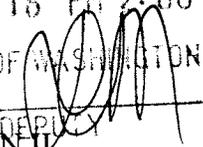


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COURT OF APPEALS
DIVISION II

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No. 37979-1-II STATE OF WASHINGTON
BY 

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Brown, Jr.,

Appellant.

Thurston County Superior Court

Cause No. 08-1-00621-6

The Honorable Judge Richard Strophy

Appellant's Opening Brief

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P. M. 11/17/2008

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ASSIGNMENTS OF ERROR

1. Mr. Brown was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution.
2. Defense counsel was ineffective for failing to object to the admission of testimony relating to Mr. Brown's vertical nystagmus.
3. Defense counsel was ineffective for failing to object to expert testimony that vertical nystagmus establishes "a high level of alcohol consistent with a higher level of impairment."
4. Defense counsel was ineffective for failing to object to the prosecuting attorney's reliance on vertical nystagmus in closing.
5. Defense counsel was ineffective for failing to demand a *Frye* hearing on the state's vertical nystagmus testimony.
6. Defense counsel was ineffective for failing to seek bifurcation of the trial into two phases.
7. Defense counsel was ineffective for failing to remove from the jury consideration of Mr. Brown's four prior DUI offenses.
8. Defense counsel was ineffective for failing to remove from the jury consideration of Mr. Brown's status as a habitual offender.
9. The trial court violated Mr. Brown's constitutional right to due process under the Fourteenth Amendment to the U.S. Constitution by failing to inquire into Mr. Brown's competence to stand trial despite evidence suggesting a *bona fide* doubt as to his competence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Sixth and Fourteenth Amendments to the U.S. Constitution, an accused person is entitled to the effective assistance of counsel. Mr. Brown was denied the effective assistance of counsel. Must his felony DUI conviction be reversed?

2. Under the Sixth and Fourteenth Amendments to the U.S. Constitution, a conviction must be reversed for ineffective assistance when counsel's deficient performance prejudices the accused person. In this case, defense counsel's deficient performance prejudiced Mr. Brown. Must his felony DUI conviction be reversed?
3. Evidence that an accused person has repeatedly been convicted of the charged crime creates great danger of unfair prejudice. Defense counsel failed to seek bifurcation of Mr. Brown's felony DUI trial into two phases, to eliminate the danger of unfair prejudice caused by his four prior DUI convictions. Was Mr. Brown denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution by his attorney's failure to seek bifurcation of the trial into two phases?
4. Evidence of an accused person's prior misconduct similar to the charged crime creates a danger of unfair prejudice. Defense counsel failed to seek bifurcation of Mr. Brown's felony DUI trial, to eliminate the danger of unfair prejudice caused by Mr. Brown's status as a habitual traffic offender. Was Mr. Brown denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution by his attorney's failure to seek bifurcation of the trial into two phases?
5. An accused person may stipulate to highly prejudicial evidence and waive the right to a jury determination of an element relating to that evidence, in order to avoid the danger of unfair prejudice. Defense counsel did not seek to remove from the jury's consideration evidence of Mr. Brown's four prior DUIs and his status as a habitual traffic offender. Was Mr. Brown denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution by his attorney's failure to seek removal from the jury's consideration evidence of Mr. Brown's four prior DUIs and his status as a habitual traffic offender?

6. Novel scientific evidence is inadmissible in Washington courts unless generally accepted by the relevant scientific community. No American court (state or federal) has allowed evidence of vertical nystagmus to prove a high level of alcohol impairment. Was Mr. Brown denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution by his attorney's failure to object to evidence that his vertical nystagmus established a "high level of alcohol consistent with a higher level of impairment?"
7. Where there is reason to doubt an accused person's competence, the due process clause of the Fourteenth Amendment to the U.S. Constitution requires a trial judge to inquire into the person's competence to stand trial. Mr. Brown testified and filed documents raising doubts about his competence to stand trial. Did the trial judge violate Mr. Brown's constitutional right to due process under the Fourteenth Amendment to the U.S. Constitution by failing to inquire into his competence to stand trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

- A. Mr. Brown was arrested and charged with felony DUI and DWLS in the First Degree.

James Brown, Jr. was charged with felony DUI and DWLS in the First Degree. CP 2. The investigating officer was a cadet from the Washington State Patrol, named Thomas Thorpe. RP (6/5/08) 104. According to Thorpe, Mr. Brown was stopped for speeding, changing lanes without signaling, and cutting off a semi truck. RP (6/5/08) 104-113. Cadet Thorpe testified that Mr. Brown had watery and bloodshot eyes, slurred his speech, and smelled of alcohol. RP (6/5/08) 121. When asked to perform a walk-and-turn test, Mr. Brown deviated from the instructions (in part by taking the wrong number of steps). RP (6/5/08) 135-141. Mr. Brown did not perform a one-leg stand test, because he “wouldn’t be able to do the counting portion of the test.” RP (6/5/08) 145.

