

Supreme Court
of the State of Washington

State of Washington, Respondent

v.

DWAYNE MARCUM, Petitioner

Response to Respondent's Response

DWAYNE MARCUM
[Name of petitioner]

DWAYNE MARCUM 369667
Coyote Ridge Correction Center
P.O. Box 769
Connell, Wa. 99326
[Address]

No. 9300699
RECEIVED
JUN - 2 2016
Washington State
Supreme Court

Table of Contents

Table of contents	pi
Table of Authorities	pi
Identity of Petitioner	pl
Statement of relief	pl
Facts	pl
Argument A.-Petitioner's claim of ineffective assistance of counsel	pa
Argument B.-Petitioner's claim of double jeopardy	p4
Argument C.- L.F.O.'s	p5
Conclusion	p5

Table of Authorities

Baxhillon, 907 F.2d at 597	p4
Cory, 62 Wn.2d at 373-74	p3-4
House v. Balkcom, 725 F.2d 608 (11th Cir. 1984)	p2
In re Winship, 397 U.S. 358, 378, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970)	p4-5
Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985)	p4
Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527 (1932)	p5
Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)	p4
United States v. Cronin, 466 U.S. at 654 n.11 quoting U.S. v. Decoster 624 F.2d 196, 219 (D.C. Cir. 1976), judgement entered, 598 F.2d 311 (D.C. Cir. 1979) (Max Kinnon, J., concurring)	p2
United States v. Gray, 878 F.2d 702 (3rd Cir. 1989)	p3
United States v. Scott, 625 F.2d 623 (5th Cir. 1981)	p5
Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990)	p5

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff,

v.

Dwayne Marcum
Petitioner,

Case No. 93006-6

MOTION

I. IDENTITY OF MOVING PARTY

COMES NOW, Dwayne Marcum Petitioner, seeks the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

I would like to have the Motion For Discretionary Review approved. To have my case remanded so I can have fair representation and my case investigated. Have the double jeopardy charges dropped or have the charges against me dropped

III. Facts

I incorporate the facts stated in Petitioner's "Motion For Discretionary Review" dated April 10th for this response.

Argument A

! The process and the right to be represented by an attorney are Constitutional and both have been violated. Ineffective assistance of counsel engulfs the parameters of my case. Trial counsel's failure to investigate facts of case is unconscionable and falls below the demands of the Sixth Amendment. *Hovey v. Balkcom*, 705 F.2d 608 (11th Cir. 1984). I cannot make a claim such as double jeopardy or diminished capacity without it having a foothold in ineffective assistance. There was no investigation, no questions asked, nobody to stand up for my rights, no guiding hand to help me through this traumatic experience. The Sixth Amendment... guarantees more than the appointment of competent counsel. By its terms, one has a right to "Assistance of counsel [for] his defense." Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly in such cases, the defendant's Sixth Amendment right to have assistance of counsel is denied. *United States v. Cronis*, 460 U.S. at 574 n.11 quoting *U.S. v. Deoster*, 624 F.2d 196, 219 (D.C. Cir. 1976), judgment entered, 598 F.2d 311 (D.C. Cir. 1979) (*MacKinnon v. U.S. concerning*) I never had fair representation in this case. Both the prosecution (Ann Lundval) and the defense (John Hayden) figured my case was a slam dunk for the prosecution. My defense attorney went as far as to tell me that I was Lundval's last major case and she intended to make an example out of me. I tried to fire Hayden a number of times in writing, finally I was told by another inmate to write the judge, so I did. The same time this was going on I was attempting to withdraw my guilty plea. I was given substitute counsel, and the first thing he says to me after he informs me that he's going to look at my case is "Hayden and I are good friends, I think he's a good attorney." My substitute counsel was biased. I couldn't help but to think that my case was getting

