68168-1

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COA NO. 68168-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM CARNEY,

Appellant.

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

The Honorable Carol A. Schapira, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN FAILING TO REACH THE MERITS OF CARNEY'S COLLATERAL ATTACK ON TIME BAR GROUNDS.

a. The State Offers No Substantive Response Regarding Lack Of Notice.

In a single footnote, the State claims not to concede lack of notice of Carney's right to file a personal restraint petition under RCW 10.73. Brief of Respondent (BOR) at 4 n.7. The State's footnote is not a substitute for proper argument and should be disregarded. State v. N.E., 70 Wn. App. 602, 606 n. 3, 854 P.2d 672 (1993) (declining to consider argument raised in footnote); State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) (same).

The State presents no reasoned argument in support of its disagreement with Carney's contention that he was entitled to notice and did not receive it. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290, review denied, 136 Wn.2d 1015, 966 P.2d 1278 (1998). Furthermore, "[i]t is not the function of . . . appellate courts to do counsel's thinking and briefing." Orwick v. City of Seattle, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). The State's perfunctory disagreement with Carney's argument that he was entitled to

receive adequate notice and did not in fact receive it is unworthy of judicial consideration.

b. Carney Should Receive The Retroactive Benefit Of Jones Under RCW 10.73.100(6).

The State claims it is irrelevant whether Carney received notice because State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983) does not apply retroactively to Carney's case. BOR at 1, 4. Contrary to the State's argument, Carney is able to receive the benefit of Jones.

Under United States Supreme Court jurisprudence, new rules of criminal procedure will generally not be retroactively applied on collateral attack. Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). There are two exceptions: (1) rules that place certain kinds of primary, private individual conduct beyond the State's power to prohibit and (2) rules that require observance of procedures that are implicit in the concept of ordered liberty. Teague, 489 U.S. at 311. The Washington Supreme Court has generally followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law. State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627, cert. denied, 546 U.S. 983, 126 S. Ct. 560, 163 L. Ed. 2d 472 (2005).

It must be remembered, however, that the non-retroactivity principle announced in Teague acts as a limitation on the power of federal courts to grant habeas corpus relief to state prisoners. Beard v. Banks, 542 U.S. 406, 412, 124 S. Ct. 2504, 159 L. Ed.2d 494 (2004). Teague was "grounded in important considerations of federal-state relations" — a concern that disappears when a Washington court construes the application of Washington's own laws to a given case. Evans, 154 Wn.2d at 448 (quoting Collins v. Youngblood, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)). The Teague rule does not constrain the authority of state courts to give broader effect to new rules of criminal procedure. Danforth v. Minnesota, 552 U.S. 264, 266, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

The State's retroactivity claim necessarily implicates the relevant state law addressing retroactivity. RCW 10.73.100(6) provides the one year deadline for filing a personal restraint petition is subject to the exception that there has been "a significant change in the law, whether substantive or procedural, which is material to the conviction" and "a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard."

RCW 10.73.100(6) has been applied "consistent with the United States Supreme Court's retroactivity analysis, although that analysis does not limit the scope of relief we may provide under the statute." In re Pers. Restraint of Hacheney, 169 Wn. App. 1, 17 n.11, 288 P.3d 619 (2012). Our Supreme Court recognizes "the possibility that there may be a case where a petitioner would not be entitled to relief under the federal analysis as it exists today, or as it may develop, but where sufficient reason would exist to depart from that analysis." In re Pers. Restraint of Markel, 154 Wn.2d 262, 268 n.1, 111 P.3d 249 (2005). In other words, "[t]here may be a case where our state statute would authorize or require retroactive application of a new rule of law when Teague would not." Evans, 154 Wn.2d at 448.

Interests associated with the finality of litigation must be balanced against the interest in preserving constitutional liberties and remedying prejudicial error. State v. Brand, 120 Wn.2d 365, 368-69, 842 P.2d 470 (1992). The Washington Supreme Court has cautioned "we limit collateral review, but not so rigidly as 'to prevent the consideration of serious and potentially valid claims.'" Brand, 120 Wn.2d at 369 (quoting In re Pers. Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990)).

