

SUPREME COURT NO. 85236-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 06, 2014, 11:09 am
BY RONALD R. CARPENTER
CLERK

E

bjh
RECEIVED BY E-MAIL

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

The Honorable Monica Benton, Judge

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

JENNIFER J. SWEIGERT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Supplemental Assignments of Error</u>	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
1. <u>Procedural Posture</u>	1
2. <u>Testimony and Argument at Remand Hearing</u>	2
a. <u>Kitching’s Testimony Regarding the Failure to Interview Witnesses</u>	2
b. <u>Kitching’s Testimony Regarding Jones’ Competency</u> ,	4
c. <u>Opinion Testimony by Expert Richard Hansen</u>	5
d. <u>Findings on Remand</u>	7
C. <u>ARGUMENT</u>	8
1. <u>COUNSEL WAS INEFFECTIVE IN FAILING TO INTERVIEW HAMILTON</u>	8
a. <u>There Was No Reason Not to Interview Hamilton</u>	9
b. <u>It Is Reasonably Probable Competent Counsel Would Have Called Hamilton to Testify for the Defense</u>	13
c. <u>It Is Reasonably Probable that Hamilton’s Testimony Would Have Persuaded the Jury There Was Reasonable Doubt</u>	17
2. <u>COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A COMPETENCY EVALUATION</u>	18
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Davis</u> 152 Wn.2d 647, 101 P.3d 1 (2004).....	9
<u>In re Pers. Restraint of Fleming</u> 142 Wn.2d 853, 16 P.3d 610 (2001).....	18, 19
<u>State v. Jones</u> 157 Wn. App. 1052 (no. 63223-0-I, Sept. 7, 2010).....	2
 <u>FEDERAL CASES</u>	
<u>Anderson v. Johnson</u> 338 F.3d 382 (5th Cir. 2003)	11, 16
<u>Brown v. Myers</u> 137 F.3d 1154 (9th Cir. 1998)	7, 8, 9
<u>Bryant v. Scott</u> 28 F.3d 1411 (5th Cir.1994).	16
<u>Godinez v. Moran</u> 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).....	19
<u>Howard v. Clark</u> 608 F.3d 563 (9th Cir. 2010)	16
<u>Kimmelman v. Morrison</u> 477 U.S. 365, 106 S. Ct. 257, 491 L. Ed. 2d 305 (1986).....	10
<u>Loyd v. Whitley</u> 977 F.2d 149 (5th Cir. 1992)	11
<u>Luna v. Cambra</u> 306 F.3d 954 (9th Cir. 2002)	17

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Mickey v. Ayers</u> 606 F.3d 1223 (9th Cir. 2010)	8
<u>Riley v. Payne</u> 352 F.3d 1313 (9th Cir. 2003)	9, 12, 17, 18
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	8, 10, 11
<u>Thomas v. Chappell</u> 678 F.3d 1086 (9th Cir. 2012) <u>cert. denied</u> , 133 S. Ct. 1239 (2013)	12
<u>Wiggins v. Smith</u> 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).....	8, 13, 14, 15
<u>Williams v. Washington</u> 59 F.3d 673 (7th Cir. 1995)	10, 12
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 10.77.050	20

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court erred in finding the 911 call shows witness Hamilton mixed up the parties, saying petitioner was chased by a younger man. 2CP¹ 36 (Finding of Fact (FoF) B.2).

2. The court erred in finding “Accordingly, the failure to call Hamilton to testify is not objectively unreasonable. This decision appears strategic in nature and hence not deficient performance.” 2CP 37 (FoF B.4).

3. The court erred in finding counsel’s failure to seek a competency evaluation was not deficient. 2CP 38-39 (FoF C.6, C.8).

Issues Pertaining to Supplemental Assignments of Error

1. Does the evidence on remand show counsel was ineffective in failing to investigate an eyewitness with exculpatory information?

2. Does the evidence on remand show counsel was ineffective in failing to request evaluation of petitioner’s competency to stand trial?²

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural Posture

Petitioner Leroy Jones was found guilty of second-degree assault and sentenced to life in prison without possibility of parole. CP 79, 887,

¹ 2CP refers to the clerk’s papers on remand to distinguish them from the clerk’s papers initially designated.