Mr. Brown testified that he’d only gone through the eighth grade, was not good at math, and was being asked to count backward from four thousand.¹ RP (6/5/08) 329-330. Mr. Brown was arrested and taken to jail. RP (6/5/08) 146, 153. He was angry and uncooperative, and did not

¹ Mr. Brown demonstrated by saying “Four thousand nine, four thousand eight, like that.” RP (6/5/08) 330.

respond when asked to provide a breath sample.² RP (6/5/08) 149, 158-159.

B. At trial, defense counsel did not seek to bifurcate the trial or remove from the jury's consideration Mr. Brown's four prior DUIs and habitual traffic offender status.

At Mr. Brown's trial, the parties stipulated that "the defendant had been previously convicted of four prior driving under the influence offenses within ten years." RP (6/5/08) 167. In addition, the prosecutor introduced evidence establishing that Mr. Brown was a habitual traffic offender. Exhibit 2, Supp. CP; RP (6/5/08) 165-166. Defense counsel did not seek to bifurcate the trial or (through further stipulation) to remove consideration of this evidence from the jury. *See* RP, *generally*. The trial judge instructed the jury regarding the prior convictions:

You may only consider evidence of the defendant's prior convictions as proof that he has previously been convicted of 4 prior offenses within 10 years.

You cannot consider the Defendant's prior convictions when determining whether or not he was operating a motor vehicle under the influence of intoxicants on the date alleged.
Instruction No. 7, Supp. CP.

² After his arrest, he told the officer he didn't want to do any more tests. RP (6/5/08) 150, 159.

C. Defense counsel did not object to testimony that Mr. Brown's vertical nystagmus established "a high level of alcohol consistent with a higher level of impairment."

At Mr. Brown's trial, Cadet Thorpe testified that he used a flashlight to examine Mr. Brown's horizontal gaze nystagmus. RP (6/5/08) 126-133. He also described Mr. Brown as exhibiting vertical nystagmus. RP (6/5/08) 130, 132, 133. Cadet Thorpe described these observations as "scientifically done tests" and "scientific field sobriety tests," and told the jury that the results indicated possible alcohol use. RP (6/5/08) 126-133, 145, 174. Christopher Johnston, a WSP Toxicologist, later testified (without objection) that vertical nystagmus indicates "a high level of alcohol consistent with a higher level of impairment." RP (6/5/08) 227, 243.³ In closing, the prosecutor emphasized that nystagmus is a "very reliable test of impairment," and that Thorpe found vertical nystagmus:

And he goes one step further. He does something called a vertical nystagmus. Mr. Johnston indicated that's something, if you see it, is evidence of high-alcohol content, high-alcohol level within a person. And what Trooper Thorpe testified to is not only does he have those six [horizontal nystagmus] clues, he has that one, too. It's all there.
RP (6/5/08) 374.

³ Johnston was asked "And in the field of toxicology with regard to nystagmus generally, what is—is there a consensus with regard to the presence of vertical nystagmus signifies [sic]?" He responded "Sure." RP (6/5/08) 243.

Defense counsel did not object to this argument. RP (6/5/08) 374.

- D. Mr. Brown's testimony and post-trial motion cast doubt on his competence to stand trial, but the court did not inquire into his competence.

Mr. Brown testified at trial, and denied that he was impaired on the night of his arrest. RP (6/5/08) 312. He also claimed that the arrest occurred in Kitsap County, not Thurston County. RP (6/5/08) 331. He believed, even at trial, that his arrest had been for a misdemeanor warrant, and not for DUI. RP (6/5/08) 313. Cadet Thorpe testified that the arrest occurred in Thurston County, that Mr. Brown had no warrant, and that there was no discussion about a warrant. RP (6/5/08) 108-109, 338-339.

Mr. Brown was convicted as charged, and sentenced to 55 months in prison. RP (6/26/08) 12; CP 10. He timely appealed. CP 16. A month after his sentencing hearing, he filed a *pro se* "Motion to Modify Judgment and Sentence." Supp. CP. In this motion, he asserted that both prosecution and defense had asked for a standard range sentence of 51 months, and that the sentencing judge had accepted the recommendation and imposed 51 months. Motion to Modify, p. 2, Supp. CP. This was not what occurred at sentencing: the state recommended a 60-month sentence, and the court imposed 55 months. RP (6/26/08) 3-12.