swept under the rug. There was nobody there for my defense. No one wanted to get their hands dirty and investigate my case. I had witnesses that could vouch that the dates the prosecution was using were wrong. The person I got the camera from was willing to testify and write an affidavit. The person that helped me move to the victim's house and later to my last residence was willing to testify and write an affidavit. I even had a few people that could vouch for where I was on those dates. My youngest son and his mother, all my neighbors at the Clallam County Housing Authority, I'm sure I was on their surveillance tapes. My psychologist would have been able to verify my state of mind during that time. I even had a bunch of character witnesses all willing to write affidavits on my behalf. Even the victim's mother, if she told the truth, could have verified that the dates were wrong. Especially since I moved out September 29th and I lived there less than ten weeks. I gave Mr. Hayden the list of names that I had and he never bothered to contact any of them. Trial counsel's failure to interview potential witnesses, whose names had been provided to counsel by defendant, amounted to ineffective assistance of counsel. *U.S. v Gray*, 878 F.2d 702 (3rd Cir. 1989). I was scared to openly discuss my case with counsel because almost every time I went into the attorney booth there was another inmate in the other booth and you can hear everything the other person was saying. I never was able to have a private or confidential meeting with any attorney. This was made worse because there were plenty of people in there that would like nothing more than to see me come to harm. "It is universally accepted that effective representation cannot be had without the right of a defendant to confer with his

counsel in private. Cory, 62 Wn.2d at 373-74.

B.

Double jeopardy is constitutional. If my claim is based upon matters outside the record is because the matter was not investigated.

"The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) "I told my attorney many times that the date's were wrong, that the t-shirts were the same the overshirt was taken off, and that when most people get something new they figure out how it works especially when there is no instruction manual. It's not like the date can't be changed particularly when you don't know what buttons do what. The prosecution doesn't have the camera either. I sold it to cover a debt that I owed the night I got it. There is no way the date's can be right because I owned the camera less than twelve hours, I told counsel this but he still refused to do anything.

"Although the scope of the required investigation is a function of the number of issues in the case, the relative complexity of those issues, the strength of the government's case and the overall strategy of trial counsel, this circuit has recognized that, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Nesly v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985). "Furthermore, the attorney's duty to investigate is not diminished by the fact that counsel was appointed rather than retained and possibly limited to a fee cap." *Bouchillon*, 907 F.2d at 597 (noting that "there is a duty to investigate which cannot be abridged because counsel is only appointed, not retained.") Once again my due process rights have been violated by my defense attorney. [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. "In re

Dwayne Marcum 369667
Carolee Ridge Correction Center
I-8-21
P.O. Box 719
Conell, W. 99330

I do not have the skills or knowledge of law to begin to fight the prosecution as it states in Rowell v. Alabama, [a defendant] is unfamiliar with the rules of evidence... he lacks both skill and knowledge. I have been successfully stumbling through the process with minimal help from my attorneys, you might say "functionally illiterate." All I wanted was fair unbiased representation, my case to be investigated, and the right to be heard. I appreciate the court taking the time to review my motion. Based on the above, this court should accept review.

Conclusion

Like I said in the "Motion for Discretionary Review" I was under the impression that my LFO's would be dismissed at the restitution hearing. The way it was mentioned was so brief that it sounded like everything would be discussed later that I felt at that it would be inappropriate to object since as soon as it was mentioned we went straight to restitution without having a say one way or the other with the LFO's, therefore I would like them to be quashed.

c.

(c.c. 1981)

Winnship, 397 U.S. 358, 378, 90 S.Ct. 1008, 25 L.Ed. 2d 368 (1970). I've given him plenty of items to investigate or even just ask some people to cast a shadow on reasonable doubt. Before my case was even heard the defense attorney has taken it upon himself to act as judge and find me guilty and therefore deny giving me assistance. The court held that a remand was required to determine whether petitioners was prejudiced by his counsel's failure to investigate a crime to which, upon counsel's advice, petitioner pled guilty. Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990) (Reversed and remanded). A conviction on a guilty plea that is entered solely as a result of faulty legal advice is a miscarriage of justice. United States v. Scott, 625 F.2d 623 (5th Cir. 1981).