² This argument was not raised in the petition for review. It is included because this Court’s order did not limit the additional evidence of ineffective assistance that could be presented on remand.

896. On appeal, the court held Jones' attorney was not ineffective and his Florida convictions were comparable to Washington "most serious offenses." State v. Jones, 157 Wn. App. 1052 (no. 63223-0-I, Sept. 7, 2010). This Court granted review.

After oral argument, this Court instructed the trial court to take additional evidence on whether Jones' trial counsel was ineffective "including but not limited to": "(1) whether defense counsel's performance was deficient for failure to interview witnesses; (2) why defense counsel did not interview all the witnesses listed in the discovery; and (3) why defense counsel did not call one of the witnesses listed in the discovery, Michael Hamilton, to testify." After the remand hearing, this Court ordered supplemental briefing.

2. Testimony and Argument at Remand Hearing³

a. Kitching's Testimony Regarding the Failure to Interview Witnesses

Trial counsel Al Kitching testified he did not know why neither he nor his investigator contacted Hamilton, whose name, contact information, and 911 call were in the discovery. 14RP⁴ 11, 40. Kitching reaffirmed that,

³ This recitation of the facts is limited to new information presented on remand.

⁴ There are two volumes of Verbatim Report of Proceedings on remand referenced as follows: 14RP – Aug. 21, 2014; 15RP – Aug. 22, 2014.

before trial, he had no idea what Hamilton would say and Hamilton's statement was not part of Kitching's trial preparation. 14RP 47.

Kitching did not recall listening to Hamilton's 911 call. 14RP 41, 42. Having reviewed it since the trial, he testified it contained "not a lot of significant information" and did not necessarily indicate Hamilton's testimony would be exculpatory. 14RP 42, 44. Regarding Hamilton's post-trial defense interview, Kitching testified Hamilton was "impressed with himself" but Kitching was "not sure how impressive he would have been with the jury." 14RP 45. He testified that, to base a theory on Hamilton's testimony, he would have had to also argue Hamilton was mistaken about some things, such as who was chasing whom. 14RP 61.

Finally, Kitching testified that, based on the information he now has, he would not have called Hamilton to testify. 14RP 49-51. Kitching felt he had no choice but to focus on when the knife came out because all the witnesses, except Hamilton, seemed consistent that Jones was chasing Alford. 14RP 48, 51. He would not have called Hamilton because Hamilton saw a knife when only Jones and Alford were involved in the altercation. 14RP 57. Kitching admitted this was a difficult case to win because of the first aggressor instruction. 14RP 55. He admitted Hamilton's testimony "lends some evidence to the idea of self-defense." 14RP 60. However, he concluded Hamilton must have been confused. 14RP 61.

Kitching did not believe Jones' statement to the police impacted his sense that there was only one possible defense theory, although he knew the statement was admissible if the State had sought to admit it. 14RP 55-56. The statement reads in full: "They sold me some bullshit dope and I went fighting for my money. They jumped me when I was fighting with the young one. I bought a \$10 rock of bullshit. I was trying to stab him because three of these guys jumped me. I was defending myself." Ex. 8. The case strategy was not dictated by keeping Jones' statement out; on the contrary, Kitching testified he would have loved for the jury to hear Jones's statement. 14RP 63-65.

Kitching also testified that, on the first day of trial, the prosecutor told him Sulvia Ooveda had potentially exculpatory information. 14RP 27-28. Kitching did not interview her, although the fact that she called 911 was in the discovery, as was her contact information. 14RP 28. Kitching testified he was extremely busy and relied on his investigator to attend many of the witness interviews. 14RP 24-25.

b. Kitching's Testimony Regarding Jones' Competency.

