assigns error to Conclusion of Law “A” (*Id.*); to wit: the conclusion improperly assumes that trial counsel was aware of Appellant’s mental health treatment.
- iii. Appellant assigns error to Conclusion of Law “B” (*Id.*); to wit: the conclusion improperly imparts that self-defense was a sound trial tactic to the exclusion of diminished capacity; and the Court erred in concluding that the failure to investigate was a legitimate trial tactic.
- iv. Appellant assigns error to Conclusion of Law “C” (*Id.*); to wit: that the Trial Court erred in holding that a clear memory forecloses a diminished capacity or other mental defense.
- v. Appellant assigns error to Conclusion of Law “D” (*Id.*); to wit: the Trial Court’s factual conclusion regarding involuntary commitments is unsupported by the record; that the Trial Court failed to consider the clear nexus between Appellant’s disorder and conduct; and that the Trial Court failed to consider that both the Court and Trial Counsel had actual knowledge of the need for investigation of Appellant’s mental health state.

C. STATEMENT OF THE CASE

Michael Levasseur is a veteran receiving Veteran’s Administration (VA) benefits; the Court and trial counsel were made aware of this fact at

arraignment. *Verbatim Report of Proceedings* (“*VRP*”) at 6:13-17¹. The Court and trial counsel were further aware that Mr. Levasseur was receiving VA **disability** benefits. *Id.* at 10:23-11:1. Additionally, trial counsel indicated to the Court at arraignment he would be following up with the VA (albeit likely regarding Mr. Levasseur’s finances). *Id.* at 12:3-8.

Finally, and most critically, the Court and trial counsel were **unquestionably aware** of Mr. Levasseur’s mental health issue:

“[The Court:]... 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.”

Id. at 15:12-22 (emphasis added). The Court, *at arraignment*, indicated the possibility of an untreated mental health issue and directed trial counsel to investigate that issue by contacting the VA. The Court reiterated this concern moments later (*Id.* at 16:1-3, 17-21), and specifically noted both on the record and in the Order on Arraignment that bond would be eliminated upon Mr. Levasseur’s demonstration of “adequate housing **and mental health services through a VA related agency...**” *Id.* at 18:1-21; *CP* at 15.

¹ Citations to the *VRP* herein are in the format Page Number: Line(s) within that page.

However, arraignment occurred May 29, 2015, wherein Mr. Levasseur was represented by Mr. Dennis Morgan of Republic. *CP* at 6; *VRP* at 4:1-19:6. On June 3, 2015, Mr. Morgan was replaced as attorney of record by Mr. James Irwin of Colville. *CP* at 17-18. Mr. Irwin represented Mr. Levasseur from his omnibus hearing on June 12, 2015 through trial. *See VRP* at 21 *et seq.* Additionally, the prosecutor that represented the State at arraignment was no longer involved with the matter by the time the case went to trial; and further, the arraigning judge and the trial judge were different. *See VRP* at 4:1; 51:4-5. The final pre-trial mention of Mr. Levasseur's mental health conditions appears to be the Court's concern therefor and direction of investigation thereof at arraignment. *See generally, VRP.*

The Matter proceeded to trial on one count of Assault in the Second Degree under the substantial bodily harm prong. *CP* at 4-5. With an offender score of 1, Mr. Levasseur was faced with a range of 6-12 months confinement. *Id.* at 117. He was convicted and sentenced to the mid-range of 9 months. *Id.* at 118.

Following conviction, Appellate Counsel provided to the Court the documentation trial counsel should have procured; this information was attached as an exhibit to his motion for a new trial. *See CP* at 164-73; 190-632. This information included medical records and doctor's notes from the

Veteran's Administration which detailed psychiatric care being provided to Mr. Levasseur for approximately the past decade. *CP* at 502-514.

Mr. Levasseur's medical records impart many years of treatment for mental health issues relating to injuries received during combat deployments to Iraq. *Id.* at 514. The records indicate that Mr. Levasseur was removed from combat operations while deployed to Iraq and placed into a U.S. Army Hospital, citing to "combat stress" on three separate occasions. *Id.* More specifically:

Mr. Levasseur was discharged from the U.S. Army in 2007, due to a diagnosis of personality disorders. *Id.* at 568. One test, the Minnesota Multiphasic Personality Inventory-2 profile, showed that Mr. Levasseur had an antisocial personality style, low frustration tolerance, anxiety, depression, post-traumatic stress disorder symptoms, and a tendency to be hostile, aggressive, and argumentative. *Id.* at 571.

In July of 2007, Mr. Levasseur sought assistance managing his PTSD symptoms and anger episodes; he described his condition as "being hypervigilant... am on guard...feels like I'm still over in Iraq and looking for a bomb... need help to relax." *Id.* at 253 (ellipses original).

