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A. ARGUMENT IN REPLY

1. THIS COURT SHOULD CONSIDER ALL ISSUES RAISED IN PETITIONER'S BRIEF BECAUSE THE ISSUES WERE INITIALLY ARGUED IN PETITIONER'S PERSONAL RESTRAINT PETITION WHICH THIS COURT GRANTED AND REFERRED TO A PANEL OF JUDGES FOR DETERMINATION ON THE MERITS.

The state asserts that this Court should not consider the supplemental arguments in petitioner's brief because the issues were not raised in the petition or they are reformulations of issues raised on direct appeal. Second Brief of Respondent (2BOR) at 11-15, 19-20. The state's argument is highly misguided.

The record reflects that Chea argued in his personal restraint petition that he was entitled to relief because he was wrongfully convicted of five counts of aggravated murder in the first degree and five counts of assault in the first degree. Chea's argument was based on several grounds. See Petition of Chea at 1-35. The state argued that Chea's petition should be dismissed because he failed to show either prejudicial constitutional error or a fundamental defect resulting in a complete miscarriage of justice and that he raised claims that were rejected on direct appeal and failed to show that the interests of justice required their relitigation. First Brief of Respondent (1BOR) at 3-7. However, this Court determined that the issues raised by Chea were not frivolous and granted his petition, referring

the petition to a panel of judges for determination on the merits. Furthermore, this Court appointed counsel “to represent Petitioner in this court’s consideration of the petition at public expense, including briefing of the issues initially raised by Petitioner.”

Accordingly, counsel has supplemented the arguments Chea initially made in his petition as needed. If counsel is limited to merely reiterating the issues raised by Chea, as the state asserts, there would be no meaningful purpose for the appointment of counsel. The state primarily relies on In re Personal Restraint of Benn, 134 Wn.2d 868, 938-40, 952 P.2d 116 (1998). Importantly, unlike Benn who belatedly moved to amend his personal restraint petition to raise a new issue, Chea filed a timely petition which was granted and a supplemental brief was filed as ordered by this Court.

The state contends that the issues of 1) the unconstitutionality of the accomplice liability instruction; 2) ineffective assistance of counsel; and 3) cumulative error are new issues barred under RCW 10.73.090. To the contrary, Sarausad v. Porter, 479 F.3d 671 (9<sup>th</sup> Cir. 2007), cert. granted, Waddington v. Sarausad, 128 S. Ct. 1650, 170 L. Ed. 2d 352 (2008), was filed on March 7, 2007, after Chea filed his personal restraint petition. The issue therefore falls under the exception provided in RCW 10.73.100(6), which allows a claim to be raised after one year when it is

based on a significant change in the law. In re Personal Restraint of Stoudmire, 145 Wn.2d 258, 263-65, 36 P.3d 1005 (2001). Sarausad represents a significant change in the law because Chea could not have argued this issue before publication of the decision. Id.

Furthermore, the issues of ineffective assistance of appellate counsel and cumulative error are inherent in Chea's arguments presented in his petition. Chea raised several issues not raised by appellate counsel. Consequently, to the extent that the issues were not raised or sufficiently raised on direct appeal, he received ineffective assistance of counsel and review of the issues should not be precluded. Chea also argued in his petition that several errors denied him a fair trial. This Court is therefore not precluded from reviewing whether cumulative error deprived Chea of his constitutional right to a fair trial.

The state argues further that petitioner's brief contains claims that are merely reformulations of claims rejected on direct appeal. 2BOR at 19-20 (citing In re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994)). Unlike in Lord, Chea has argued issues that constitute fundamental and prejudicial errors that were not raised or sufficiently raised and adequately considered by this Court in the direct appeal. Moreover, it is evident that the interests of justice require consideration of the issues raised, particularly in light of the fact that Chea is serving a life

sentence without parole and there truly exists a question as to the validity and fairness of his incarceration. See Lord, 123 Wn.2d at 329.

2. REVERSAL IS REQUIRED BECAUSE THE ACCOMPLICE LIABILITY JURY INSTRUCTION GIVEN IN THIS CASE UNCONSTITUTIONALLY RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

The state argues that this Court is bound by decisions of the Washington State Supreme Court and therefore State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) and State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) are controlling rather than the Ninth Circuit's decision in Sarausad v. Porter. 2BOR at 16-17. The state's argument lacks merit given that Sarausad does not conflict with Cronin and Roberts where the Supreme Court disapproved the accomplice liability jury instruction because it improperly departed from the language of the accomplice liability statute. Cronin, 142 Wn.2d at 578-79, Roberts, 142 Wn.2d 511-12. In its analysis of the accomplice liability jury instructions provided in Sarausad, the Ninth Circuit considered Cronin and Roberts and went beyond the analysis undertaken by the State Supreme Court. Sarausad, 479 F.3d at 687-88, 689-91. The Ninth Circuit concluded that simply changing "a crime" to "the crime" does not make the instructions unambiguous because the instructions still fail to explicitly instruct the

jury that an accomplice must have knowledge of the actual crime the principal intends to commit. Id. at 689-91. In light of the sound analysis articulated by the Ninth Circuit, this Court should adhere to its decision in Sarausad. See Brief of Petitioner at 12-19.

The state argues further that Chea is precluded from challenging the jury instruction under the doctrine of invited error because “he proposed an accomplice liability instruction in the trial court which contained the same ambiguous language of which he now complains.” 2BOR at 17-19. The state’s argument is fatally flawed because Sarausad was published in 2007, five years after Chea’s trial and Chea obviously could not have anticipated such a change in the law. Consequently, the accomplice liability instruction proposed by Chea has no bearing on this issue.

