

NO. 63223-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Appellant.

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

The Honorable Monica J. Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to dismiss or for mistrial. 6RP¹ 14, 28-29.

2. The trial court erred in denying appellant's motion for new trial or dismissal. CP 891.

3. Appellant was denied effective assistance of counsel.

4. The trial court erred in finding appellant was adequately informed about his criminal history when he rejected the State's plea offer. CP 888 (Finding of Fact A.1).²

5. The court erred in finding appellant was not prejudiced by counsel's failure to independently investigate his criminal history. CP 888 (Finding of Fact A.2).

6. The court erred in finding the prosecutor did not misrepresent appellant's criminal history. CP 889 (Finding of Fact B.7).

7. The court erred in finding appellant was not prejudiced by his attorney's failure to contact two eyewitnesses before trial. CP 888-89 (Finding of fact A.3).

¹ There are 13 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 4/3/2008; 2RP – 4/7/2008 (morning session); 3RP – 4/7/2008 (afternoon session); 4RP – 4/8/2008; 5RP – 4/9/2008; 6RP – 4/10/2008; 7RP – 4/14/2008, 8RP – 6/27/2008; 9RP – 7/31/2008; 10RP – 10/17/2008; 11RP – 1/21/2009; 12RP – 3/5/2009; 13RP – 3/6/2009.

² The trial court's Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for New Trial, CP 887-891, are attached as an Appendix to this Brief.

8. The court erred in finding appellant was not prejudiced by his attorney's inability to retain or present expert testimony. CP 889 (Finding of Fact A.6).

9. The trial court denied appellant a fair trial when, over defense objection, it gave jurors a first aggressor instruction.³

10. The court erred in entering judgment against appellant. CP 893.

11. The court erred in finding appellant had previously been convicted of two most serious offenses. CP 894.

12. The court erred in sentencing appellant to life in prison without the possibility of release. CP 896.

13. Appellant's life sentence without possibility of release is unconstitutional.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of a third "most serious offense" and sentenced to life in prison without possibility of release under the

³ Instruction 9 reads:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense."

CP 72.

Persistent Offender Accountability Act (POAA). Before trial, he rejected the State's offer of a plea to a non-strike offense. Defense counsel did not independently investigate whether appellant's Florida conviction for aggravated assault was comparable to a Washington most serious offense. The prosecutor stated he had done significant research in previous cases, and while he could not be absolutely certain, he believed the aggravated assault was not comparable to a Washington strike offense.

a. Was appellant denied the Sixth Amendment right to effective assistance of counsel during plea negotiations?

b. Was appellant prejudiced by governmental mismanagement under CrR 8.3 based on the prosecutor's statements about the impact of his Florida conviction?

c. Should the remedy include either dismissal with prejudice or reinstatement of the plea offer?

2. Defense counsel failed to contact two eyewitnesses before trial. Both supported appellant's claim of self-defense. One was discovered during trial, but defense counsel was unable to incorporate her testimony into opening statements or make it the focal point of his cross-examination of other witnesses. The other was not contacted in any way by either side until after appellant's conviction. Defense counsel also failed to object when the victim's mother told the jury she sent him out of

state to avoid testifying because she feared for his safety. Was defense counsel ineffective in preparing for and conducting trial?

3. The State must disclose witness statements no later than the omnibus hearing and must disclose any information tending to negate guilt. CrR 4.7. Three witnesses gave recorded statements that were not disclosed to the defense until the second day of trial. Was this governmental mismanagement warranting dismissal or a mistrial?

4. “First aggressor” instructions are disfavored in Washington and should only be used where there is evidence the defendant intentionally provoked the victim into the fray by an act separate from the crime itself. The State alleged appellant attacked the victim with a knife. The defense theory was that appellant only pulled out his knife when the victim’s friends intervened and began to badly beat him. When neither side presented evidence appellant first provoked the victim and then assaulted him in self-defense, did the court err in giving an aggressor instruction?

5. A witness’s prior juvenile convictions are admissible if necessary to a fair determination of guilt or innocence under ER 609(d). When the witness was still a minor, was the only participant to the incident who testified, and was a friend and cousin of the non-testifying

victim and other participants, were his crimes of dishonesty necessary to a fair determination of guilt or innocence?

6. Did cumulative error deny appellant a fair trial?

7. Out of state convictions do not count as “strikes” under the POAA unless they are legally comparable to a Washington most serious offense. Appellant was convicted of aggravated assault in Florida, where diminished capacity was not an available defense. Did the court err in finding appellant’s Florida conviction legally comparable?

8. Under the POAA, the court imposed a sentence of life without parole based on prior convictions not proved to a jury beyond a reasonable doubt. Does appellant’s sentence violate the Sixth and Fourteenth Amendments?⁴

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged Leroy Jones with second-degree assault with a deadly weapon. CP 1. The jury found Jones guilty and the court imposed a sentence of life without possibility of parole under the POAA. CP 79, 887, 896. Jones timely filed notice of appeal. CP 892.

⁴ Our state Supreme Court has held there is no right under our either our state constitution or the federal constitution to a jury determination of prior convictions at sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). To preserve the issue for federal review in the event the law changes, however, Jones raises the issue herein.

2. Substantive Facts

Jones was involved in a fight with Taurian Alford near a bus stop in Seattle. 4RP 26-35, 92, 123. Within minutes, several of Alford's friends joined the fray and began beating and kicking Jones so severely that bystanders felt compelled to tell them to stop because the police were coming. 4RP 144; 5RP 22.

When the police arrived, Jones was being held on the ground against his will and had a small knife in his hand. 6RP 46-47. He continued struggling and did not drop the knife until police used the Taser. 6RP 50. Alford and his friends had minor cuts. 4RP 98-99; 5RP 19, 24; 6RP 54. Jones had abrasions and blood on his lip. 5RP 47.

The defense theory was that Jones acted in self-defense when he pulled out his knife after Alford's three companions began beating and kicking him. 7RP 117-18. The State argued Jones attacked Alford with the knife. 7RP 98. Eyewitnesses including Alford's cousin T'Shaun Hill (who generally goes by Bennett) gave varying accounts of events. 4RP 22. Neither Jones, nor Alford, nor Alford's other two companions testified.

Jones and Alford argued outside a small store. 4RP 26-27. Alford said he was fine, so his companions (Bennett and two others) continued on. 4RP 28-29. Moments later, Bennett heard Alford scream that someone had a knife and saw Alford running away with Jones chasing him holding what

looked like a knife. 4RP 29-30. Bennett and the others gave chase, and when Bennett rounded the corner, he saw Jones on top of Alford. 4RP 35. It appeared Alford was trying to avoid being stabbed. 4RP 35. Bennett and the others ran over and began hitting Jones. 4RP 37. Alford got up and kicked Jones several times. 4RP 39. Bennett and the others held Jones down until police arrived. 4RP 41.

Peter Schwab, Gus Iverson, Erik Fierce, and Endre Veka were walking back to their office after a coffee break when Alford ran past them and said someone was chasing him with a knife. 4RP 87, 119, 137; 5RP 9. At first, they did not believe him. 4RP 90, 119, 138; 5RP 9. Jones then ran up and began fighting with Alford. 4RP 92, 120, 139. The fight became more intense when three others joined. 5RP 16. Jones was kicked very hard in the face, and the repeated kicking became “egregious.” 4RP 100, 143; 5RP 22.

The main disputed issue at trial was when each witness saw the knife in Jones’ hand. Bennett testified he could see Jones’ knife from 15 feet away as he chased Alford before the fight began. 4RP 30. Schwab testified Jones stabbed Alford when the pair first engaged, before the others joined the fight. 4RP 140-41. Iverson also saw Jones with a knife before Alford’s friends arrived. 5RP 30, 36. Veka and Fierce, on the other hand, heard Alford

mention a knife as he ran past, but did not see a weapon until after Alford's friends joined the fight. 4RP 96-97, 119, 123, 133.