Dr. Robert J. Bateen, Ph.D., noted on October 18, 2007, that Mr. Levasseur would do best with only brief and superficial contact with others,

and that Mr. Levasseur's stress tolerance is reduced and exhibited by Mr. Levasseur's easy irritability when faced with minor stress. *Id.* at 208.

Timothy J. Wolfram, PsyD, LP, noted on December 18, 2008, that Mr. Levasseur is suffering from post-traumatic stress disorder, including affective numbing and rage reactions. *Id.* at 571-72. Dr. Wolfram goes on to state that what he (Mr. Levasseur) calls anger is more accurately termed as rage, which is an anxiety response. *Id.*

Dr. Roberto R. Pagarigan noted on February 23, 2009, that Mr. Levasseur should seek to adjust his VA disability and that Dr. Pagarigan would verify that Mr. Levasseur's problems and history of assaults were because of his head injuries; and that he (Mr. Levasseur) could not possibly tolerate some stressors in his work situation without getting into more trouble. *Id.* at 551-52.

On September 24, 2013, eight months prior to the underlying conduct, Mr. Levasseur sought assistance managing his anxiety and hypervigilance. *Id.* at 312. At that time, he further indicated he had a long history of mental health diagnosis and previous care in St. Cloud, Minnesota. *Id.* Mr. Levasseur reported he "look[s] for every possible threat that is there;" has difficulty concentrating; always feels amped; and that he works to avoid places where he cannot easily remove himself. *Id.* At that time, his initial treatment plan was directed at improving his adaptive

behavior and social interactions while decreasing intrusive thoughts and avoidant behavior; the plan also addressed reducing distress when triggered. *Id.* at 317.

Despite these indicia, the Ferry County Superior Court denied Mr. Levasseur's motion for new trial. *Id.* at 633-37. Despite actual knowledge of a need for investigation, no party did so. Mr. Levasseur respectfully urges this Court to reverse his conviction and remand this case for new trial.

D. SUMMARY OF ARGUMENT

Mr. Levasseur's conviction is a product of a violation of his Sixth Amendment right to effective counsel, as well as his due process rights. A mental health issue presented at his arraignment, and the Court directed counsel to investigate. There is no evidence that this ever occurred; had counsel followed the Court's directive, the information gleaned would clearly substantiate a diminished capacity defense.

The trial Court's denial of a new trial is in error. The trial Court placed heavy weight on the his memory and cognitive function, and thus improperly construed the diminished capacity defense. Further the Court's analysis distinguishing Mr. Levasseur's case from *State v. Fedoruk* also improperly emphasizes his cognitive function, and failed to consider the substantial medical evidence establishing a nexus between Mr. Levasseur's

Post-Traumatic Stress Disorder and the diminution of his capacity to control his reactions when confronted.

E. ARGUMENT & AUTHORITY

The Sixth Amendment to the United States Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right... to have assistance of counsel for his defense.” U.S. Const., Amend. VI. Where the assistance of counsel falls below this constitutional standard, a defendant may attack his conviction on appeal by arguing, as below, that he was deprived of this constitutional right by the errors of his attorney.

1. Appellant Received Ineffective Assistance of Counsel at and Before Trial.

In an ineffective assistance of counsel appeal, “[t]he benchmark for judging any claim of ineffectiveness must be 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 v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To meet this standard, a convicted defendant must show: (1) that counsel made errors so serious that counsel was not functioning as guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defendant by depriving him of a fair trial whose result is reliable. *Id.* Both showings are required. *Id. See also State v. McFarland*, 127 Wn.2d 322,

334-35, 899 P.2d 1251 (1995) (citations, including to *Strickland*, omitted). The defendant bears the burden of showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

A challenge to competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.App. at 335.

Mr. Levasseur argues that he received ineffective assistance at trial because trial counsel failed to investigate his mental health records, despite clear direction to do so from the Court, and that this failure prejudiced his right to a fair trial.

a. Trial Counsel was *per se* Ineffective.

“A defendant can overcome the presumption of effective representation by demonstrating that counsel failed to conduct appropriate investigations.” *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). More specifically:

“The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.”

State v. A.N.J., 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010). Trial counsel's failure to investigate a mental health defense may form the basis for an ineffective assistance of counsel claim. *State v. Fedoruk*, 184 Wn.App. 866, 881-82, 339 P.3d 233 (2014). Decisions concerning the scope and nature of an attorney's investigation are judged by the reasonableness thereof in light of the totality of the circumstances:

“...strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”

Strickland, 466 U.S. at 690-91 (emphasis added).

This case involves a situation where the Court, the State, and the Defense were all made aware of the need for investigation at arraignment, yet no party conducted the Court's directed investigation.

Where a Trial Court directs defense counsel to investigate the mental health of the defendant and counsel fails to do so, a reviewing Court should conclude that this is *per se* ineffective assistance of counsel, at least insofar as establishing deficient performance.

b. Even if not *per se* ineffective assistance, Trial Counsel's failure to investigate was not reasonable, nor a legitimate stratagem.