3. CHEA WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO INVESTIGATE WITNESSES WHO WOULD HAVE CORROBORATED CHEA’S DEFENSE.

The state argues that Chea was not denied effective assistance of counsel because the four affidavits provided by Chea’s family members are “insufficient to show any prejudice stemming from a failure to investigate, but does support a conclusion that his attorneys did not call his family members as a matter of trial strategy.” 1BOR at 13-15. To the

contrary, although a decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics, this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). Moreover, the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). While defense counsel is not required to interview every possible witness, the failure to interview witnesses who may provide corroborating testimony may constitute deficient performance. Id. at 739.

In State v. Byrd, 30 Wn. App. 794, 638 P.2d 601 (1981), Arnell Byrd and David Miller were charged with first degree rape by kidnapping and forcible compulsion. They argued at trial that the alleged victim consented but a jury found them guilty as charged. Their appeals were consolidated and Miller also filed a personal restraint petition. Id. at 795-96. In Miller's personal restraint petition, he argued that defense counsel was ineffective because he failed to call a key witness to testify. Miller provided an affidavit from his neighbor, Ed Travers, who stated that he was awakened on the morning of the episode and heard three people approach and enter Miller's apartment "in a jovial mood." Id. at 799.

Miller explained in his petition that he gave Travers' name to defense counsel but Travers was never contacted. Id.

Division One of this Court concluded that the "failure of trial counsel to interview and call Travers as a defense witness, if that is the case, cannot be justified." Id. at 800. Accordingly, the Court granted Miller's petition and remanded the case for a determination on the merits. The Court noted that a personal restraint petition is the appropriate procedure to raise a claim of ineffective assistance of counsel based upon matters outside the record on appeal. Id.

In State v. Visitacion, 55 Wn. App. 166, 776 P.2d 986 (1989), Visitacion was charged with first degree assault after two eyewitnesses, N. and M., identified him as the assailant and a jury found him guilty as charged. Id. at 167-69. Visitacion filed a personal restraint petition, arguing that defense counsel was ineffective for failing to call witnesses on his behalf who were available to testify. He provided statements from five witnesses, including N. and M., all of whom stated that they were never contacted by defense counsel. Visitacion explained that N.'s and M.'s statements support his testimony that the gun went off accidentally rather than intentionally. Id. at 172. Visitacion also provided an expert affidavit from an experienced criminal defense attorney who stated that

under the circumstances of the case, he could not conceive any reason for not contacting the witnesses. Id. at 173.

Division One of this Court determined that N.'s and M.'s statements submitted with Visitacion's petition supported his version of events but the statements varied significantly from their prior statements to the police. Nonetheless, the Court concluded that N.'s and M.'s credibility and whether they could have been located for trial were questions of fact and because "this court does not determine issues of fact," the Court remanded the case for a decision on the merits. Id. at 174-75.

Like in Byrd and Visitacion, Chea has provided evidence that his defense attorneys were ineffective because they failed to interview material witnesses. He has presented affidavits from his father, mother, brother, and sister, all of whom state that Chea was at home asleep on the couch during the time of the Trang Dai shooting and that they are willing to testify. Furthermore, they all state that although they mentioned what they witnessed to Chea's defense attorneys, they were never interviewed. See affidavits attached to Personal Restraint Petition of Chea. As the state points out, the affidavits of Chea's parents and brother appear inconsistent with a portion of Chea's testimony at trial. 1BOR at 11-12. However, the

state's accusation that Chea necessarily either "lied under oath" or presented "perjured testimony" is unfounded and improper. 1BOR 12.

As in Bryd and Visitacion, the credibility of Chea's family and the truthfulness of their affidavits are questions of fact and this Court does not determine issues of fact. Accordingly, if this Court does not reverse Chea's convictions, the case should be remanded to the superior court for a determination on the merits pursuant to RAP 16.12.

4. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT AN INQUIRY INTO JURY MISCONDUCT.

The state argues that the trial court did not fail "to conduct an inquiry" into jury misconduct or fail to protect petitioner's right to a fair trial because the court "took careful observation" of the juror over the course of the trial. 1BOR at 17. The state's argument cannot be taken seriously when the record clearly reflects that the court was compelled to do more than just watch the juror. RP 2965-68, 5122-33, 5731-32, 6724-25.

In O'Brien v. Seattle, 52 Wn.2d 543, 327 P.2d 433 (1958), after the jury returned its verdict, two jurors filed affidavits stating that the jury foreman and bailiff discussed the jury instructions. The bailiff and his assistant filed affidavits admitting to a conversation but denying any discussion about jury instructions. Id. at 546. Eleven days after the end of

the trial, the trial judge recalled the entire panel, placed them under oath, and conducted an examination in order “to get to the truth of it.” Id. Thereafter, the court granted a new trial. Id. In affirming the court’s order granting the new trial, the State Supreme Court emphasized that the “trial judge is to be commended for the action taken to learn exactly what happened.” Id. at 546, 549.

In contrast, the trial court here did nothing beyond merely observing the juror from the bench. Given the fact that there were four alternate jurors and in light of the grave concerns raised by defense counsel, the record substantiates that the court abused its discretion in making no effort to conduct any form of inquiry. See Brief of Petitioner at 26-30. Reversal is required because the court failed to fulfill its judicial duty to ensure Chea’s fundamental right to a fair and impartial trial.

B. CONCLUSION

For the reasons stated here, and in petitioner’s brief, this Court should reverse Mr. Chea’s convictions.

DATED this 12<sup>th</sup> day of June, 2008.

Respectfully submitted,

  
VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Petitioner

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of June, 2008 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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