3. Mistrial Motion

During testimony by Detective Timothy Devore, it was revealed he had taken recorded statements from eyewitnesses Schwab, Fierce, and Lori Brown that were never disclosed to the defense. 5RP 61. The detective testified he relayed the statements to the prosecutor, but the prosecutor did not have them in the file. 5RP 58, 60-61.

Schwab's statement to Devore contradicted his testimony at trial; he said he initially did not see a knife. CP 172, 174. As Jones and Alford were fighting, he heard another bystander, an Asian woman, say the word "knife" repeatedly. CP 173-74. Only then did he begin to believe there was a knife. CP 174. He did not actually see the knife until after Alford's friends joined the fray and after Jones had been punched in the side of the head. CP 175.

Brown's statement to Devore also supported the defense. Like Fierce and Veka, Brown did not see a knife until after Alford's friends began beating and kicking Jones. CP 182. Brown's name and phone number was in the discovery provided to the defense, but neither side contacted her. 5RP 69.

Defense counsel moved for a mistrial or for dismissal based on violation of the discovery rules and governmental mismanagement. 5RP 72;

CrR 4.7; CrR 8.3(b). The court found this “stood out as an irregularity” and was a “clear 4.7 violation.” 5RP 72. She concluded Schwab and Fierce’s statements had impeachment value and Brown’s testimony “tends to negate the defendant’s guilt.” 6RP 13, 28.

However, instead of granting dismissal or a mistrial, the court granted a three-day continuance so the statements could be reviewed and Brown could be interviewed. 6RP 14. Brown then testified, and Schwab and Fierce were re-called for further cross-examination. 6RP 27-29. Defense counsel objected he was still not prepared and was unable to form a coherent trial strategy including opening statement and cross-examination of all witnesses based on Brown and Schwab’s exculpatory testimony. 6RP 15-18; 7RP 8.

After the guilty verdict, the prosecutor notified defense counsel for the first time that he believed this was Jones’ third “most serious offense” and sought a life sentence under the POAA. 8RP 2. Defense counsel Alfred Kitching moved to withdraw because he believed he had been ineffective. Supp. CP ____ (Sub no. 75, Order Authorizing Substitution of Counsel).⁵

4. New Trial Motion

New counsel David Trieweiler moved for a new trial or dismissal under CrR 8.3(b). In addition to the issues previously raised in the mistrial

⁵ A Supplemental Designation of Clerk’s Papers was filed on September 29, 2009.

motion, Trieweiler argued former counsel had been ineffective in failing to investigate Jones' Florida aggravated assault conviction before trial to determine whether it was a strike offense. CP 87. He also argued the prosecutor's negligent statements that he believed it was not a strike violated due process and required dismissal under CrR 8.3(b). CP 93.

Before trial, the prosecutor offered a plea to third-degree assault, a non-strike offense. CP 146, 147. Concerned this could be Jones' third strike, but without actually investigating the Florida aggravated assault conviction, defense counsel urged him to take the plea, but Jones rejected it. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 3-4); 2RP 16. Just before trial, with the plea offer still available, Kitching told the court, "based on what [the prosecutor] has told me, it looks like he has one prior strike. If he's convicted in this case, this would be his second strike. On that basis, I'm ready to proceed as if this were not a third strike case." 2RP 17. The prosecutor responded that he could not be absolutely certain, but it was his good faith belief based on the research he had done that the aggravated assault conviction was not a strike. 2RP 18-19.

Trieweiler also argued Kitching was ineffective in failing to interview Michael Hamilton, an eyewitness listed in the discovery but never contacted by either side. CP 216, 234. Hamilton would have testified Jones pulled the knife in self-defense after Alford attacked him.

CP 222-23. Both Hamilton and his companion at the time agreed that a latecomer would have the mistaken impression that Jones was the aggressor. CP 225, 233. “It was going to look like two guys subdued a man with a knife. . . . I witnessed more of a self-defense.” CP 225. Hamilton also said had he been contacted sooner, he would have been able to contact his companion. CP 234.

C. ARGUMENT

1. INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL AND MISMANAGEMENT BY THE PROSECUTOR DEPRIVED JONES OF THE OPPORTUNITY TO MAKE AN INFORMED DECISION ABOUT HIS PLEA OFFER.

Jones moved for a new trial or dismissal under CrR 8.3(b) because defense counsel failed to investigate whether his aggravated assault conviction was a strike and because the prosecutor negligently misrepresented that it was not. CP 88, 93. If he had been advised this was his third strike offense, Jones would have accepted the State’s plea offer to third-degree assault, a non-strike offense. CP 82-100. Under that offer, Jones would have faced a statutory maximum penalty of five years. RCW 9A.20.021, RCW 9A.36.031. Instead he was convicted at trial and received a mandatory sentence of life in prison without possibility of release. CP 896. Jones is 45 years old. CP 898.

a. The Court Erred in Denying Jones' New Trial Motion Because Jones' Attorney Was Ineffective During Plea Negotiations.

The decision to reject a plea offer is a “vitaly important decision.” United State ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982). Thus, plea negotiations are a critical stage at which the accused has a Sixth Amendment right to effective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 57-58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The inquiry focuses on “whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59.

A new trial may be granted when “substantial justice has not been done.” CrR 7.5(a) (8). Jones' new trial motion was also based on misconduct of the prosecutor, surprise to the defense, irregularity depriving the defendant of a fair trial, and error of law. CrR 7.5(a)(2), (4), (5), (6). The abuse of discretion standard applies when reviewing the grant of new trial based on ineffective assistance of counsel. State v. Dawkins, 71 Wn. App. 902, 906, 863 P.2d 124 (1993). A much stronger

showing of abuse of discretion is required to set aside an order granting a new trial than one denying it. Id. at 906-907 (citing State v. Crowell, 92 Wn.2d 143, 145-46, 594 P.2d 905 (1979)).

However, when the new trial ruling is predicated upon legal rulings, no element of discretion exists. Crowell, 92 Wn.2d at 145. Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

- i. Defense Counsel Was Deficient in Failing to Investigate Jones' Criminal History and Advise Him the Florida Assault Was a Strike.

Effective assistance in a three strikes case requires counsel to investigate potential strike offenses and advise the defendant on that basis. State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Crawford was charged with first-degree robbery and second-degree assault. Id. at 90. He had previously been convicted of second-degree robbery in Washington and first-degree sex abuse in Kentucky. Id. Before trial, neither the prosecutor nor Crawford's attorney were aware of the Kentucky conviction. Id. The State offered to recommend a sentence at the low end of the standard range (57 to 75 months) in exchange for a guilty plea. Id. at 91. Although both sides later learned of the Kentucky conviction, neither side investigated further, and Crawford proceeded to trial, believing his standard range was

57-75 months. Id. at 91. After trial, the prosecutor determined the Kentucky conviction was a strike and the court imposed the mandatory life sentence. Id. at 91-92. The court held defense counsel's failure to investigate whether the Kentucky conviction was a strike before recommending trial was deficient performance. Id. at 99.

Here, the State conceded Jones' attorney was deficient under Crawford. 10RP 30-31. At first, Kitching advised Jones he believed he had two prior strikes. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 2-3). But this opinion was based on a robbery charge erroneously listed as a conviction in the State's initial summary of Jones' criminal history. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 2-3). Jones knew the robbery conviction was incorrect. CP 129. After it became clear Jones was convicted of aggravated assault, not robbery, Kitching was concerned that conviction could still be a strike. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 3-4). He told Jones the aggravated assault conviction "could" be a strike despite the prosecutor's assessment that it was not. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 4).

But like the attorney in Crawford, even after learning of the conviction, Kitching did not investigate whether it was a strike under Washington law. On the contrary, the day trial began, Kitching stated, "I

haven't actually had a chance to independently look at that particular conviction." 2RP 16.