Kitching testified he requested a social worker because Jones did not seem to appreciate how serious the case was and his behavior "seemed to warrant a closer look at competency." 14RP 17-19. By email on February 6, 2008, the social worker informed Kitching Jones "does not have his

marbles together. As[sic] never done a trial and just wants to do one.” Ex. 1, 14RP 19-20. On February 27, 2008, Jones turned down a plea offer to a non-strike offense. Ex. 1. That same day, Kitching requested Jones be evaluated by an expert, “just to make sure he is competent to make the call to go to trial.” Ex. 1. A May 12 email shows Kitching did not complete the paperwork for the evaluation. Ex. 1. The file shows Kitching canceled the request for an expert on April 3, 2008, the day trial began. Ex. 1.

Kitching testified he did not recall what information he had regarding competency when trial began and did not know whether a psychological evaluation was ever performed. 14RP 23-24. He did not recall any competency concerns at the time of trial. 14RP 24. He believed Jones knew what Kitching’s role was and understood the charges. 14RP 58.

c. Opinion Testimony by Expert Richard Hansen

Richard Hansen, called by Jones as an expert witness, testified Hamilton’s testimony would have been critical and there was “no excuse for not calling somebody who would defeat the first aggressor instruction.” 14RP 70, 73. He agreed the timing of when the knife came out was a crucial fact. 14RP 74. But, he argued, Hamilton’s testimony is helpful in this regard, since he only saw the knife after Jones was tackled. 14RP 74. Though it would have been one witness against four regarding who tackled whom, Hansen explained, “That’s why we have trials.” 14RP 75. Hansen

opined it was not justifiable to simply dismiss Hamilton's testimony out of hand merely because he placed Jones as the one being chased. 14RP 81. Overall, he opined the case was simply not ready for trial and it was deficient performance not to interview the witnesses before trial or even listen to the 911 calls. 14RP 78-79.

Hansen opined that, if the issues were undisputed or there were an extremely large number of eyewitnesses, it would not necessarily be deficient performance not to interview all of them. 14RP 79. But in this case, there were only ten eyewitnesses, and there were discrepancies among their accounts. 14RP 79. He also noted that the number of witnesses makes a huge difference with a jury. 14RP 80. At trial, the State's witnesses outnumbered the defense witness four to one. 14RP 80. Adding Hamilton and perhaps Ooveda would make it far more likely a jury would find reasonable doubt. 14RP 80. Under these circumstances, he opined, it was deficient performance not to interview the other eyewitnesses. 14RP 80.

He pointed out there was no way to tell from the discovery how credible Hamilton would be and no possible strategic reason for not talking to him. 14RP 106. Even if some of his testimony were inconsistent, if Kitching had known of it before trial, it could have been made part of a coherent trial strategy. 14RP 86-87. He opined the new trial motion should

have been granted when Hamilton's testimony came to light because no competent attorney would have failed to call him as a witness. 14RP 86, 90.

Hansen also found it was deficient performance not to halt the proceedings when Kitching had concerns about Jones' competency. 14RP 82-83, 90.

d. Findings on Remand

On remand, the court found Kitching's failure to interview Ooveda and Laurie Brown before trial was unreasonably deficient performance. CP 35. However, the court concluded the record did not show proper investigation would have altered the outcome because the other witnesses testified, "Jones first introduced the knife." CP 35.

Regarding Hamilton, the court found Kitching does not recall and the record shows no reason why he was not contacted. CP 36. Nevertheless, the court found, "the failure to call Hamilton to testify is not objectively unreasonable" and "[t]his decision appears strategic in nature and hence not deficient performance." CP 37.

Finally, the court found Kitching's decision not to obtain a competency evaluation was not deficient performance and there was no evidence Jones was actually confused about whether this case was a third strike. CP 39. Overall, the court concluded there was some deficient

performance but was not persuaded there was a reasonable probability the outcome would have been different without counsel's errors. CP 39.