Alternatively, Mr. Levasseur submits that even applying a heavy measure of deference to trial counsel's judgments, the failure to investigate herein was neither a legitimate trial strategy nor objectively reasonable.

A legitimate trial strategy cannot form the basis for an ineffective assistance appeal. *McFarland*, 127 Wn.2d at 336 (citations omitted). However, "where there is no conceivable legitimate tactic explaining counsel's performance," a sufficient basis exists to rebut the presumption that counsel's performance was not deficient. *State v. Reichenbach*, 153 Wn.2d 126, 129, 101 P.3d 80 (2004). Here, there is no conceivable trial tactic that would explain trial counsel's failure to follow the direction of the trial Court and obtain information concerning Mr. Levasseur's mental health records. Given the overwhelming precedent requiring investigation in order to ensure a defendant may make an informed decision concerning the direction of litigation, it **cannot** be a legitimate trial strategy to forgo such investigation, and particularly not in light of the Court's direction to do so.

Similarly, this failure cannot be objectively reasonable. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. It **cannot** be a

prevailing professional norm that an attorney may ignore the directive of the trial Court. Moreover, the same behavior, if intentional, would be grounds for contempt. See RCW 7.21.010(1)(b) & (d). Further, even a communication breakdown between arraiging counsel and trial counsel would not meet the reasonableness requirement. RPC 1.16(d) (Upon termination, a lawyer shall take steps reasonably practicable to protect a client's interests.) Finally, *Fedoruk* precludes a finding that counsel's conduct here was reasonable:

“The extensive history of mental illness outlined above, all of which was available to the defense from the beginning of the case, indicates that the decision not to seek to retain an expert to evaluate Fedoruk until the day before jury selection fell below an objective standard of reasonableness.”

Fedoruk, 184 Wn.App. at 881-82. The same issue is present here, though trial counsel here is *more* culpable. Trial counsel in *Fedoruk* was at least aware of the mental health issue, and there had been a 10.77 evaluation. *Id.* at 874-75. Here, trial counsel was aware of the need to investigate, and was only unaware of the details of Mr. Levasseur's mental health issues *because of his failure to investigate.*

Trial counsel's failure to investigate Mr. Levasseur's mental health issues was *per se* ineffective assistance because the failure was despite the Court's direction to investigate. Alternatively, trial counsel's failure to investigate is ineffective assistance because it was not objectively

reasonable; was not a legitimate trial tactic; and fell well-short of the prevailing norms of professional conduct.

c. Trial Counsel's errors were so prejudicial they deprived Appellant of a fair trial with a reliable result. Substantial justice was not done.

The deficiencies above create a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. At issue here is whether Mr. Levasseur can meet his burden to show "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This is not, as the State argued to the trial court, the same as demonstrating that the error "would have *changed* the outcome of the trial." *CP* at 182:17 (emphasis added). Mr. Levasseur need not show a probability sufficient to *change* the outcome, but rather merely "a probability sufficient to *undermine confidence* in the outcome." *Strickland*, 466 U.S. at 694 (emphasis added).

In *Fedoruk*, the evidence showed a "reasonable likelihood that the outcome of the trial would have differed had Fedoruk been able to present an insanity **or diminished capacity** defense." *Fedoruk*, 184 Wn.App. at 885 (emphasis added). A central question here thus becomes whether the record in this case is sufficient to raise a reasonable likelihood that confidence in the outcome was undermined by the lack of a diminished capacity defense.

To assert diminished capacity, a defendant must provide evidence of a “mental disorder, usually not amounting to insanity, that is demonstrated to have a specific effect on one’s capacity to achieve the level of culpability required for a given crime.” *State v. Gough*, 53 Wn.App. 619, 622, 768 P.2d 1028 (1989). The evidence must be directed at the defendant’s capacity for the required level of culpability. *Id.* Neither the existence of a disorder nor conclusory testimony concerning its effect are sufficient, standing alone to raise an inference of diminished capacity. *Id.* The evidence must explain the connection between the disorder and diminution of capacity. *Id.*

Here, the available evidence strikes directly to the heart of a diminished capacity defense. As noted above, Dr. Timothy Wolfram would establish that Mr. Levasseur is suffering from post-traumatic stress disorder, including affective numbing and rage reactions. *CP* at 571-72. This testimony would establish the existence of the disorder. Dr. Roberto R. Pagarigan would establish that Mr. Levasseur’s assaultive conduct is linked to his history of PTSD and combat injuries *Id.* at 551-52.

Mr. Levasseur’s medical records consume more than four hundred pages of the Court’s record, and disclose multiple basis for a diminished capacity defense, all stemming from brain injuries received in combat. Mr.