Counsel's repeated statements that the aggravated assault conviction could be a strike were insufficient to permit Jones to make an informed decision on the plea offer for several reasons. First, it was clear from the colloquy that the prosecutor had done research that supported his opinion, while defense counsel had not. 2RP 16, 18-19. Then counsel's last word on the matter in open court was that he was ready to proceed as if this were not a three strikes case. 2RP 17. Kitching's errors and equivocations leading up to trial, culminating in his declaration that this was not a three strikes case, affirmatively misinformed Jones about the risk of going to trial. Kitching's failure to independently investigate and advise Jones whether the Florida aggravated assault was a strike offense was deficient performance. Crawford, 159 Wn.2d at 99.

- ii. Jones Was Prejudiced Because If He Had Known the Assault Was a Strike, He Would Have Accepted the Plea.

Federal courts have held that the prejudice prong of Strickland is satisfied when there is a reasonable probability that but for counsel's deficient performance, the petitioner would have pled guilty. Magana v. Hofbauer, 263 F.3d 542, 547-48 (6th Cir. 2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694. Here there is at least a reasonable probability Jones would have pled guilty. First, the State actually offered a plea to a non-strike offense. Second, Jones declared under oath he would have accepted if he had he known this was his third strike. Third, there is a large discrepancy between the sentence he received after trial and the sentence he would have received under the plea. Finally, Jones began to be more open to the idea of a plea on the day of trial even without the information that this was his third strike.

In Crawford, the court found no prejudice from counsel's failure to investigate and advise about comparability of a possible strike offense because the State never offered a plea to a non-strike offense. 159 Wn.2d at 100-01. Here, by contrast, a plea offer to the non-strike offense of third-degree assault was on the table as late as the day of trial. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 4). In support of the motion for dismissal or a new trial, Jones declared he would have pled guilty if he had known this was his third strike. CP 129-30. Thus, Jones has shown the prejudice Crawford could not.

The large disparity between the sentences Jones would have received under the plea and the jury verdict further supports Jones' assertion that he would have accepted the plea. In Magana, the court found a reasonable probability Magana would have pled guilty based in part on the "large

disparity” between the sentence offered by the State and the one he received after the jury verdict. Magana, 263 F.3d at 551-52. Under the offered plea, the sentence would have been ten years; after conviction, Magana received a minimum of 20 and a maximum of 40 years. Id. Thus, the court concluded, “It does not strain reason to believe that Magana would have chosen a flat ten-year sentence instead of risking a possible forty-year term.” Id. at 552. The disparity here is far larger than that in Magana, and similarly, it does not strain reason to believe Jones would have pled guilty to an offense with a statutory maximum of five years instead of risking a mandatory life sentence.

The record shows Jones was flexible on the idea of a guilty plea, despite his bravado. The State may argue Jones told his attorney he was unconcerned about the possibility of a life sentence. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 3). But this is easy to say when the potential does not seem real. See Magana, 263 F.3d at 552-53 (finding Magana did not fully appreciate the risks of going to trial despite being told there was a possibility of a 20 year sentence). See also CP 119 (declaration of Richard Hansen that “it is not uncommon for clients to assert that they will never take the plea bargain. . . . However, when faced with additional information that increases the risk of conviction or increases the possible length of the sentence, they will often relent and accept the plea bargain.”).

The day of trial Jones told his attorney he would be willing to consider a plea to a misdemeanor, although the State never offered a misdemeanor plea. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 5). This sign of flexibility, which arose even without the knowledge that his assault conviction was a strike, is telling. Properly advised, Jones would have accepted the State's offer.

The existence of other reasons for rejecting a plea does not preclude a finding the defendant would have accepted it if properly advised. Magana, 263 F.3d at 552. In Magana, the defendant stated he had other reasons for turning down the plea offer, namely that he thought he had some good issues that would weigh in his favor at trial. Id. Nevertheless, the Sixth Circuit concluded these other reasons did not undermine Magana's testimony that he would have pled guilty had he known of the longer sentence. Id. Magana's expression of other reasons for rejecting the plea merely showed he had assessed the relative strengths and weaknesses of his case. Id. Similarly, Kitching's declaration that Jones had other reasons for rejecting the State's plea offer, does not undermine Jones' declaration that he would have accepted the plea.

“Strickland v. Washington does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only ‘reasonable probability’

that that is the case.” Magana, 263 F.3d at 550. There is at least a reasonable probability that Jones would have pled guilty to third-degree assault but for his counsel’s failings. Thus, the trial court erred in denying Jones’ motion for a new trial based on ineffective assistance of counsel.

b. Negligent Misrepresentation of Jones’ Criminal History Constitutes Governmental Misconduct Under CrR 8.3(b).

The trial court also erred in denying Jones’ motion to dismiss for governmental mismanagement under CrR 8.3(b). The purpose of CrR 8.3 is to ensure that, once a person is charged with a crime, that he or she is treated fairly. State v. Whitney, 96 Wn.2d 578, 580, 637 P.2d 956 (1981). CrR 8.3 protects the accused from governmental mismanagement. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (quoting State v. Cantrell, 111 Wn.2d 385, 390, 758 P.2d 1 (1988)). Under that rule, the court may dismiss the case “due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affects the accused’s right to a fair trial.” CrR 8.3(b). The government’s conduct need not be evil or dishonest; simple mismanagement is sufficient to implicate the rule. Michielli, 132 Wn.2d at 239-40. A court’s decision not to dismiss under CrR 8.3(b) should be overturned when the court abuses its discretion by rendering a decision that is manifestly unreasonable or based on untenable grounds. Id. at 240.

Here, the prosecutor's negligent misrepresentations regarding Jones' criminal history misled him about the risks he faced at trial. In essence, they lulled him into a false sense of security that he could exercise his right to a jury trial without risking a mandatory life sentence.

The prosecutor misrepresented Jones' criminal history, and the legal impact of that history on several occasions. First, the prosecutor first listed a robbery conviction Jones did not have. Supp. CP ____ (Sub no. 134, Declaration of Alfred Kitching at 1-2). After it was discovered that Jones was convicted of aggravated assault, not robbery, the prosecutor told Jones and the court he believed it was not a strike offense. 2RP 17-19. The prosecutor based his assessment on the maximum penalty for the Florida aggravated assault, despite his acknowledgment that the definition of the crime appeared to be a strike. 2RP 18-19. This was governmental mismanagement because the prosecutor knew or should have known that legal comparability of out-of-state prior convictions in Washington rests on the elements of the crime, not the penalty. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005).

The State may argue there was no prejudice from the prosecutor's misunderstanding of the legal ramifications of Jones' criminal history because if the prosecutor had known of the two prior strikes, he would not have offered a plea to a non-strike offense. This argument should be rejected

for several reasons. First, nothing prevents the prosecutor from charging a non-strike offense pursuant to a plea bargain. Second, with the victim out of state and refusing to testify, the State still had the same motive to avoid a trial if possible. 5RP 41-42. Finally, before trial the State was fully aware of Jones' lengthy criminal history, yet offered a plea to a non-strike offense. Just as the court in Crawford would not speculate as to whether the State would have made a non-strike plea offer if presented with a mitigation package, this Court should not speculate whether the State might have rescinded its plea offer if it had researched the comparability of Jones' Florida convictions. Crawford, 159 Wn.2d at 100-01.

While it does not appear intentional, the effect was of a bait and switch. Jones was enticed into going to trial by the prosecutor's belief that he would not be risking a life sentence. Although under Crawford, Jones is not entitled to notice that he was facing a third strike, this case did not involve a mere lack of notice. See Crawford, 159 Wn.2d at 96. Jones was affirmatively misled by the prosecutor's misrepresentations of the law.

Although the prosecutor qualified his belief with the caution that he could not be absolutely certain, this does not change the impact on Jones. The prosecutor specifically grounded his opinion that the aggravated assault was not a strike in "quite a bit of research." 2RP 19. The overall effect of the prosecutor's statements was that he was convinced the aggravated assault

was not a strike, but simply did not want to be called to account for that opinion. From Jones' perspective, it was the prosecutor who had done the research and concluded this was not a strike.

c. The Proper Remedy Is Dismissal or Reinstatement of the Plea Offer.