C. ARGUMENT

1. COUNSEL WAS INEFFECTIVE IN FAILING TO INTERVIEW HAMILTON.

When applying the standard for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in cases of failure to investigate a witness, courts have posed three questions: First, was the failure to interview the witness a reasonable exercise of professional judgment under the circumstances? Wiggins v. Smith, 539 U.S. 510, 522-23, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003). This question corresponds to the "deficient performance" prong of the Strickland analysis. Id. Second, in light of the witness' testimony, is it reasonably probable a competent attorney would have called the witness to testify? Mickey v. Ayers, 606 F.3d 1223, 1236-37 (9th Cir. 2010) (citing Wiggins, 535 U.S. at 535). And third, if the witness had testified, is there a reasonable probability the outcome of the proceedings would have been different, such that the absence of the witness undermines confidence in the outcome? Id. These second and third questions reflect the "prejudice" prong of the Strickland standard. Id.

The testimony on remand demonstrates the lack of a strategic reason or exercise of professional judgment behind the failure to interview Hamilton, Brown, or Ooveda. On the contrary, the evidence reflects a busy public defender who relied on his investigator, ran out of time, and did not thoroughly review the discovery to identify potential defense witnesses.

Despite counsel's post-hoc rationalizations, there is at least a reasonable probability that competent counsel would have presented Hamilton's testimony because it would have overcome the first aggressor instruction. For the same reason, it is reasonably probable Hamilton's testimony would have led a jury to find reasonable doubt.

a. There Was No Reason Not to Interview Hamilton.

"Defense counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client. This includes investigating all reasonable lines of defense, especially the defendant's most important defense." In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (internal quotes and footnotes omitted). The failure to interview Hamilton was not reasonable because Kitching failed to fully investigate Jones' "most important defense," self-defense.

A reasonable investigation would include interviewing the eyewitnesses to determine if anyone could corroborate Jones' self-defense

claim because without corroboration even a defendant's own testimony is not an "effective defense." Riley v. Payne, 352 F.3d 1313, 1320 (9th Cir. 2003) (quoting Brown v. Myers, 137 F.3d 1154, 1158 (9th Cir. 1998)). Even assuming, without conceding, that Kitching had already reasonably chosen a strategy based solely on Mark Forbes' testimony regarding when he saw the knife, there was no reason not to interview the remaining witnesses to find out if they might corroborate Forbes' testimony. There were not an unreasonable number of eyewitnesses. Kitching testified he interviewed eight. Hamilton, Brown, and Ooveda would have amounted to eleven. There was no basis to assume the witnesses would all say the same thing; Kitching admitted the witnesses he did interview gave varying accounts. 14RP 48.

At a minimum, before deciding to call off further investigation, counsel must do sufficient investigation to make a reasoned determination on that question. Strickland, 466 U.S. at 691. But Kitching could not even be certain he had fully reviewed the discovery by listening to Hamilton's 911 call. 14RP 41, 42. This failure alone was deficient. See Williams v. Washington, 59 F.3d 673, 680 (7th Cir. 1995) ("We cannot imagine a plausible excuse for a decision not to read discovery materials voluntarily provided by the State. 'Such a complete lack of trial preparation puts at risk

... the reliability of the adversarial testing process.”) (quoting Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S. Ct. 257, 491 L. Ed. 2d 305 (1986)).

Even assuming Kitching listened to Hamilton’s 911 call or reviewed the transcript, that information does not provide a reasonable basis to forego interviewing Hamilton. The 911 call does not provide many hints as to the substance of Hamilton’s testimony, but the fact that he was an eyewitness with the potential to corroborate Jones’ or Forbes’ accounts should have prodded counsel to investigate.

The mere fact that there were witnesses to the events that the State chose not to call should have been a red flag warning defense counsel they might have exculpatory information. Anderson v. Johnson, 338 F.3d 382, 394 n. 52 (5th Cir. 2003). But if that were not enough, the prosecutor warned Kitching the first day of trial that Ooveda may have exculpatory information. 14RP 27-28. If one eyewitness saw something potentially exculpatory, others may have as well. Even without the prosecutor’s advisement, Kitching already knew at least one witness (Forbes) had testimony supporting his defense theory. Yet Kitching failed to interview Ooveda, Hamilton or Brown, to see if they might provide corroboration.