Consistent with that principle, "[w]here an intervening opinion has effectively overturned a prior appellate decision that was originally

determinative of a material issue, the intervening opinion constitutes a significant change in the law for purposes of exemption from procedural bars." In re Personal Restraint of Rowland, 149 Wn. App. 496, 503, 204 P.3d 953 (2009). Washington appellate courts have accordingly granted relief pursuant to RCW 10.73.100(6) to those whose judgments were already final before a significant change in the law took place.

In Rowland, for example, this Court held a significant change in the law governing legal comparability of the California burglary statute to Washington's statute that was material to Rowland's sentence entitled him to relief on collateral attack, even though the judgment had been final for 14 years. Rowland, 149 Wn. App. at 500-01, 506-07 ("Because the change is material to Rowland's conviction, his petition falls under the statutory exception to the one-year time bar and will be considered on the merits.").

In support, Rowland cited In re Pers. Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005).[1] The Court in Lavery held pursuant to RCW 10.77.100(6) that the time bar did not apply against a petitioner whose judgment became final before a new appellate decision changed the comparability rule affecting the offender score. Lavery, 154 Wn.2d at 253, 260-61.

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[1] Rowland, 149 Wn. App. at 506-07.

It has also been held that new cases regarding the scope of accomplice liability, when considered a significant change in the law, should be applied to a petitioner whose judgment was already final. In re Pers. Restraint of Smith, 117 Wn. App. 846, 855-57, 73 P.3d 386 (2003), abrogated by In re Pers. Restraint of Domingo, 155 Wn.2d 356, 119 P.3d 816 (2005).[2]

None of these courts felt constrained to condition relief on whether a petitioner's claim satisfied the Teague exceptions to non-retroactivity. It appears the driving force behind the decisions to grant relief hinged on a sense that it would be unfair to deprive the petitioner of the benefit of the new rule, despite the fact the judgment was final. Such an outcome comports with the broad language in RCW 10.73.100(6) requiring only a "sufficient reason" to apply a new law retroactively.

The State acknowledges Jones provided a new rule. BOR at 4. Jones is material to Carney's case. The jury found Carney committed the act charged but found him not guilty be reason of insanity. CP 88. Had

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[2] The Supreme Court in Domingo subsequently held the cases upon which Smith relied as announcing a new rule of accomplice liability did not in fact significantly change the law and therefore could not be used to avoid the one-year time bar under RCW 10.77.100(6). Domingo, 155 Wn.2d at 363, 366-68. Domingo, however, did not suggest Smith was wrongly decided insofar as it held relief was appropriate under RCW 10.77.100(6) in the event those cases could correctly be deemed to mark a significant change in the law.

Jones been the law at the time of Carney's trial, the trial court would have lacked authority to impose the NGRI plea against Carney's wishes and would not have been able to order Carney committed to Western State Hospital. Jones, 99 Wn.2d at 737, 740, 747 (recognizing all aspects of the judgment affected by such error must be vacated). It is fundamentally unfair that Carney be subjected to indefinite involuntary commitment as a result of a denial of his constitutional right to control his own plea and defense. This is a "sufficient reason" to find Jones retroactive under RCW 10.73.100(6).

Moreover, the purpose behind the retroactivity test for "new" rules of criminal procedure must be kept in mind, lest the test's reason for being become unmoored from its application. Interest in preserving the finality of judgments is the driving force behind the rule that courts will not routinely apply "new" decisions of law to cases that are already final. Evans, 154 Wn.2d at 443; Markel, 154 Wn.2d at 275; In re Pers. Restraint of Eastmond, 173 Wn.2d 632, 638, 272 P.3d 188 (2012).

Rules of finality operate on the presumption that notice is given of procedural rights related to challenging the judgment in a timely manner. This is not a case where the defendant was advised of his right to file a collateral attack and chose not to exercise it for many years after judgment was entered. In assessing whether Carney should receive the benefit of

Jones, the lack of notice regarding the availability of collateral attack operates in his favor or, at minimum, does not diminish his claim in considering the equities of the situation.

c. Jones Satisfies The First Exception Of The Teague Test.