Either alone or together, defense counsel's failure to investigate Jones' criminal history and the prosecutor's negligent misrepresentations in that regard prejudiced Jones. Although dismissal with prejudice under CrR 8.3(b) is an extraordinary remedy, it is necessary here because the prejudice of foregoing a favorable plea offer cannot be remedied by a new trial. See State v. Baker, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970) (citing State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963)) (dismissal warranted when mismanagement causes prejudice that cannot be remedied by a new trial).

This case stands in contrast to State v. Frederick, where the court held the mere failure to provide the defense a complete list of the defendant's prior convictions before trial does not justify dismissal. State v. Frederick, 32 Wn. App. 624, 628, 648 P.2d 925 (1982), rev'd on other grounds, 100 Wn.2d 550 (1983). In Frederick, the defendant was sentenced as a habitual criminal under the precursor to the POAA. 32 Wn. App. at 625. Before trial, defense counsel requested a complete list of Frederick's prior convictions. Id. at 626. The prosecutor disclosed the

convictions he was aware of and informed defense counsel he was awaiting a report from state and federal authorities. Id. After trial, the prosecutor received the report and disclosed to the defense another Washington conviction. Id. at 627.

On appeal, the defense argued the prosecutor's failure to list all Frederick's prior convictions before trial required dismissal under CrR 8.3(b). Id. The Court of Appeals rejected this argument for two main reasons. First, the prosecutor was not required to search the court files for Frederick's convictions before trial; it was reasonable to rely on the search by other state and federal authorities. Id. at 627. Second, Frederick was not prejudiced because he was in the same position he would have been in had the prior convictions been disclosed before trial. Id. at 628.

Unlike Frederick, Jones was not in the same position because he rejected a concrete plea offer. Also, the prosecutor in this case did not merely fail to list a prior conviction. He made affirmative misrepresentations of the law, however unintentionally, that misled Jones, causing him to forego a plea to a non-strike offense and risk a life sentence without possibility of parole under the POAA. In contrast to Frederick, the mismanagement in this case requires dismissal.

Alternatively, as a remedy for ineffective assistance of counsel during plea negotiations, this Court should reverse Jones' conviction and

remand with instructions to dismiss with prejudice if the same plea offer is not made on re-trial. Riggs v. Fairman, 399 F.3d 1179, 1184 (9th Cir. 2005) (When ineffective assistance of counsel has deprived a defendant of a plea bargain, court may vacate the conviction and return the parties to the plea bargaining state or order the government to reinstate its original plea).

The remedy for counsel's ineffective assistance should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred. United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994). In Blaylock, defense counsel failed to inform his client of a plea offer. Id. at 1465. The court noted that requiring the State to reinstate the plea offer is constitutionally permissible and consistent with the constitutional policy of requiring the State to bear the burden of ineffective assistance of counsel. Id. at 1468-69. The court remanded for an evidentiary hearing on whether Blaylock was prejudiced, but held that if prejudice were shown, "the district court must ensure that the government restates its original plea offer." Id. at 1469.

When affirmative misinformation, rather than a failure to relay information, results in rejection of a favorable plea, the State should also be held to its initial offer. Cf. Hoffman v. Arave, 455 F.3d 926, 942 (9th Cir. 2006) ("Where a defendant is deprived of the opportunity to make a reasoned decision about a proffered plea agreement, the proper remedy is

reinstatement of the offer of the plea agreement.”), vacated as moot, Arave v. Hoffman, 552 U.S. 117 (2008) (defendant abandoned claim of ineffective assistance during plea bargaining). Ineffective assistance of counsel deprived Jones of the benefit of a favorable plea offer. Therefore, the remedy must be to put him in the position he would have been in without counsel’s failings. This Court should vacate Jones’ conviction and require that the State reinstate the same or better plea offer on remand. Blaylock, 20 F.3d at 1468.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN PREPARING FOR AND CONDUCTING TRIAL.

a. Defense Counsel Failed to Investigate Exculpatory Witnesses.

“Failure to investigate or interview witnesses. . . is a recognized basis upon which a claim of ineffective assistance of counsel may rest.” State v. Ray, 116 Wn. App. 531, 806 P.2d 1220 (1991) (citing, inter alia, State v. Visitacion, 55 Wn. App. 166, 174, 776 P.2d 986 (1989)). That failure is “especially egregious” when the evidence that would have been uncovered is exculpatory. State v. Weber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004)). Defense counsel in this case failed to investigate two eyewitnesses to the events. This failure constituted ineffective assistance of counsel because there was no tactical reason to fail to contact eyewitnesses; their

testimony was exculpatory; and defense counsel was unable to incorporate their testimony into the trial strategy.

A reasonably competent attorney “will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses.” Hawkman v. Parratt, 661 F.2d 1161, 1168 (8th Cir. 1981) (quoting Morrow v. Parratt, 574 F.2d 411, 413 (8th Cir. 1978)). The failure to interview witnesses is ineffective assistance. Visitacion, 55 Wn. App. at 174. In his personal restraint petition, Visitacion presented statements by two eyewitnesses whose testimony would have corroborated his defense that the gun went off accidentally. Id. at 172. Defense counsel failed to contact these witnesses before trial. Id. at 174. Visitacion also presented an affidavit from an experienced trial attorney that he could conceive of no reason for relying on police reports instead of contacting eyewitnesses. Id. at 173. The court relied on Hawkman, as well as expert testimony to conclude it was unreasonably deficient performance to reject the two witnesses based merely on the police reports without interviewing them. Visitacion, 55 Wn. App. at 174.⁶

Similarly, even if Jones’ attorney made a conscious choice not to interview additional witnesses to the events, that choice was unreasonable.

⁶ The Visitacion court remanded the case back to the superior court to determine prejudice because the record showed the two eyewitnesses were difficult to locate, and their statements differed significantly from their statements to police at the time. 55 Wn. App. at 174-75.

Id. Like Visitacion, Jones presented a sworn declaration from an experienced attorney that the failure to interview these witnesses fell below prevailing standards of attorney competence. CP 122. Counsel had no idea from the discovery whether Brown and Hamilton's testimony would have been helpful. The utter failure to inquire before trial whether these eyewitnesses had any helpful testimony was deficient performance. Visitacion, 55 Wn. App. at 174.

Both Brown and Hamilton's accounts supported Jones' defense. The defense theory was that Jones did not pull out his knife until after Alford's friends attacked him and that his use of the knife was reasonable self-defense. 7RP 106-07. Lori Brown testified she never saw a knife. 7RP 19; CP 182 (Brown's statement to Detective Devore). She heard someone say "knife" only after three other people joined the fight. 7RP 26; CP 182. She also saw jabbing motions consistent with a knife, but only after the three others joined. 7RP 27; CP 182. At that point, she testified, the individual with the knife was trying to protect himself. 7RP 27-28. The trial court concluded her statement was exculpatory. 6RP 13.

Hamilton's statement was also favorable to the defense. He would have testified Jones pulled the knife in self-defense after Alford attacked him. CP 222-23. The trial court erred when it concluded this testimony would have defeated Jones' claim of self-defense. 10RP 52. It certainly

may have resulted in a different variant of self-defense. But Hamilton's testimony would have been that he saw Jones use the knife to defend himself. CP 225. This is exculpatory testimony. See Hawkman, 661 F.2d at 1168-69.

In Hawkman, defense counsel failed to interview eyewitnesses whose testimony would have supported a potential defense of intoxication and would have partially impeached the victim's testimony. Hawkman, 661 F.2d at 1168-69. The court concluded Hawkman was prejudiced because his attorney failed to interview these witnesses before advising his client to plead guilty. Id. at 1169. Similarly, Hamilton's testimony would have both supported Jones' claim of self-defense and impeached the testimony of other witnesses. CP 222-25. Additionally, if counsel had interviewed Hamilton, he would have been led to yet another eyewitness who would have supported Jones' defense. CP 234. Jones was prejudiced by the failure to contact Hamilton before trial.