Levassuer's mental health records were summarized for the trial Court at the motion for new trial:

The fact of the matter is [] that this Court has heard detailed descriptions of Mr. Levasseur's military career, his military training, yet somehow it was missed that his military discharge was because of a mental health disorder. Since his discharge, he has been seen by no less than 16 psychiatrists and psychologists across the United States. All of them are employees of the Veterans' Administration. He's been committed at least on one occasion since he's got out of the military; that was in Minneapolis. That commitment was for a period of almost nine weeks. That was a voluntary commitment; however, he did go through the commitment, they did recommend further treatment and further commitment, the VA lacked the authority to insist or commit him without his permission, so he ended up leaving that program.

While on active duty his record showed he was also committed on three separate occasions during combat operations in Iraq. Those operations all cite to combat stress. The main cause of his mental health, at least according to the VA records [] has been from his military service in Iraq during the war. While there he experienced combat where an IED blew up, it caused a light post to fall on his head and caused a brain injury that the VA has fully disabled him for at this point. The VA then attributes this brain injury [to] all of his mental health issues. His mental health issues include everything from a Cluster B analysis, which include[s] narcissism, anti-social, aggressive behaviors, also includes an evaluation on many, many occasions on what's called the GAS scale, which the American Association of Psychiatrists use to reference and evaluate a person's mental health. Mr. Levasseur has never scored above a 60. To give the Court an idea, a normal individual that a psychiatrist would say is capable of functioning in society on a reasonable and responsible level would be a 90 to 100, whereas a person that is just incapable of functioning in society would be a 1. Mr. Levasseur has scored between 40 and 60, never higher than 60. 60 details that he had moderate to severe mental health

and anti-social deficiencies that precluded him from performing as what we would expect within society's parameters.

The reason why this is all so important is this is very probative to the charge upon which he was convicted. He was accused of assault two, he attacked another individual, and part of that is he had to have acted with intent. The records show, through multiple occasions and multiple analyses of his health records, that he functionally is incapable of forming the intent that's required on an assault two charge. There are numerous VA physicians that have attributed his mental health, his PTSD to his TBI, that's the brain injury, and they have cited to saying that his disability needs to be 100% because he's incapable of dealing with the normal stresses of our society. There is one that goes on to say that there is no way that he can be expected to not assault other people because he is incapable of responding in an appropriate manner. That very fact goes to the intent to commit the crime upon which he was convicted.

VRP at 649:17-652:13. This characterization was found by the trial Court to be supported by the records. *CP* at 633-34, FN 2 ("The Court reviewed five groups of medical records... Defendant's summary of his mental health records is supported by these medical records.").

The available evidence here is sufficient to establish the required nexus between the disorder and the effect upon Mr. Levasseur's capacity to form the intent to assault another. The evidence establishes that he was discharged for mental health concerns related to a traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD). Additionally, it establishes that the TBI and PTSD are causally linked to his assaultive conduct. But specifically, and most critically, the medical evidence

establishes that Mr. Levasseur is incapable of forming the intent to assault someone when in a stressful situation². The medical records in this case are sufficient to articulate a diminished capacity defense.

The failure to raise this diminished capacity defense at trial crystallizes the prejudice to Mr. Levasseur. The same information could have been used as well in the plea-bargaining context to secure a favorable offer in negotiations with the State.

2. Appellant Received Ineffective Assistance of Counsel at Sentencing.

As a result of trial counsel's failure to investigate, Mr. Levasseur also received ineffective assistance of Counsel at sentencing. Trial counsel's failure to investigate resulted in trial counsel's failure to put forward mitigating evidence at sentencing. The mitigating circumstance borne out by the evidence here is that "The defendant's capacity... to conform his or her conduct to the requirements of law was significantly impaired." RCW 9.94A.535(1)(e).

Mr. Levasseur 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

² And, to forestall the State's likely rebuttal, the issue of whether Mr. Levasseur shares culpability for placing himself in such a situation is a jury question that is not before this Court on appeal.

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).

This is the circumstance here. Mr. Levasseur's mental health history discloses that he lacks the capacity to conform his conduct to the requirements of law. This is a discretionary mitigating factor pursuant to RCW 9.94A.535(1). There was an extraordinarily brief discussion of mental health issues at sentencing, but this was in regards to its "part and parcel" inclusion with anger management counseling. *VRP* at 608:12-609:7. And in fact, the trial Court curiously concluded that there was no basis for the State's request for a mental health evaluation. *Id.* at 608:14-15. Otherwise, there was no mention of Mr. Levasseur's mental health conditions at sentencing. *See VRP* at 581-611.

The Court was thus uninformed of the 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. Levasseur's 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.

Mr. Levasseur would be remiss in failing to mention that the *McGill* Court noted and disagreed with *State v. Hernandez-Hernandez*, 104 Wn.App. 263, 15 P.3d 719 (2001). In *Hernandez-Hernandez*, this Court rejected an ineffective assistance claim based upon failure to cite controlling case law at sentencing. *Id.* However, *Hernandez-Hernandez* is factually inapposite. In that case, the issue was whether it was ineffective assistance to fail to argue for an exceptional downward departure based on *State v. Sanchez*³ and the multiple offense policy. *Id.* at 265. However, no prejudice was established because trial counsel argued the mitigating factors and sought a low-end standard range sentence and the Court retained the discretion to depart downward with or without counsel's request. *Id.* at 266.