Even if Carney is not entitled to the benefit of Jones under the analysis set forth in section A. 1. b., supra, he should still receive its benefit for alternate reasons. Jones places imposition of involuntary civil commitment beyond the power of the courts where a defendant does not voluntarily wish to subject himself to that kind of outcome through entry of an NGRI plea. Jones, 99 Wn.2d at 737, 740, 747. Jones applies retroactively for this reason.

The first exception — rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe — is at issue here. This exception applies "not only [to] rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry v. Lynaugh, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

The latter is triggered when "the Constitution itself deprives the State of the power to impose a certain penalty." Penry, 492 U.S. at 330. An example of such a case is Graham v. Florida, which held the Eighth Amendment precludes a sentence of life without parole for a juvenile who did not commit a homicide offense. Graham v. Florida, __U.S.__, 130 S. Ct. 2011, 2033-34, 176 L. Ed. 2d 825 (2010). Graham applies retroactively under the first Teague exception. In Re Sparks, 657 F.3d 258, 260-62 (5th Cir. 2011); In re Moss, __ F.3d __, 2013 WL 28371 at *1 (11th Cir. 2013); see also United States v. Shipp, 589 F.3d 1084, 1086, 1090-91 (10th Cir. 2009) (Chambers v. United States, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009) applied retroactively under first Teague exception: petitioner could not be sentenced as an armed career criminal where one of his predicate convictions no longer served as a qualifying offense under Chambers).

At the time of Carney's trial, those acquitted by reason of insanity but found to be "a substantial danger to himself or others and in need of control by the court or other persons or institutions" were subject to hospitalization or other alternative treatment. Former RCW 10.77.110(1) (Laws of 1979 ex.s. c 215 § 4). As a result of the imposition of a plea he did not want to enter and a defense he did not want to submit to the trier of fact, Carney has been subject to involuntary treatment and recurrent

rounds of involuntary hospitalization for the past 30 years pursuant to RCW 10.77.110. He remains subject to that state of affairs for life. RCW 10.77.025(1).

But under Jones, Carney had the constitutional right to control his plea and his own defense. Jones, 99 Wn.2d at 737, 740, 743-44, 747. Courts cannot constitutionally impose an NGRI plea and accompanying defense on an unwilling defendant. Id. The effect of Jones is to prohibit imposition of civil commitment on a particular class of persons — those who do not wish to be subject to that penalty through declining an NGRI plea. Under Jones, Carney received a penalty that the law cannot impose upon him. And there can be no mistake that indefinite civil commitment is a penalty due to the loss of liberty it entails. See State v. Wilcox, 92 Wn.2d 610, 612, 600 P.2d 561 (1979) (commitment of a criminally insane person is a deprivation of liberty).

Had the trial court not imposed an NGRI plea and defense on Carney, the court would have had no power to sentence Carney under the provisions of RCW 10.77.110. Jones should be given retroactive effect because the rule it announced has the effect of prohibiting a certain kind of sentence — involuntary hospitalization and treatment under RCW 10.77.110 — as a result of the status of defendants who do not wish to

submit themselves to that outcome by declining an NGRI plea. Penry, 492 U.S. at 330.

d. In The Alternative, Jones Satisfies The Second Exception Of The Teague Test.

Where a new rule for the conduct of criminal prosecutions is announced after a personal restraint petitioner's conviction became final, the petitioner remains entitled to the benefit of the new rule if it "requires the observance of procedures implicit in the concept of ordered liberty." In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992). This category encompasses "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Markel, 154 Wn.2d at 269-70 (quoting Schriro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)) (internal quotation marks omitted).

Carney should receive the benefit of Jones because the ability to control one's own plea and thereby avoid indefinite civil commitment is implicit in the concept of ordered liberty. The rule at issue here is that the court cannot impose an NGRI plea upon an unwilling defendant. Jones, 99 Wn.2d at 737, 740, 743-44, 747. The rule announced in Jones seriously diminishes the accuracy of the criminal proceeding because it removes the availability of an NGRI acquittal altogether under the

circumstance where a defendant does not wish to submit himself to the possibility of such an outcome. Carney has been held in the throes of involuntary civil commitment for the past 30 years because the court imposed an NGRI plea and defense that he did not want and the jury should never been allowed to find. The fundamental fairness of the proceeding is therefore implicated.