The Strickland standard distinguishes between reasonable, informed professional judgment on the one hand and “plain omissions” on the other. Anderson, 338 F.3d at 394 n. 51 (quoting Loyd v. Whitley, 977 F.2d 149,

158 (5th Cir. 1992)). Kitching's testimony at the remand hearing makes clear which side of the line this case falls on. His failure to interview Hamilton was not a strategic decision. It was a plain omission. Kitching could not give any reason for his failure to interview Hamilton. 14RP 11. Nor could he give any reason for failing to interview Brown and Ooveda. 14RP 27-33. The record shows no evidence he made any reasoned decision in this regard. In a case where his client was facing life in prison without the possibility of parole, it was objectively unreasonable not to determine whether any of the three remaining eyewitnesses could have corroborated his defense. The failure to interview Hamilton and the others was deficient performance.

This court's order also inquired why Hamilton was not called as a witness. The answer is that Kitching had no idea what he might say. 14RP 47. Contrary to the trial court's finding,⁵ Kitching could not have made a tactical decision not to call Hamilton as a witness because he had no information upon which to base such a decision. See Thomas v. Chappell, 678 F.3d 1086, 1104-05 (9th Cir. 2012) cert. denied, 133 S. Ct. 1239 (2013) (When counsel had not learned of the existence of two witnesses or interviewed a third, the failure to call the witnesses "cannot be excused as a tactical decision because he did not have sufficient information with which

⁵ CP 37 (FoF B.4).

to make an informed decision.”).⁶ Kitching did not make a tactical decision not to call Hamilton – he simply failed to investigate.

Moreover, Kitching’s post hoc rationalizations for why he would not have called Hamilton are immaterial. Once it is established that counsel unreasonably failed to investigate a witness, the question is not whether the attorney who has already been deemed to have rendered deficient performance would have called the witness. The question is whether it is reasonably probable that *effective* counsel would have called the witness. Wiggins, 539 U.S. at 535. Given the exculpatory nature of Hamilton’s testimony, the answer to that question is yes.

b. It Is Reasonably Probable Competent Counsel Would Have Called Hamilton to Testify for the Defense.

As Kitching acknowledged, his defense based on the timing of the knife was weak at best and got weaker when Forbes actually testified. 14RP 55. In the face of a weak defense, it is reasonably probable that competent counsel would have seized on exculpatory testimony such as Hamilton’s. See Wiggins, 539 U.S. at 535-36. In Wiggins, counsel failed to investigate or present mitigating evidence at a capital sentencing proceeding, focusing

⁶ See also Riley, 352 F.3d at 1318-19 (Counsel who did not interview the witness could not have determined what the witness would have said, whether he would have been credible, or whether he should have been called to testify, and “did not make a reasonable professional judgment to ignore an important corroborating witness.”); Williams, 59 F.3d at 680 (“Because of his ignorance, counsel was both unable and unprepared to make any strategic decisions regarding the letter.”).

instead on Wiggins' direct responsibility for the offense. The Court held it was reasonably probable that, had counsel learned of the abuse and hardship Wiggins had suffered, reasonable counsel would have introduced it. Id.

Much like Kitching and the State here, Wiggins' attorneys argued they had already chosen a different reasonable strategy that did not rely on mitigation. Id. at 535. The Court rejected this argument for two reasons. First, arguing for mitigation based on abuse would not necessarily have been inconsistent with the chosen strategy to focus on direct responsibility. Second, counsel "were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." Id. at 536.

The same is true here. Hamilton's statement is not necessarily inconsistent with Kitching's strategy regarding the timing of the knife. Kitching claims he would not have called Hamilton because Hamilton saw Jones with the knife while he was fighting only with Alford. 14RP 57. But the purpose of arguing Jones did not pull the knife until the other three men joined the fight was to avoid the first-aggressor instruction. Since Hamilton would have testified it was Jones who was attacked, his testimony would also have avoided the first-aggressor problem. The problems with eyewitness testimony and memory are well documented. A reasonable strategy could have incorporated Forbes' and Hamilton's testimony to show

reasonable doubt based on the variations in witness' perceptions. But even if the two theories were inconsistent, Kitching simply could not have made a reasoned choice in the matter because he failed to investigate. Wiggins, 539 U.S. at 536.