The distinction here is that trial counsel did *not* argue the mitigating factors, even though counsel did request a low-end standard range sentence. *VRP* at 590:20-22. More importantly, unlike *Hernandez-Hernandez*, the sentencing Court here was not made aware of the mitigating factors. And here, as in *McGill*, the trial court was unable to exercise its discretion. With respect to the *Hernandez-Hernandez* Court, Mr. Levasseur submits that the sentencing Court here did *not* in fact retain discretion to consider the mitigating factors. No request for downward departure had been made, and

³ 104 Wn.App. 263, 15 P.3d 719.

the Court was unaware of the existence of the mitigating factors. In light of these two facts, a downward departure would have been an abuse of discretion, and thus, the trial Court in this case was truly *unable* to exercise discretion regarding the mitigating factors.

A question further remains as to whether the outcome of the proceeding would have differed. On this issue, *McGill* and *Hernandez-Hernandez* are seemingly in conflict. Mr. Levasseur submits that *McGill* is aimed at the Court's awareness of the issues, while *Hernandez-Hernandez* is aimed at the Court's discretion concerning issues of which it is aware. Mr. Levasseur acknowledges that the sentencing ineffective assistance claim is a steep upward battle. In *McGill*, one of the factors that the Court relied upon was the fact that the trial court indicated it would have considered an exceptional departure had it known it could. *McGill*, 112 Wn.App at 100.

Here, admittedly the only similar evidence is the sentencing Court's indication that the mental health aspect was something that "...could be looked into..." *VRP* at 609:6-7. However, 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

⁴ The State may note that *Brett* suggests that failure to investigate mental health issues, standing alone, is not ineffective assistance of counsel. *Brett*, 142 Wn.App. at 882. To the extent that *Brett* stands for this proposition, this argument is rebutted in *Fedoruk* by

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 every stage of the trial process to investigate and bring to the Court’s attention these mitigating factors. Even if standing alone, a simple failure to act was insufficient, that failure is combined here with the fact that it is in light of the trial Court’s direction to investigate. This combination of issues undermines the proper function of the sentencing process. Even if this matter is not remanded for new trial, Mr. Levasseur respectfully urges this Court to remand the matter for resentencing in light of the mitigating circumstances of this case.

3. The Trial Court Should Not Have Permitted Trial to Proceed Without Evaluation Results.

Where issues of mental health are concerned, our law favors a robust investigation thereof to avoid the risk of convicting an incapacitated person. RCW 10.77.050; *See also* Chapter 10.77 RCW, *generally*. For example, if “there is reason to doubt [a defendant’s] competency, the court **on its own**

discussion of concurrent failures. Here, Mr. Levasseur addresses this issue above, near the end of section (E)(1)(a). Additionally, his claim does not stand alone; it is combined with a failure to follow the Court’s direction.

motion or on the motion of any party **shall** either appoint or request the secretary to designate a qualified expert... to evaluate and report upon the mental condition of the defendant.” RCW 10.77.060(1)(a) (emphasis added). In such a situation, a trial court is *required* to order an evaluation of the defendant’s competency. *State v. Sissouvanh*, 175 Wn.2d 607, 620-21, 290 P.3d 942 (2012). This is due to the trial court’s constitutional obligation to assure itself of the defendant’s competence. *Id.*

A highly similar issue presents here. Admittedly, counsel could not find authority supporting a trial court’s requirement to inquire into *diminished capacity* as opposed to competency. To the extent that Mr. Levasseur’s argument is not encompassed by the *Sissouvanh* holding, he argues herein for an extension of that doctrine.

The fundamental issue here is that the trial Court directed trial counsel to inquire into Mr. Levasseur’s mental health history. The Court, in indicating that it would revisit the issue of bond⁵ upon evidence of mental health treatment, clearly expected a response on this issue. *VRP* at 15:12-22. Not only this, but the Court directed **an evaluation**. *Id.*

⁵ The State may suggest that because this issue is tied to bond, the Court was more concerned with Mr. Levasseur’s danger to the community than his mental state. However, this would seem to be an argument for the *Appellant*, not the State – i.e. if Mr. Levasseur posed such a danger, then the Court has even *more* reason hold off trial until an inquiry is accomplished.

In doing so, the trial Court assumed an obligation to satisfy itself that the concerns about Mr. Levasseur's mental health had been addressed. This obligation can be characterized, as in *Sissouvanh*, as having a constitutional dimension because it impacts Mr. Levasseur's right to due process under the 14th Amendment to the United States Constitution. The 14th Amendment provides: "No State shall... deprive any person of life, liberty, or property, without due process of law;" U.S. Const., amend. XIV. And indeed, the obligation spoken of in *Sissouvanh* has its roots in the Constitutional Due Process right. *State v. Wicklund*, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982) (citations omitted).