Although Brown's statement was discovered mid-trial and she ultimately testified, Jones was also prejudiced by the delay. Kitching explained that, had he known of Brown's testimony, it would have been the centerpiece of the defense's case and the focal point of cross-examination of other witnesses. 6RP 15. The expert declaration of Richard Hansen also supported Jones' claim that the failure to interview this witness before trial,

so as to incorporate her statement into the defense, rather than tack it on as an afterthought, was ineffective. CP 116. Most importantly, Brown's version of events should have been presented to the jury during opening statements, when the jury is fresh and has yet to begin forming opinions about the case. CP 116.

Counsel's failure to investigate these witnesses in time to incorporate them into the defense prejudiced Jones. Thus, the trial court erred in denying Jones' motions for a mistrial and a new trial on this basis. CP 888-89; 6RP 14. The outcome of the trial depended on which eyewitnesses, all of whom gave slightly different accounts of the events, the jury believed. If defense counsel had investigated and incorporated into the defense two witnesses who corroborated Jones' claim of self-defense, there is a "reasonable probability" the jury would have found a reasonable doubt. Strickland, 466 U.S. at 694.

b. Defense Counsel Was Ineffective in Failing to Object to Alford's Mother's Testimony That She Feared for His Safety If He Testified.

References to a witness's fear of testifying are improper to bolster the witness's credibility unless that credibility has been specifically attacked. State v. Bourgeois, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997). In Bourgeois, a witness to the shooting at issue testified he did not want to be in court. Id. at 394. When asked why, he explained, "Just fear, worry."

Id. The witness went on to say that he was “[f]earful of getting hurt, my family being hurt,” and that he was in court only because he had been arrested on a material witness warrant. Id. He testified he had not appeared even when served with a subpoena because he “didn’t want to show up. [He] wanted to hide.” Id. The court held this testimony was improper because the logical effect was to bolster the witness’s credibility. Id. at 401-02. But even more damaging, the court concluded it, “could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant’s guilt.” Id. at 400.

Similarly, Julia Buchanan, Alford’s mother, testified she sent her son out of state because she was afraid for him to testify. 5RP 41-42. As in Bourgeois, the effect was to bolster Alford’s credibility. Bourgeois, 133 Wn.2d at 401-02. Even if some aspect of Alford’s mother’s testimony would have been admissible in anticipation of the defense focusing on Alford’s failure to testify, unfairly prejudicial information that unfairly bolstered Alford’s credibility should have been excluded. State v. Green, 119 Wn. App. 15, 24, 79 P.3d 460 (2003). Under the circumstances, the jury was likely to view Buchanan’s testimony as substantive evidence of Jones’ guilt. Id.

A defendant is denied effective assistance of counsel where his attorney fails to object to inadmissible and prejudicial evidence. See Dawkins, 71 Wn. App. at 907-10 (upholding grant of new trial based on ineffective assistance where trial attorney failed to object to “lustful disposition” evidence that the court would have otherwise excluded). Specifically, failing to object to evidence constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three of these factors are met here. There could be no tactical reason for failing to object to this testimony, which was inadmissible and unfairly prejudicial. Under Bourgeois, an objection would likely have been sustained.

At a minimum, competent counsel would have requested that the jury be instructed as to the limited purpose of this testimony to ensure it was not used as substantive evidence of guilt. See, e.g., State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993) (defendant has the right to a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury) State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (“a limiting

instruction must be given to the jury” if evidence of other crimes, wrongs, or acts is admitted for limited purpose). Trial counsel’s deficient performance prejudiced Jones and made his trial unfair. This Court should reverse Jones’ conviction and remand for a new trial.

3. LATE DISCLOSURE OF WITNESS STATEMENTS
DURING TRIAL RENDERED JONES’ TRIAL UNFAIR.

The State’s withholding of exculpatory evidence is misconduct so egregious that it violates principles of fairness and warrants dismissal under CrR 8.3(b). State v. Martinez, 121 Wn. App. 21, 24, 86 P.3d 1210 (2004). A mistrial should be granted when the State violates discovery rules and nothing short of a new trial can cure the prejudice. State v. Greiff, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000).

Here, the trial court found the State violated CrR 4.7(b) by failing to disclose three witness statements until the second day of testimony after seven witnesses had already testified. 5RP 72. Erik Fierce’s statement was largely consistent with his testimony, but Peter Schwab’s statement directly contradicted some of his testimony and other interviews. Lori Brown’s statement tended to negate guilt. 6RP 13-14. Thus, based on its own findings, the court erred in denying Jones’ motions for a mistrial or dismissal under CrR 8.3(b). CP 47; 6RP 14, 27-29. Additionally, mistrial or dismissal was required because Jones was deprived of the benefit of Brown and

Schwab's statements in preparing his case and was forced to proceed with counsel who was unprepared as described in section C.2 of this brief.

Jones was prejudiced by surprise that forced him to go to trial with unprepared counsel. The purpose of CrR 4.7 requiring prosecutors to disclose witness statements is "to protect against surprise that might prejudice the defense." State v. Smith, 67 Wn. App. 847, 851, 841 P.2d 65 (1992). In State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980), the court explained trial courts may dismiss criminal actions where a lack of diligence by the prosecution results in prejudice to the defendant. Id. at 814. Although the defendants in Price were unable to show prejudice, the court recognized that authority to dismiss was necessary to prevent infringement of defendants' rights:

if the state inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced.

Price, 94 Wn.2d at 814-15.

Here, at the very least, the State failed to act with due diligence in turning over the witness statements to the defense. The court found there was uncontradicted and sworn testimony that Devore forwarded the statements to the prosecutor. 6RP 13-14. Yet these statements were not

revealed to the defense until the detective mentioned them while testifying on the second day of trial. 6RP 61. This denied defense counsel the “opportunity to adequately prepare a material part of his defense.” Price, 94 Wn.2d at 814.

Late disclosure of Schwab’s statement prejudiced Jones because he was unable to incorporate the inconsistencies between Schwab’s various statements into his opening statement, or make it the focal point of cross-examination of not only Schwab, but other witnesses as well. Schwab testified at trial that he saw Jones with a knife before he was attacked by Alford’s friends. 4RP 141. However, in his recorded statement to Detective Devore, he told the detective he did not see a knife at first. 6RP 40. When confronted with his prior statement, Schwab explained the discrepancy by saying that he saw something in Jones’ hand from the beginning of the encounter, and assumed it was a knife because he heard several people mention a knife. 7RP 42-43. At trial, he claimed for the first time he could see clearly that the item was a knife before Alford’s friends attacked. 7RP 44.

The discrepancies in Schwab’s statements could have been explained to Jones’ benefit if he had had time to seek out Dr. Geoffrey Loftus’ testimony before trial. Loftus would have testified that, when it is impossible to see all the details of an event, the brain “fills in the blanks.”

CP 125. This gap-filling is often based on inferences drawn by the witness and/or information acquired from other sources. CP 125. The witness then comes to believe he or she actually perceived the details that were actually inferred or imported from other sources. CP 125. He would have testified that the changes in Schwab's testimony appear to show such gap-filling, rather than an accurate perception of events.⁷ CP 127. However, the court's attempt to cure the prejudice with only a three-day recess left defense counsel with insufficient time to prepare and investigate expert testimony. This deprived Jones of effective assistance of counsel. CP 117 (Declaration of Richard Hansen).

When the State fails to reveal exculpatory evidence until mid-trial, the trial is tainted from the opening statements, and the prejudice cannot be cured by a continuance. Martinez, 121 Wn. App. at 34. In Martinez, the State knew well before trial of a report confirming that the gun used in the robbery could not have belonged to the defendant, but did not reveal this report until near the close of the State's case. Id. at 33. The Court of Appeals agreed with the trial court's finding of prejudice because the late discovery compromised counsel's ability to prepare for trial and hindered

⁷ Loftus' interpretation of Schwab's testimony would also have been more complete if the Office of Public Defense had granted defense counsel Triewiler's request for expert funds. Thus, the declaration is limited to the amount of investigation and research Loftus was able to do on a purely pro bono basis. CP 127.