At no time did the trial judge inquire into Mr. Brown's competence to stand trial. *See RP, generally.*

ARGUMENT

I. MR. BROWN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that,

but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

An appellant claiming ineffective assistance based on the failure to challenge the admission of evidence must show (1) an absence of legitimate strategic or tactical reasons; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- A. Defense counsel’s failure to seek exclusion of testimony (that Mr. Brown’s vertical nystagmus established “a high level of alcohol

consistent with a higher level of impairment”) constituted deficient performance under the Sixth and Fourteenth Amendments to the Federal Constitution.

Defense counsel should have objected to testimony that Mr.

Brown’s vertical gaze nystagmus established “a high level of alcohol consistent with a higher level of impairment.” RP (6/5/08) 129, 243.

First, no legitimate strategic or tactical reason supported admission of the evidence. Mr. Brown asserted that he was not intoxicated; evidence of a “high level of alcohol” and a “higher level of impairment” ran counter to the defense strategy. RP (6/5/08) 312, 381-394.

Second, an objection to the evidence would likely have been sustained. In Washington, the admission of novel scientific evidence is determined using the *Frye* test. *State v. Sipin*, 130 Wn. App. 403, 413, 123 P.3d 862 (2005); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, such evidence is admissible if (1) it is based on a scientific principle that is generally accepted in the relevant scientific community, (2) there are generally accepted methods of applying the principle to produce reliable results, and (3) the accepted method was properly applied in the case before the court. *Sipin*, at 414. If there is a significant dispute

among qualified experts, scientific evidence is inadmissible.⁴ *Sipin*, at 414.

Although evidence of horizontal gaze nystagmus (HGN) has been accepted in Washington courts,⁵ the relationship between vertical nystagmus and intoxication is not well established. *See e.g., Stovall v. State*, 140 S.W.3d 712 (Tex. App. 2004); *Quinney v. State*, 99 S.W.3d 853 (Tex. App. 2003). No American court (state or federal) has accepted vertical nystagmus as proof of alcohol consumption,⁶ let alone “a high level of alcohol consistent with a higher level of impairment” as toxicologist Johnston testified. RP (6/5/08) 243. Nor does a review of the scientific and technical literature support the opinions expressed at Mr. Brown’s trial. Indeed, although a subject’s vertical nystagmus may be

⁴ Review of a trial court’s decision under *Frye* is *de novo*, and the appellate court “may undertake a searching review of scientific literature as well as secondary legal authority before rendering a decision.” *Sipin*, at 414. A trial court’s decision under *Frye* cannot be sustained “on a mere finding that the record contains sufficient evidence of the reliability of the challenged scientific method.” *Sipin*, at 414.

⁵ This is so despite continuing controversy on its use as evidence of intoxication at trial. *See, e.g., State v. Dilliner*, 212 W. Va. 135, 149 (2002) (concurrency); *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002).

⁶ Some states, including Washington, have accepted the use of vertical nystagmus as part of a 12-step drug recognition protocol. *See State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000). However, as the *Baity* court noted, the protocol is reliable only “where all 12 steps of the protocol have been undertaken;” furthermore, an officer “may not testify in a fashion that casts an aura of scientific certainty to the testimony.” *Baity*, at 17.

influenced by alcohol, vertical nystagmus also relates to head position and nicotine consumption. *Compare* Citek, Ball, and Rutledge, *Nystagmus testing in intoxicated individuals*, *Optometry*, Nov. 2003, 74 (11): 695-710, *with* Kim, Somers, Stahl, Bhidayasiri, and Leigh, *Vertical nystagmus in normal subjects: effects of head position, nicotine and scopolamine*, *J Vestib Res.* 2000, 10 (6): 291-300.

Defense counsel, in the absence of a published opinion accepting vertical nystagmus testimony, should have challenged the evidence. His failure to do so constituted deficient performance.

B. Defense counsel's failure to seek to bifurcate the trial or to remove Mr. Brown's four prior DUI convictions and his habitual traffic offender status from the jury's consideration constituted deficient performance under the Sixth and Fourteenth Amendments to the Federal Constitution.

Defense counsel's failure to seek bifurcation of the trial and/or removal of the prior offenses (and HTO status) from the jury's consideration is analogous to a failure to object to inadmissible evidence. Accordingly, it should be analyzed using the test outlined above for failure to object to inadmissible evidence: Mr. Brown's felony DUI conviction must be reversed upon a showing (1) that his attorney lacked a legitimate strategic or tactical reason for his failures; (2) that a motion to bifurcate (or to remove the prior offenses from the jury's consideration) would likely have been granted; and (3) that the result of the trial would have

been different had appropriate motions been granted. *See Saunders*, at 578.