The State has also argued Hamilton's testimony would have been inconsistent with Jones' own statement, which Kitching knew could have been admitted at trial. But Jones's statement fails to show a legitimate reason to ignore testimony from an eyewitness who would have testified Jones was assaulted and acted in self-defense. Jones did not admit to being the first aggressor in a physical altercation. Ex. 8. According to him, he fought with Alford over money, but is not specific whether that was a mere verbal altercation. Ex. 8. He did not say he tried to stab Alford to get his money back. Ex. 8. He said he tried to stab Alford because three people had "jumped" him and he was defending himself. Ex. 8. Kitching obviously did not consider this statement contradictory to his theory of the case, because he testified he wished he could admit it in support of Jones' defense. 14RP 65.

Kitching admitted one of the main obstacles at trial was the instruction that self-defense was not available if Jones was the first aggressor. 14RP 55. Hamilton's testimony that Alford chased and assaulted Jones would have given the jury reason to doubt whether Jones was the first aggressor, thereby giving them permission to consider whether he acted in

self-defense. Kitching's strategy rested on the idea that Jones did not attack Alford's friends who joined the fray. But it is reasonably probable that counsel who had thoroughly investigated would have presented Hamilton's testimony as another reason to doubt that Jones was the first aggressor.

On remand, Kitching testified he would not have called Hamilton because of his doubts about Hamilton's value a witness. 14RP 45. And the trial court concluded Hamilton, in both his 911 call and his post-trial defense interview "mixed up the parties." CP 36.⁷ But the transcript of the 911 call does not support this conclusion. Ex. 6. Even if Kitching had listened to the 911 call, the call does not show a "mix up" that could have excused his failure to investigate further or call the witness. Ex. 6.

Moreover, doubts about credibility are not a legitimate reason for failing to investigate a witness with exculpatory testimony. See, e.g., Howard v. Clark, 608 F.3d 563, 571 (9th Cir. 2010).⁸ In Howard, the Court declared that the lower court's focus on "serious credibility issues" was "unreasonable." Id. "As we have previously noted, the fact that a witness *might* not appear credible at trial is not a reasonable basis for failing to

⁷ (FoF B.2).

⁸ See also Anderson, 338 F.3d at 392 ("Acknowledging that a lack of credibility might support a strategic decision not to call a witness to *testify* at trial, we explained that a witness's character flaws cannot support a failure to *investigate*. Without so much as contacting a witness, much less speaking with him, counsel is 'ill-equipped to assess his credibility or persuasiveness as a witness.'") (quoting Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir.1994)).

identify or attempt to interview him.” Id. (internal quotes omitted). It is at least reasonably probable that reasonable investigation would have led a competent attorney to use Hamilton’s different perception of events to sow the seeds of reasonable doubt.

c. It Is Reasonably Probable that Hamilton’s Testimony Would Have Persuaded the Jury There Was Reasonable Doubt.

The failure to investigate Hamilton’s testimony undermines confidence in the verdict because the testimony would have given the jury a reason to doubt Jones was the first aggressor and, therefore, would have given the jury permission to consider whether Jones acted in self-defense. In the “race for the hearts and minds of the jury,” a reason to believe the defendant was not the aggressor is essential and can make the difference between conviction and acquittal. Riley, 352 F.3d at 1319-20.

Additionally, Hamilton’s testimony would have created a greater equilibrium of witnesses between the State and the defense. See id. at 1320 (“Pettis’s testimony would have been ‘consistent with [Riley’s] account’ and would have created more equilibrium in the evidence presented to the jury.”) (quoting Luna v. Cambra, 306 F.3d 954, 961 (9th Cir. 2002)). The Riley court concluded that an additional witness who would have corroborated Riley’s claim that he acted in self-defense and was not the first aggressor “may have led to a different verdict.” Riley, 352 F.3d at 1320.