Martinez's ability to present a defense. Martinez, 121 Wn. App. at 34-35.

The same is true here.

Brown's testimony corroborating Jones' defense and the inconsistencies in Schwab's testimony, which supported Jones' defense, would have been crucial in opening statements when the jury was forming its first impressions of the case. CP 116-17. This testimony would also have been the focal point of cross-examination of other witnesses. CP 115. The late disclosure of these crucial statements denied Jones a fair trial and the court should have declared a mistrial or granted dismissal under CrR 4.7 or CrR 8.3(b).

4. THE TRIAL COURT ERRED WHEN IT GAVE THE JURY AN AGGRESSOR INSTRUCTION.

"[A]ggressor instructions are not favored." State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) overruled on other grounds as noted in State v. Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). An aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Accordingly, courts should use care in giving an aggressor instruction. Id. Indeed, this Court has warned that "Few situations come to mind where the necessity for an aggressor

instruction is warranted.” State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

To support an aggressor instruction, there must be evidence the defendant engaged in an intentional act reasonably likely to provoke a belligerent response, which precipitated the incident. State v. Wasson, 54 Wn. App. 156, 159, 772 P. 2d 1039 (1989). It is reversible error to give an aggressor instruction when not supported by the evidence. Id. at 161; State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). Here, the court erred in giving an aggressor instruction over defense counsel’s objection because under the State’s theory of the case, there was no separate provoking act justifying the instruction and under the defense theory of the case, Jones’ right of self-defense against Alford’s friends could not be limited based on an aggressive act towards a third party.

The aggressor instruction was not justified because the provocation must be a separate act from the assault itself. Wasson, 54 Wn. App. 159; Brower, 43 Wn. App. at 902. This case stands in contrast to State v. McConaghey, 84 Wash. 168, 146 P. 396 (1965). In that case a wife came to defend her husband, who was engaged in a verbal altercation. Id. at 169-70. She brought a gun hidden under her apron. Id. at 170. After engaging in “overt acts . . . indicating an intended assault” on her husband’s opponent she then shot him with the gun. Id. at 170. The evidence warranted an

aggressor instruction because bringing the gun and engaging in overt acts indicating an assault constituted provoking conduct separate from the subsequent shooting. Id. at 170-71; see also Riley, 137 Wn.2d at 911 n.3 (distinguishing McConaghey).

Under the State's theory of the case, there is no such separate provoking conduct here. According to the State, Jones attacked Alford with a knife from the beginning of their encounter, chasing him down the street and finally fighting with him when Alford stopped running. 7RP 98. Under this theory, the fight with Alford was one ongoing assault and there was no separate provoking act justifying an aggressor instruction.

Nor is there evidence supporting an aggressor instruction under the defense theory of the case. Jones may well have been aggressive toward Alford, but he claimed the right to defend himself against Alford's friends. Jones' defense of self-defense may not be limited based on his conduct toward third parties. Wasson, 54 Wn. App. at 159-60. In Wasson, the defendant quarreled with his neighbor Bartlett, drawing the attention of another neighbor, Reed. Id. at 157. During the course of his quarrel with Bartlett, Wasson obtained his gun. Id. Reed approached and attacked Bartlett before turning toward Wasson. Id. Wasson shot Reed and argued he did so in self-defense. Id. at 157-58. The court reversed Wasson's conviction, holding the aggressor instruction was unjustified because,

Perhaps there is evidence here of an unlawful act by Mr. Wasson, a breach of peace. However, there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault.

Id. at 159. Under the defense theory, Jones was fighting with Alford, and pulled out his knife to defend himself when he came under brutal attack by Alford's friends. He had not engaged in any aggressive act towards Alford's friends, and thus his right of self-defense as pertains to them was intact. When neither theory supported the idea that Jones was the aggressor, the court failed to use the requisite care with this disfavored instruction.

Because of its impact on the State's burden to disprove self-defense, error in giving an aggressor instruction is constitutional and requires reversal unless it is harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473. The jury may have believed the defense theory of the case, but erroneously found Jones was not entitled to defend himself against Alford's friends because of his assault on Alford. Thus, the instruction deprived Jones of his defense even if the jury accepted the defense theory of the case. Because the State cannot show the aggressor instruction was harmless -- that it had no impact -- reversal is required.

5. THE COURT ERRED IN GRANTING THE STATE'S MOTION TO EXCLUDE MENTION OF BENNETT'S JUVENILE PRIOR CONVICTIONS.

Bennett, the State's key witness, had prior juvenile convictions for third-degree possession of stolen property, third-degree malicious mischief, hit and run unattended, and three convictions for second-degree taking a motor vehicle. Supp. CP ____ (Sub no. 59B, State's Trial Memorandum at 7). The court found several of these could implicate dishonesty. 1RP 16. Nevertheless, it rejected Jones' argument that admission was necessary to a fair determination of guilt or innocence under ER 609(d). 4RP 51. This was error. Bennett's convictions were necessary to rebut the portrayal of Jones as the aggressor.

The defense's theory of the case was that Bennett's attack on Jones went far beyond protecting this friend and was instead a brutal assault giving rise to Jones' right of self-defense. Under these circumstances, evidence that Bennett had previously committed several crimes was "necessary for a fair determination of the issue of guilt or innocence." ER 609(d).

ER 609(d) requires a "positive showing that the prior juvenile record is necessary to determine guilt." State v. Gerard, 36 Wn. App. 7, 12, 671 P.2d 286 (1983). In Gerard, the court held the trial court did not abuse its discretion in excluding the State witness' juvenile convictions. Id. The court stated two reasons for this result. First, "Gerard did not give any reasons for

admissibility beyond general impeachment of the witness' credibility." Id. Second, "The evidence of a prior conviction would be of dubious value to a defendant in a bench trial." Id.

Unlike Gerard, Jones gave a specific reason why the juvenile convictions were necessary, namely, that without them not only Bennett, but also Alford and the others were unfairly sanitized. 4RP 47. Bennett's prior crimes were relevant to show a pertinent trait of the group of which Alford was a part. ER 404(a)(2). They were necessary to rebut the implicit claim of peacefulness raised by the State's evidence and by the instruction to the jury that it could consider whether Jones was the first aggressor. Id. Bennett testified to the lawful and wholesome activities he and his friends were engaged in prior to the incident here. He and his friends were on their way to their companion's football practice. 4RP 23. They also hung out at McDonalds and Subway and visited a corner store. 4RP 23-25. Without Bennett's prior convictions, the entire group was unfairly sanitized, and the jury was more likely to discredit Jones' claim of self-defense.

Finally, Bennett's juvenile convictions were necessary because at the time of trial, Bennett was still a juvenile. Bennett was only 17 years old at trial. 4RP 22. Thus, his crimes of dishonesty were not particularly remote in time, as would often be the case with an adult defendant. Because Bennett's criminal activity impacted Jones' self-defense claim, and the effect of

exclusion extended to other absent witnesses, his prior juvenile convictions should have been admitted under the necessity exception to ER 609(d).

6. CUMULATIVE ERROR DENIED JONES A FAIR TRIAL

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors, even though individually not reversible errors, cumulatively produced a trial that was fundamentally unfair. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, counsel's failure to investigate witnesses and the prosecutor's delay in disclosing witness statements prejudiced Jones, particularly when taken together with the improper aggressor instruction, Alford's mother's testimony implying Jones was dangerous, and the inability to bring up Bennett's numerous criminal convictions. Even if individually these numerous errors do not require reversal, the cumulative effect denied Jones a fair trial.

7. JONES' FLORIDA CONVICTIONS ARE NOT COMPARABLE TO WASHINGTON OFFENSES.

a. Introduction

The POAA mandates a sentence of life without possibility of parole if the offender has a current conviction for a "most serious offense" and two prior convictions "whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score." RCW 9.94A.030(32); RCW 9.94A.570.