1. Defense counsel lacked a legitimate strategic or tactical reason for presenting Mr. Brown's four prior DUI offenses and his habitual traffic offender status to the jury during the trial of his current felony DUI.

Mr. Brown's defense at trial was that he was not intoxicated. He did not contest any other element of the offense, and did not dispute that he drove while his license was revoked in the first degree. There was no conceivable reason to inform the jury that he had previously been convicted of DUI on four separate occasions, or that he was a habitual traffic offender. Courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. *State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1175 (1997); *State v. Calegar*, 133 Wn.2d 718, 947 P.2d 235 (1997); *State v. Young*, 129 Wn. App. 468, 119 P.3d 870 (2005). The risk of unfair prejudice is especially great where the prior offense is similar to the charged offense. *Young*, at 475.

Because there was no conceivable tactical or strategic reason to present the four prior DUI convictions to the jury during the guilt phase of the DUI trial, defense counsel should have moved to bifurcate the trial or

remove the prior offenses from the jury's determination. The same is true of his status as a habitual traffic offender.

2. The trial court would likely have granted a motion to bifurcate the trial or to remove from the jury's consideration the four prior DUI convictions and Mr. Brown's status as a habitual traffic offender.

Had defense counsel made appropriate motions, it is likely that the trial court would have either bifurcated the trial, or (if requested) removed consideration of the four prior DUIs and Mr. Brown's DUI status from the jury's consideration.

First, where prior convictions are an element of a criminal offense, the accused must be allowed to "sanitize" them, to diminish the potential for unfair prejudice:

[T]he risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.

Old Chief v. United States, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)). Washington courts have reversed convictions based on a trial judge's refusal to accept similar stipulations. See e.g. *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998) (conviction reversed where court rejected defendant's offer to stipulate to prior serious offense as an element of UPF charge).

Second, where an accused stipulates to an element of a criminal offense, the stipulation need not be entered into evidence or even mentioned to the jury. *State v. Wolf*, 134 Wn. App. 196, 197, 139 P.3d 414 (2006).⁷

Third, a trial court has broad discretion to control the order and manner of trial, and may bifurcate a trial where necessary to avoid prejudice to the accused. *State v. Monschke*, 133 Wn. App. 313, 334-335, 135 P.3d 966 (2006). Furthermore, a trial judge has discretion to accept an accused's waiver of the right to a jury trial. *State v. Jones*, 70 Wn.2d 591, 594, 424 P.2d 665 (1967).

As these authorities demonstrate, the trial court had the discretion to either bifurcate the trial or remove consideration of the prejudicial evidence from the jury. Given the extreme prejudice inherent in the evidence of Mr. Brown's four prior DUI convictions and his HTO status, it is likely that appropriate motions to the trial court would have been granted. Indeed, given the level of prejudice, refusal to grant such motions would have constituted an abuse of discretion.

⁷ In *Wolf*, the stipulation was included in the jury instructions; however, the Court noted that a judge "might simply tell the jury that certain matters have been the subject of a stipulation and that the jury need not concern itself with such matters." *Wolf*, at 203.

- C. Defense counsel's deficient performance prejudiced Mr. Brown, and the result of the trial would have been different had defense counsel provided effective assistance.

To assess prejudice, a court may consider the cumulative impact of multiple instances of deficient performance. *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005). Mr. Brown was prejudiced by his attorney's failure to object to the vertical gaze nystagmus testimony and by counsel's failure to seek bifurcation of the trial or removal of highly prejudicial evidence from the jury's consideration.

The improper admission of vertical nystagmus testimony prejudiced Mr. Brown. As one commentator has noted, "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980). Here, the jury was exposed to "scientific" evidence that has yet to be accepted by any federal or state court in America. The testimony that Mr. Brown's vertical nystagmus established "a high level of alcohol consistent with a higher level of impairment" was extremely prejudicial.⁸ RP (6/5/08) 129, 243. It gave

⁸ The prejudice was enhanced by defense counsel's failure to cross examine on basic relating to horizontal and vertical nystagmus. *See, e.g., Baity*, at 13-14 ("[T]he defense

the state's case an aura of scientific certainty that otherwise would have been lacking.