Mr. Levasseur's primary hurdle on this issue is the distinction between competency and diminished capacity. However, the two issues, *qua* the Court's concern, are related enough that Mr. Levasseur urges this Court to either recognize that the Court's constitutional obligations to due process already include mental health issues under *Sissouvanh*; or extend *Sissouvanh* to include non-competency mental issues where the Court has directed an evaluation thereof.

The crux of this issue is not whether the Court has an independent duty to investigate a defendant's mental health. Rather, Mr. Levasseur's position is that where the Court orders a mental health investigation and

clearly expects results, holding a trial prior to receiving those results violates due process.

The primary purpose of inquiring into the mental health of a defendant is to avoid a due process violation – i.e. the unlawful conviction of an incompetent person. The record from arraignment does not indicate that the trial Court opined one way or the other concerning *competency*, but the Court was very clearly concerned about Mr. Levasseur’s mental health issues; so concerned that, despite a presumption of release (*See CrR 3.2(a)*), Mr. Levasseur was held on bond pending information concerning his living situation **and mental health treatment**. *See VRP* at 15:12-22; *CP* at 15.

Under these circumstances, where the Court is awaiting a response on a direction to procure information about the defendant’s mental health condition, it is a violation of the defendant’s due process rights to hold a trial without first receiving and reviewing that information. Ordinarily, the Court has no such obligation to refrain from holding trial, but here, once the Court inquired, it assumed a constitutional obligation grounded in the due process right to see that inquiry through before subjecting Mr. Levasseur to trial.

4. The Trial Court Erred in Denying Appellant's Motion for a New Trial.

The trial Court erred in denying the Motion for New Trial because the Court improperly applied the relevant law and then committed multiple errors in distinguishing this case from *Fedoruk*.

a. The Trial Court erred both Factually and Legally.

The trial Court first erred in concluding that Mr. Levasseur's actions were willful. *CP* at 634:12-14. The trial Court was considering the issue in relation to Mr. Levasseur's assertion of blackouts or flashbacks. *Id.* at FN 3. However, the conclusion of a willful act improperly ignores the substantial evidence that Mr. Levasseur's actions were *not* willful. Specifically, the trial Court failed to consider that the willful or intentional nature of his actions were the product of his TBI and PTSD, as well as the effects his disorder(s) had upon his capacity for willful or intentional acts under certain circumstances. *See CP* at 551-52 & 571-72. The conclusion of willful conduct is unsupported by the record.

The trial Court next erred by concluding that Mr. Levasseur's burden was to show that "his attorney ignored his medical and mental treatment by the VA." *CP* at 634:20-22. This conclusion improperly assumes that trial counsel was in fact aware of the medical and mental treatment, and this assumption is particularly improper in light of the

Court's Finding of Fact "A," noting the absence of communications between Mr. Levasseur and his trial counsel. Moreover, this formulation improperly states the nature of Mr. Levasseur's burden, despite the Court quoting the relevant *Strickland* standards immediately above. The implicit assumption that trial counsel obtained and subsequently ignored the medical and mental treatment records is unsupported by the record.

To the extent that Conclusion of Law "B" imparts that self-defense was a sound tactic *to the exclusion of* diminished capacity or some other mental defense, this conclusion is in error. More fundamentally, however, the trial Court erred in implicitly holding that the *failure to investigate* was a legitimate trial tactic. *CP* at 635:1-8. Self-defense likely *was* a sound trial tactic, but, contrary to the trial Court's implicit conclusion, the existence of an alternative, sound tactic does not indicate that *failure to investigate* another tactic was a reasonable strategy. A trial attorney must investigate in order to "reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial..." *A.N.J.*, 168 Wn. App. at 111-12. A fundamental principle of effective assistance is that the attorney's function is to assist the defendant in making *informed* decisions as to the course of litigation. *Id.* at 111. Where the complained-of failure is the failure to obtain the information necessary to make an informed decision

about defenses at trial, there can be no finding that this was a matter of effective trial strategy.

The Trial Court further erred by holding that Mr. Levasseur's clear memory "[leaves] no place for a diminished capacity or other mental defense." *CP* at 635:14-16. A defendant's memory is immaterial to a diminished capacity defense. A diminished capacity defense requires (1) a mental disorder (2) that causes (3) a demonstrable, specific effect on one's capacity for culpability. *Gough*, 53 Wn.App. at 622. Capacity to recall one's conduct (or as the trial Court suggests, a lack thereof) is not an element.