The prosecution bears the burden of proving comparability of foreign convictions. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2006). Appellate review is de novo. State v. Thieffault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

When determining comparability, the trial court must compare the elements of the foreign crime with the elements of potentially comparable Washington crimes as defined on the date of the foreign crime. Thieffault, 160 Wn.2d at 415; In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The first question is whether the foreign offense is legally comparable. Thieffault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 255-56. Under this prong, the court considers whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. Thieffault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 256.

When the foreign offense is not substantially similar to or prohibits a broader range of conduct than the Washington counterpart, the court must determine whether the offenses are factually comparable. Thieffault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 255-56. In assessing factual comparability, the trial court may view the facts underlying the prior conviction to determine if the prior conduct would have resulted in a conviction in Washington. Thieffault, 160 Wn.2d at 419-20; Lavery, at 255.

Here, the trial court ruled the Florida convictions were legally comparable based on the statutory elements but without regard to the availability of defenses. 13RP 22. This was error under Lavery. 154 Wn.2d at 256, 258.

b. Jones' Florida Convictions Are Broader than Their Washington Counterparts Because Diminished Capacity Is Not a Defense in Florida.

When a defense that negates an element of the crime is available in Washington, but not the foreign jurisdiction, the offenses are not substantially similar. See State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007) (“[W]hen there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable.”) (citing Lavery, 154 Wn.2d at 256-57). In Lavery, the court held a federal robbery offense was not legally comparable to its Washington counterpart. 154 Wn.2d at 256-57. The court reasoned that the federal crime was broader than the Washington offense because the federal offense required proof of only general intent, while in Washington, robbery requires specific intent to steal. Id. Because of the different required intent, diminished capacity and several other defenses would be recognized in Washington, but would not be available for the federal robbery. Id. The court then concluded the elements of the offenses were not substantially similar. Id.

As was the case with the federal robbery offense in Lavery, diminished capacity is not a recognized defense in Florida. See, e.g., Evans v. State, 946 So.2d 1 (Fla. 2006); Chestnut v. State, 538 So.2d 820, 820 (Fla. 1989) (holding that diminished capacity is not a viable defense). Indeed, evidence of an abnormal mental state not amounting to insanity is inadmissible. Hodges v. State, 885 So.2d 338, 352 n. 8 (Fla. 2004).

By contrast, assault in Washington is a specific intent crime, and diminished capacity is an affirmative defense. See State v. Eakins, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995); State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008) (diminished capacity defense was valid trial strategy in assault case). “Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged.” State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). Thus, in Washington, diminished capacity may negate the intent element of assault.

The unavailability of a diminished capacity defense is more than a purely theoretical issue in Jones’ case. He has a history of episodes of psychosis and alcohol-induced blackouts. Supp. CP ____ (Sub no. 123, Declaration of David Trieweiler, Exhibit 1, 2).

Because the diminished capacity defense changes the scope of the mental state required for the crime, the unavailability of this defense renders

the intent element substantially different. The trial court erred in finding the Florida aggravated assault and battery convictions were legally comparable to Washington strike offenses because the intent elements of the crimes are not substantially similar. See Lavery, 154 Wn.2d at 256.

c. The State Cannot Meet Its Burden to Show Factual Comparability Without Judicial Fact Finding in Violation of Blakely v. Washington.

The court's factual analysis of prior convictions must be narrowly limited to facts admitted, stipulated to, or proved beyond a reasonable doubt in the other state. Thiefault, 160 Wn.2d at 415, 420; Lavery, at 258; State v. Bunting, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003). Judicial fact finding beyond this limited inquiry violates the state and federal constitutional right to jury trial on every fact that increases the penalty above the standard range. U.S. Const. amends. 6, 14; Const. art. 1, §§ 3, 21; Apprendi v. New Jersey, 530 U.S. 466, 477, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 301, 303-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Thiefault, 160 Wn.2d at 418-20; Lavery, 154 Wn.2d at 256-58.

According to the Florida judgment, Jones pleaded guilty to aggravated assault. Supp. CP ____ (Sub no. 132, State's Brief, Ex. 2). The only acts conceded by a guilty plea are the broad elements of the offense. Bunting, 115 Wn. App. at 143. Neither the judgments nor the other

documentation provided by the State shows the absence of a diminished capacity defense. Supp. CP ____ (Sub no. 132, State's Brief). Therefore, there is no basis to find Jones' conduct would have constituted a crime in Washington.

Additionally, remand to determine factual comparability would violate the right to a jury trial because, in Florida, Jones had no incentive to prove diminished capacity. See Lavery, 154 Wn.2d at 257-58. (refusing to remand to find factual comparability because the defendant had "no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution.") There is, therefore, no way to know whether Jones' conduct in Florida would have constituted a crime in Washington without engaging in additional fact-finding impermissible under Blakely v. Washington and Apprendi v. New Jersey. Thus, Jones may not be sentenced as a persistent offender on the basis of his Florida aggravated assault and battery convictions.⁸

8. JONES' PERSISTENT OFFENDER SENTENCE
VIOLATES HIS RIGHT TO DUE PROCESS.

As noted above, any fact, other than the fact of a prior conviction, that increases the penalty beyond the standard range must be determined by a

⁸ Nor may they be used to calculate Jones' offender score for purposes of determining his standard range. RCW 9.94A.525(3) (requiring sentencing court to determine comparability of out-of-state offenses for purposes of offender score).

jury. U. S. Const. amends. 6, 14; Apprendi, 530 U.S. at 490; Blakely, 542 U.S. at 303-04. The State did not prove Jones' prior convictions or his identity beyond a reasonable doubt to a jury. Nonetheless, the court sentenced him as a persistent offender to life without parole, based on these judicially determined facts. Therefore, that sentence is invalid because it violates Jones' Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process.

As the state will likely point out, Apprendi excepted the "fact of a prior conviction" from its rule requiring the state to plead and prove all facts beyond a reasonable doubt. See Apprendi, 530 U.S. at 490. The exception arises from Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), and, as discussed below, has since been criticized by a majority of the United States Supreme Court. See also State v. Wheeler, 145 Wn.2d 116, 124-37, 34 P.3d 799 (2001) (Sanders, J., dissenting).

Although the Apprendi Court included the exception, the Court did so only after heavily weighting it with caveats. The Court initially noted that Almendarez-Torres "represents at best an exceptional departure from the historic practice that we have described." 530 U.S. at 487. Next, although the validity of the Almendarez-Torres exception was not before it, the Court

noted “it is arguable that Almendarez-Torres was incorrectly decided.” Apprendi, 530 U.S. at 489.

Almendarez-Torres’ crumbling foundation was further exposed by Justice Thomas’s concurring opinion in Apprendi. Although Justice Thomas joined the 5-4 majority in Almendarez-Torres, his Apprendi concurrence thoroughly analyzed why the Almendarez-Torres opinion was incorrect. The concurrence reached the conclusion that “the fact of a prior conviction is an element under a recidivism statute” that must be pleaded and proved beyond a reasonable doubt. Apprendi, 530 U.S. at 521 (Thomas, J., concurring). With Thomas’s defection, the Almendarez-Torres rule lost its majority, clearly disfavoring the prior conviction exception. Apprendi, 530 U.S. at 499-523 (Thomas, J., concurring). Almendarez-Torres was further eroded by the Supreme Court’s decision in Shepard v. United States, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring) (“[A] majority of the Court now recognizes that Almendarez-Torres was wrongly decided.”)

Because the Almendarez-Torres exception should be rejected, the sentencing court lacked authority to impose a persistent offender sentence without a jury finding that Jones had constitutionally valid prior convictions. Jones’ persistent offender sentence therefore should be

vacated and the matter remanded for a standard sentence under RCW 9.94A.505.

D. CONCLUSION

For the foregoing reasons, Jones respectfully requests this court reverse his conviction and vacate his sentence of life imprisonment without possibility of release.