The problem was compounded by the admission of Mr. Brown's four prior DUI convictions and his HTO status during the trial. This evidence should have been presented at a bifurcated penalty phase of the trial, or should have been removed from the jury's consideration. Evidence that an accused person has previously been convicted of the charged crime is highly prejudicial. *Saunders*, at 580. Once a jury hears evidence of prior convictions, "it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence." *Odemns v. United States*, 901 A.2d 770, 782 (D.C. 2006) (internal quotation marks and citation omitted).⁹

and the amicus argue many factors make HGN testing unreliable, including the possibility of false positives and other possible physiological causes... All of those factors can be shown through cross-examination, and they therefore go to the weight of the evidence...").

⁹ See also *Spencer v. Texas*, 385 U.S. 554, 572-575, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (Warren, C.J., dissenting) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, 'the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'")

Where the evidence shows that a person has multiple prior convictions for the same offense, the prejudice is magnified. *See, e.g., Dumes v. State*, 718 N.E.2d 1171, 1176 (In. 1999) (Evidence of multiple convictions and license suspensions unrelated to the charged crime may have resulted in conviction based on character rather than the evidence); *Commonwealth v. Richardson*, 674 S.W.2d 515, 517 (Ky. 1984) (“We recognize this prejudice particularly with multiple prior convictions on the same offense as the principal charge”); *United States v. Barfield*, 527 F.2d 858, 861 (5th Cir. 1976) (“[T]he danger of the jury convicting a ‘bad man’ is surely enhanced if multiple prior convictions are in evidence”).

The evidence here was extremely prejudicial. Mr. Brown was charged with DUI, and the jury heard that he had four prior convictions for DUI, as well as his status as a Habitual Traffic Offender. It is unlikely that even one juror was able to set aside the knowledge of Mr. Brown’s four prior convictions (and his HTO status) in evaluating the evidence of intoxication presented by the state. While jurors are presumed to “follow court instructions... no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.’” *State v. Babcock*, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (internal citations and

quotation marks omitted) (quoting *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)).

There is a reasonable possibility that the outcome of the proceeding would have been different had counsel provided effective assistance. *Reichenbach*, at 130. Without the vertical nystagmus testimony, the four prior DUI convictions, and the evidence of Mr. Brown's HTO status, the jury might well have acquitted Mr. Brown of DUI. Accordingly, Mr. Brown's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution were violated; his DUI conviction must be reversed and the case remanded for a new trial.

II. MR. BROWN WAS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION WHEN THE TRIAL COURT FAILED TO INQUIRE INTO HIS COMPETENCE.

State courts must have adequate procedures to prevent conviction of an accused person who is incompetent. *McMurtrey v. Ryan*, 539 F.3d 1112, 1118-1119 (9th Cir. 2008). A trial judge must *sua sponte* conduct an evidentiary hearing whenever there is a *bona fide* doubt about the accused person's competence. *Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Poor or "spotty" memories about the charged crime may raise doubts about an accused person's ability to assist in their own defense. *McMurtrey*, at 1132. Erroneous memories of court

proceedings should also raise concerns, because “a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” *Drope v. Missouri*, 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

In this case, the record raises doubts that should have prompted the trial judge to inquire into Mr. Brown’s competence. First, Mr. Brown had not progressed beyond the eighth grade. Second, he told Thorpe that he had difficulty with counting. Third, he believed (even at the time of trial) that his arrest had been for a misdemeanor warrant, even though no such warrant existed. Fourth, his *pro se* motion, filed a month after sentencing, alleged (contrary to the record) that the prosecutor had recommended and the court had ordered a 51-month sentence.

These portions of the record suggest that Mr. Brown had intellectual deficits and some difficulty distinguishing fantasy from reality. This information should have raised doubts as to his competence, and the trial judge should have held a competence hearing.

The court’s failure to hold a competence hearing at the time of trial can be cured by a retroactive competence hearing, but only if the record contains “sufficient information upon which to base a reasonable psychiatric judgment.” *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. Cal. 2001). The record here, although sufficient to raise a doubt, is not

sufficient to permit a reasonable psychiatric judgment. Accordingly, the convictions must be reversed and the case remanded for a new trial, with instructions to inquire into Mr. Brown's competence. *Pate, supra.*

CONCLUSION

For the foregoing reasons, Mr. Brown's convictions must be reversed, and the case remanded for a new trial, with instructions to inquire into Mr. Brown's competence.

Respectfully submitted on November 17, 2008.

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BY [Signature]
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

James Brown, Jr. DOC #852638
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Thurston County Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 17, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 17, 2008.

[Signature]
Jodi R. Backlund, WSBA No. 22917
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