These errors compound to cause the final errors present in Conclusion of Law "D." *CP* at 635:17-636:16. In this Conclusion, the trial Court made several errors, both of law and fact. First, the factual conclusion regarding involuntary commitments is, at best, incomplete. The trial Court failed to consider Mr. Levasseur's three psychiatric hospitalizations during combat operations in Iraq, as well as the administration of antipsychotics during at least one of those hospitalizations. *CP* at 514. Second, despite counsel's characterization of his history being "supported by these medical records," (*CP* at 633-34, FN 2) and the Court having reviewed those same records, the trial Court failed to consider the nexus between a mental disorder and specific effects on Mr. Levasseur's capacity for culpability that was apparent from the records. This omission was error. Finally, the Trial

Court failed to consider that trial counsel had actual knowledge of the need for investigation of Mr. Levasseur's mental state. *See CP* at 635-36. To be fair, neither the State nor Defense raised this issue to the Court at the Motion for New Trial⁶. However, this evidence is independently ascertainable from the trial Court's file because the direction to investigate is written on the face of the Court's Order on Arraignment. *CP* at 15. The trial Court erred by not considering this critical fact.

b. The Trial Court's analysis of *Fedoruk* is flawed:

The ultimate result of these errors was that the trial Court did not properly analyze *Fedoruk*. Interestingly, the factors identified by the Trial court in its analysis are in fact eerily *similar* to *Fedoruk*.

The trial Court noted that Mr. Fedoruk had a prior NGBI, prior involuntary commitment, and a second involuntary commitment for threatening to blow up the victim in his case; the trial Court also noted his competency⁷. *CP* at 635:20-25. Here, Mr. Levassuer has two prior assault cases that are the product of his mental disorder. *Id.* at 551-52. He 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

⁶ Due in part to the need to file quickly, transfer of the file, and also due to the fact the VRP had not yet been transcribed at the time of the hearing on the Motion for New Trial.

⁷ The timing of the presentation of the defense is also discussed, but this is immaterial here, where the issue is that the defense was never presented.

one occasion was under guard). He was even charged with making terroristic threats, very similarly to Mr. Fedoruk. *Id.* at 443. Also just like Mr. Fedoruk, Mr. Levasseur was not suffering a cognitive impairment that would preclude a trial; his records are replete with evidence of his high *cognitive* function. *See, e.g., Id.* at 552-53.

Another interesting similarity between *Fedoruk* is the bizarre actions present in both cases. Division II noted that “[Mr. Fedoruk’s] actions on the night of the killing were bizarre under any yardstick, as shown by testimony described above.” *Fedoruk*, 184 Wn.App. at 885. Testimony at Mr. Levasseur’s trial established that he and the victim were friends, and that Mr. Levasseur returned to assist in administering medical attention of his own accord. *VRP* at 397:2-16; 406:17-20; 382:17-20. This is a circumstance “bizarre under any yardstick.”

In reality, Mr. Levasseur and Mr. Fedoruk are far more similarly situated than the trial Court considered. The source of the Court’s error seems to be the conflation of the insanity defense with the defense of diminished capacity. *Id.* at 636:16 (“He was sane at the time of the altercation; information about his previous diagnosis or behavior would not have been relevant.”). This constitutes clear error in light of *Gough*. 53 Wn.App. at 622 (“Diminished capacity arises out of a mental disorder, **usually not amounting to insanity...**” (emphasis added)). When combined

with the Court's conclusion concerning Mr. Levasseur's memory discussed above, it is clear that the trial Court did not follow the proper legal or factual analysis in comparing this case to *Fedoruk*.

The trial Court's errors are reflected in the ultimate ruling on the Motion for New Trial: "The motion for new trial is denied, as the use of self-defense was a legitimate trial strategy." *CP* at 636:18-20. The existence or even providence of a *different* trial strategy does not excuse trial counsel's deficient performance in failing to investigate Mr. Levasseur's mental health. The self-defense strategy ultimately pursued at trial is completely immaterial to the duty to investigate present here. Similarly, the providence of self-defense as a trial tactic is wholly irrelevant to trial counsel's failure to follow the Court's directive and investigate. As discussed above, that failure cannot be a legitimate trial strategy.

F. CONCLUSION

Mr. Levasseur's conviction is not the confident result of a fair trial. To the contrary, had trial counsel followed the Court's directive, he would have discovered hundreds of pages of medical and mental health records disclosing a clear diminished capacity defense. Where the Court directs counsel to inquire into the defendant's mental health, and counsel fails to do so, this is *per se* ineffective assistance of counsel.

Regardless, the failure to investigate was not objectively reasonable; was not a legitimate trial tactic; and fell well short of the prevailing norms of professional conduct. The failure to investigate cannot be considered reasonable, nor a stratagem.

The failure to investigate prejudiced Mr. Levasseur because the investigation would have disclosed a diminished capacity defense. Nor is this defense a theoretical shot in the dark – the records in this case strike directly to the heart of culpability in this matter, raising significant questions as to whether Mr. Levasseur could form the requisite intentional mental state for an assault. This undermines confidence in the outcome of the trial.