DATED this 30th day of September, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051

Attorneys for Appellant

FILED
KING COUNTY, WASHINGTON

MAR 18 2009

SUPERIOR COURT CLERK
BY DONNA LEE PICKREL
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

LEROY A. JONES,

Defendant,

No. 07-1-06919-1 SEA

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL
AND/OR DISMISSAL**

Comes now, the court, in response to defendant's motion for new trial and/or dismissal and, having considered the following pleadings and exhibits: Defendant's Motion for New Trial and/or Dismissal; Declaration of David A. Trieweiler in Support of Defendant's Motion for New Trial and/or Dismissal dated August 29, 2008; Declaration of Leroy A. Jones dated July 22, 2008; Declaration of Richard Alan Hansen dated August 30, 2008; Declaration of Geoffrey R. Loftus dated August 29, 2008; State's Reply to Defendant's Motion for New Trial and/or Dismissal and Exhibits attached thereto with the exception of Exhibits 7 through 14, 23, 24, and 25; Defendant' Response to State's Response to Defendant's Motion for New Trial and/or Dismissal; the Declaration of Alfred Kitching dated October 13, 2008; the Declaration of Penny Cole dated October 15, 2008; the argument of counsel and the files and records herein and makes the following:

**FINDINGS OF FACT, CONCLUSION OF LAW,
AND ORDER DENYING DEFENDANT'S MOTION
FOR NEW TRIAL AND/OR DISMISSAL - 1**

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I. FINDINGS OF FACT

A. INEFFECTIVE ASSISTANCE OF COUNSEL

1. Defendant alleges that his trial counsel was ineffective for failing to adequately investigate his criminal history prior to trial. More specifically, defendant alleges that his attorney's performance fell below that required by law because he: a) failed to investigate and learn, prior to trial, that defendant did not have a prior Robbery conviction; b) advised defendant that he had two prior strikes because of convictions for Robbery and Aggravated Battery and, c) failed to investigate and learn that defendant had a prior Aggravated Assault conviction from Florida that was arguably comparable to a Washington strike crime.

The court finds that defendant's trial counsel made adequate efforts to correctly determine defendant's criminal history before trial. Defendant's attorney initially told him that he had two prior strikes based on convictions for Robbery and Aggravated Battery in Florida. On the first day of trial, when the prosecutor revealed that defendant did not have a Robbery conviction but did have an Aggravated Assault conviction and that the Aggravated Assault conviction was not comparable to a strike crime in Washington, defense counsel told defendant that the Aggravated Assault conviction could still be a strike. Consequently, defendant was adequately informed about his prior criminal history when he rejected the State's offer of Assault in the Third Degree.

2. Notwithstanding defense counsel's performance in investigating and advising defendant about his criminal history, defendant was not prejudiced thereby because he told his counsel that he would not accept the State's offer of Assault in the Third Degree even if he had two prior strikes.

3. Defendant alleges that his trial counsel's representation was ineffective because he failed to contact or interview eyewitnesses Michael Hamilton and Laurie Brown before trial or call them as witnesses at trial. The court finds that defendant was not prejudiced by the failure of defense counsel to interview Brown prior to trial because she ultimately testified at trial. Additionally, defendant was not prejudiced by his counsel's failure to interview Hamilton before

1 trial or call him at trial. That is because Hamilton's proposed testimony is not exculpatory
2 because it contradicts the defense position at trial. At trial defendant testified he drew the knife
3 in self-defense after he was assaulted by Alford and his two friends.

4 4. Defendant alleges that his trial counsel was ineffective for failing to request a jury
5 instruction that would have required the jury to find, beyond a reasonable doubt, that defendant
6 had two prior convictions for strike crimes. The ambiguity surrounding the existence of two
7 prior strike offenses together with the existing case law under *State v. Rudolph*, 141 Wn.App. 59
8 (2007), negate a showing that counsel was ineffective.

9 5. The court finds the Declaration of Richard Alan Hansen concerning ineffective
10 assistance of counsel and the prejudice of the late disclosure of evidence to be unpersuasive.
11 That is because defendant is only entitled to the assistance of a reasonably competent attorney.

12 6. The court finds that defendant was not prejudiced by the inability to retain Geoffrey
13 Loftus prior to trial or to call him as a witness at trial. That is because Loftus' testimony would
14 not have been admissible because defendant's identity as the person involved in the altercation
15 with Alford was not an issue at trial.

16 **B. STATE'S ALLEGED MISCONDUCT UNDER CrR 8.3(b)**

17 7. Defendant alleges that the State committed misconduct under CrR 8.3 sufficiently
18 prejudicial to require a new trial and/or dismissal. Defendant alleges that the State
19 misrepresented out of state conviction for Robbery and that defendant's alleged Aggravated
20 Assault conviction from Florida was not comparable to a strike offense in Washington. The
21 Court finds that the State provided no definitive position at the start of trial concerning the
22 compatibility of the Florida Aggravated Battery, rather only a belief that stemmed from a cursory
23 review of the law. The record of Valiant Richey's assertions illustrates this uncertainty. Thus,
the defendant had nothing certain to rely upon.

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II. CONCLUSIONS OF LAW

A. INEFFECTIVE ASSISTANCE OF COUNSEL

1. Defendant did not receive ineffective assistance of counsel based on the quality of defense counsel's investigation of his criminal history prior to trial. Defense counsel's investigation of defendant's criminal history was not ineffective because neither prong of the *Strickland* test has been met. *Strickland v. Washington*, 80 L.Ed.2d 674 (1984); Defense counsel's pretrial investigation of defendant's criminal history was not deficient performance because the Defendant would not accept the State's plea offer of Assault in the Third Degree even if he had two prior strikes. Moreover, the record as established by Kitching's Declaration demonstrates that the Defendant was adequately informed about his criminal history before rejecting the State's offer of Assault in the Third Degree. *Strickland* requires that the two-part test be met, failure of one negates the requirements of *Strickland*.

2. Defense counsel's pretrial failure to interview Michael Hamilton and Laurie Brown were not ineffective assistance because Ms. Brown testified at trial and Mr. Hamilton's testimony would not have been exculpatory. Consequently, this action by defense counsel was not prejudicial. *Id.*

3. The defendant is not entitled to have a jury consider the existence of his prior offenses. *State v. Rudolph*, 141 Wn.App. 59 (2007), wherein the Washington Supreme Court found that *Blakely v. Washington*, 542 U.S. 296 (2004), does not apply to prior convictions for purposes of sentencing under the Persistent Offender Accountability Act. *Rudolph*, 141 Wn.App. at 67. Accordingly, this does not constitute ineffective assistance of counsel.

1 **B. STATE'S ALLEGED MISCONDUCT UNDER CrR 8.3(b)**

2 1. The State did not commit misconduct under CrR 8.3 (b) by failing to accurately
3 determine defendant's criminal history before trial and by misrepresenting the strike status of
4 defendant's alleged Aggravated Assault conviction in Florida.

5 2. The court finds that dismissal under CrR 8.3(b) is an extraordinary remedy. Here, the
6 State did not engage in misconduct, that being intentionally giving a misleading interpretation of
7 Defendant's criminal history. Although a close question, the State's actions were not
8 mismanagement that warrants an extraordinary remedy.

7 **C. OTHER CLAIMS**

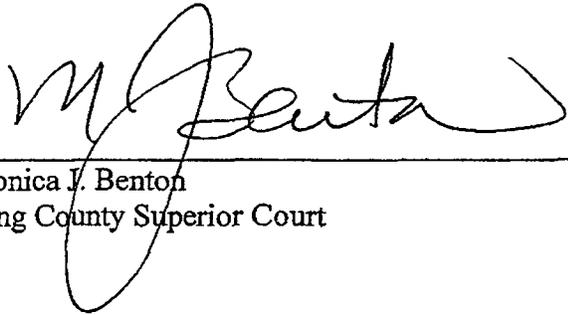
8 1. Defendant is not entitled to pretrial notice of the State's intent to seek a life sentence
9 without the possibility of parole if convicted under the Persistent Offender Accountability Act.

10 2. For the reasons state above, there has been no cumulative error.

11 **ORDER**

12 Defendant's motion for new trial and/or dismissal is denied.

13
14 DATED this 13th day of March, 2009.

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16 
17 _____
18 Monica J. Benton
19 King County Superior Court
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