Comparison with other cases that were not applied retroactively illustrates why Jones should be retroactive.

The right to confrontation rule announced in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004) does not apply retroactively.[3] Markel, 154 Wn.2d at 273. The Court in Markel reasoned the accuracy of a conviction is not seriously diminished in the absence of the Crawford rule because a defendant could always challenge the use of hearsay evidence within the previously recognized contours of the confrontation clause. Id.

In contrast, the absence of the Jones rule seriously diminishes and fundamentally affects the accuracy of the criminal proceeding because it prevents the judge from imposing a plea and a defense on an unwilling

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[3] Crawford requires all declarants of testimonial hearsay be subject to confrontation, discarding the old reliability test for when hearsay could be admitted in the absence of confrontation. Crawford, 541 U.S. at 53-54, 62-63.

defendant, which in turn prevents a trier of fact (jury or judge) from finding the defense to be proven and the defendant from receiving a sentence predicated on the finding of that defense. It is strange to even speak of "accuracy" because such a term presumes there is an outcome that is accurate and against which a new rule may be measured. But under Jones, an NGRI acquittal and subsequent sentence based on an NGRI plea is not an available option when the defendant rejects such a plea.

It has also been held that new rules regarding who can find a fact in support of conviction or an exceptional sentence do not amount to watershed rules requiring retroactive application. Comparison with such cases demonstrates why retroactive application is triggered in Carney's case.

For example, the Court held a perjury statute that required a judge rather than a jury to determine the materiality of a false statement was unconstitutional but would not be given retroactive effect. State v. Abrams, 163 Wn.2d 277, 290-92, 178 P.3d 1021 (2008). The Court reasoned shifting the determination of materiality from the judge to the jury does not alter our understanding of the bedrock procedural elements essential to the fairness of a trial. Abrams, 163 Wn.2d at 291 (citing Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997)).

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004) do not apply retroactively for much the same reason. Evans, 154 Wn.2d at 448.[4] The Washington Supreme Court reasoned the identity of the fact finder for sentencing purposes was not implicit in the concept of ordered liberty and did not implicate the fundamental fairness of the proceedings. Id. at 447-48.

Such cases show a shift in decision-making authority between the judge and jury does not rise to the level of a criminal procedure implicit in the concept of ordered liberty. The change in procedure announced in Jones goes much deeper.

Under Jones, neither a judge nor a jury has the power to impose an NGRI plea or find the NGRI defense when the defendant does not want it to be imposed and found. Unlike Abrams, the new rule in Jones did not simply shift the identity of the fact finder from judge to jury regarding whether an element of a crime has been proven. Rather, Jones mandates that a judge cannot enter an NGRI plea on behalf of an unwilling defendant and neither a judge nor a jury have the power to find a defense

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[4] The new rule in those cases was that every fact (other than the fact of a prior conviction) that increases the defendant's sentence beyond the statutory maximum may be used only if it was either proved beyond a reasonable doubt to the trier of fact at trial or admitted by the defendant. Evans, 154 Wn.2d at 441-42.

that the defendant does not wish to raise. Unlike Apprendi or Blakely, the new rule in Jones did not simply alter *how* the sentencing was carried out. Rather, it removes the availability of a kind of sentence — indefinite involuntary commitment pursuant to chapter 10.77 RCW — altogether.

For a new, important right to be applied retroactively, it must "play a vital instrumental role in securing a fair trial." Evans, 154 Wn.2d at 445. Jones is such a rule. A fair trial cannot be secured when a defendant's right to forgo a plea and defense that subjects him to indefinite civil commitment is disregarded. Carney should receive the benefit of Jones.

B. CONCLUSION

For the reasons stated above and in the opening brief, Carney requests remand to allow the trial court to consider the collateral attack on the underlying commitment order on its merits.

DATED this 24th day of January 2013

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 68168-1-I
	)	
WILLIAM CARNEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF JANUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM CARNEY
WESTERN STATE HOSPITAL
9601 STEILACOOM BOULEVARD SW
LAKEWOOD, WA 98498

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JANUARY, 2013.

X Patrick Mayovsky