At a minimum, Hamilton's testimony would have created reasonable doubt by providing a different perspective of the event, illustrating for the jury how different people can perceive the same event differently, thereby casting doubt on the accounts of the State's witnesses as well. The State argued in closing, "witness after witness described for you how the defendant attacked [Alford]." 7RP 103. With Hamilton's testimony, there would have been a chink in that armor, a dissenting view to cause the jury to doubt. One person who wholeheartedly and genuinely endorsed that Jones acted in self-defense would likely have made a difference. Riley, 352 F.3d at 1319-21. The fact that the jury did not hear that endorsement undermines confidence in the outcome. Id.

The Riley court reversed declaring,

Because Riley's counsel did not interview or call a key witness who would have corroborated Riley's testimony that Riley was not the first aggressor . . . our confidence in the verdict is undermined, and we are left with the firm conviction that Riley did not get a fair shake from the legal system.

Id. at 1325. Because Leroy Jones "did not get a fair shake from the legal system," for the same reasons, we ask this Court to reverse his conviction.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A COMPETENCY EVALUATION.

"When defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise

competency at any time ‘so long as such incapacity continues.’” In re Pers. Restraint of Fleming, 142 Wn.2d 853, 867, 16 P.3d 610 (2001) (quoting RCW 10.77.050). Kitching had reason to know Jones might be incompetent but failed to alert the court or request an evaluation. This failure was also ineffective assistance that deprived Jones of a fair trial.

Kitching testified he must have doubted Jones’ competency because the documents from his file show he requested a social worker and an evaluation by Dr. McClung. 14RP 15, 17-18, 20. The social worker’s email to Kitching indicates her assessment that Jones “does not have his marbles together” and has “never done a trial and just wants to do one.” Ex. 1. Kitching also knew Jones “didn’t seem to want to hear . . . about how serious this case was,” and unreasonably turned down plea offers to non-strike offenses, risking conviction of an offense likely to result in life in prison without the possibility of parole. 14RP 19, 56-57. Under these facts, Kitching had reason to know Jones might be incompetent to stand trial. Yet Kitching inexplicably cancelled his request for expert services. Ex. 1.

“Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” Godinez v. Moran, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). Jones’ decision to turn down plea offers to third-degree assault because he had “never done a trial and just wants to do one,”

indicates he did not have the capacity to understand the nature of the proceedings. Kitching's performance was unreasonably deficient because he failed to obtain an evaluation or raise his doubts with the trial court.

Under RCW 10.77.050, a competency evaluation would have resulted if Kitching had raised his doubts with the court. Based on the statement that he wanted a trial because he had never had one, Jones would likely have been found incompetent due to an inability to appreciate the nature of the proceedings. This probability shows a second instance of ineffective assistance of counsel.

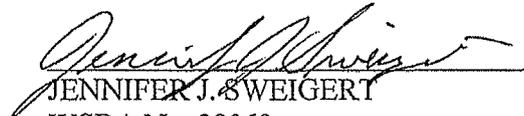
D. CONCLUSION

For the foregoing reasons, and for the reasons stated in prior briefing in this Court and the Court of Appeals, Jones requests this Court reverse his conviction or, alternatively, vacate his sentence.

DATED this 6th day of October, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051
Attorney for Appellant

OFFICE RECEPTIONIST, CLERK

To: Jennifer Sweigert
Cc: Summers, Ann
Subject: RE: State v. Jones, no. 85236-7 supplemental brief

Received 10/06/2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jennifer Sweigert [mailto:SweigertJ@nwattorney.net]
Sent: Monday, October 06, 2014 11:06 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Summers, Ann
Subject: State v. Jones, no. 85236-7 supplemental brief

Dear Supreme Court Clerk,

Attached for filing is the petitioner's second supplemental brief in State v. Leroy Jones, no. 85236-7.

By agreement, service on counsel for the State of Washington is being made via CC to this email.

Thank you for your assistance,

Jennifer J. Sweigert
Attorney at Law
WSBA no. 38068
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122
206-623-2373
SweigertJ@nwattorney.net

**

This e-mail and any attachments thereto are intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified any dissemination, distribution or copying of this email, and any attachments thereto, is strictly prohibited. If you receive this email in error please permanently delete the original copy and any copy of any e-mail, and any printout thereof.