The prejudice to Mr. Levasseur was then compounded by the Court itself. Having assumed a constitutional obligation to ensure due process in regard to Mr. Levasseur's mental health condition, the Court should never have let trial proceed. The specific prejudice encountered here is the *exact same* prejudice our legislature devoted an entire chapter to – avoiding due process violations. Where a trial Court directs a mental health investigation, the Court has a constitutional due process obligation to see that investigation through prior to holding trial.

The failure to investigate also caused Mr. Levasseur to receive ineffective assistance of counsel at sentencing. The requisite error on the sentencing issue is the same; the prejudice is that the Court did not make a

fully informed sentencing decision because, as a result of trial counsel's failure to investigate, the Court was unaware of the bounds or nature of its discretion. Proper conduct would have resulted in the introduction of a statutorily-defined mitigating circumstance.

Finally, the Court erred in several respects when ruling on the Motion for New Trial. The Court improperly focused on Mr. Levasseur's cognitive functioning and memory capacity, instead of focusing on the existence of a mental disorder and the nexus between that disorder and mental state at issue here. The trial Court's analysis of *Fedoruk* is deeply flawed by these errors.

This Court should not lose sight of the critical distinguishing fact in this matter:

“[The Court:]... 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.”

VRP at 15:12-22 (emphasis added). The Court was aware of a mental health issue. The Court made defense counsel aware of the issue; the State, being present at the hearing was also aware of the issue. And not only did the Court bring the issue to the parties' attention, the Court directed that Mr.

Levasseur “at least be evaluated.” No party to this case took it upon themselves to have him evaluated; nor did any party to this case contact the Veteran’s Administration to retrieve Mr. Levasseur’s mental health records before trial.

This case presents a failure of our justice system at every step of the proceeding. Trial counsel should have had Mr. Levassuer evaluated, as per the Court’s instruction. Trial counsel should have investigated Mr. Levassuer’s mental health records, as per the Court’s instruction. The State should have raised the issue before indicating it was ready to proceed to trial. The Court should have never held trial while still awaiting a response to its directed evaluation.

These errors, *both individually and combined*, deprived Mr. Levasseur of his right to effective assistance of counsel, and ultimately deprived him of his right to due process under the Sixth and Fourteenth Amendments to the United States Constitution.

This case is separated from *Fedoruk* by a hair’s breadth. The distinguishing factor that separates this case is that here, defense counsel did not have actual access to the medical records at the beginning of the case; however, this is a product of defense counsel’s failure to follow the Court’s directive to investigate and obtain an evaluation. This distinction clearly works *for* Mr. Levasseur.

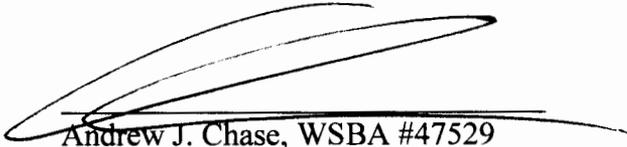
As in *Fedoruk*, Mr. Levasseur's conviction should be overturned, and the matter remanded for trial. Mr. Levasseur received ineffective assistance of counsel, and that ineffective assistance undermines confidence in the outcome of trial. Had the jury been presented a diminished capacity defense and evidence of Mr. Levasseur's Post-Traumatic Stress Disorder and Traumatic Brain Injury, the outcome of trial may have differed. The diminished capacity evidence strikes directly to the heart of the culpability and *mens rea* issues present here.

Everyone knew of the mental health issues. Nobody did anything. This is the very essence of ineffective assistance of counsel.

For the reasons above, 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 12th day of June, 2017.


Kenneth J. Miller, WSBA #46666
Attorney for Respondent


Andrew J. Chase, WSBA #47529
Attorney for Respondent

APPENDIX A: STATUTORY TEXTS

RCW 10.77.050:

No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.

RCW 10.77.060(1)(a):

(1)(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

RCW 7.21.010(1)(b) & (d):

(1) "Contempt of court" means intentional: (b) Disobedience of any lawful judgment, decree, order, or process of the court; or (d) Refusal, without lawful authority, to produce a record, document, or other object.

RCW 9.94A.535(1)(e):

(1) Mitigating Circumstances - Court to Consider. The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences. (e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

THE STATE OF WASHINGTON

Respondent,

v.

MICHAEL JOHN LEVASSEUR,

Appellant.

No.: 34326-0-III

DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, CR 5, and RAP 5.4(b) the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the dates below, the Appellant's Brief was delivered to the following persons in the manner indicated:

Kathryn Burke, Ferry Co. Prosecutor 350 E. Delaware Ave. #2 Republic, WA 99166	<input checked="" type="checkbox"/> U.S. Mail on 6/12/17 7016 3560 0000 <input type="checkbox"/> Hand Delivery 5736 0858 <input checked="" type="checkbox"/> E-Mail on 6/12/17 <input type="checkbox"/> Other: _____
--	---

DATED this 12th of June, 2017 at Okanogan, WA.

Kenneth J. Miller, WSBA #46666
Attorney for Appellant