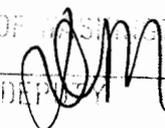


COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 37979-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**James Brown, Jr.,**

Appellant.

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Thurston County Superior Court Cause No. 08-1-00621-6

The Honorable Judge Richard Strophy

**Appellant's Reply Brief**

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## ARGUMENT

### **I. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AND VIOLATED MR. BROWN'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.**

An ineffective assistance claim requires *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 attorney's failure to challenge the admission of evidence constitutes deficient performance if there is no legitimate strategic reason for the failure, if an objection would likely have been sustained, and if the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). Here, defense counsel failed to object to inadmissible testimony relating to Mr. Brown's vertical gaze nystagmus, and failed to seek bifurcation of the trial.

A. Evidence of vertical gaze nystagmus (VGN) is not admissible in Washington because it has not been approved under the *Frye* test.

Defense counsel failed to object 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. No legitimate trial strategy supported this failure to object, since the evidence undermined Mr. Brown's position that he was not intoxicated. *See* RP

(6/5/08) 312, 381-394. An objection would likely have been sustained, since no American court has approved VGN as proof of alcohol consumption under the *Frye* test.<sup>1</sup> Respondent's argument to the contrary is incorrect. Brief of Respondent, p. 2-5.

*Baity*, the case upon which Respondent relies, did *not* approve VGN by itself as an indicator of intoxication; instead, it approved drug recognition testimony that included VGN as one component in a 12-step protocol. See *State v. Baity*, 140 Wn.2d 1, 17, 991 P.2d 1151 (2000) (noting that the DRE protocol is reliable only "where all 12 steps of the protocol have been undertaken.") The reliability of the 12-step DRE does not imply that VGN by itself can be used to establish alcohol consumption. Respondent's claim that "there is no logical reason why VGN fails to meet the *Frye* standard" misapprehends the reasoning in *Baity*. Brief of Respondent, p. 4.

Absent a published opinion accepting VGN testimony as proof of alcohol consumption, defense counsel should have objected to the VGN testimony. His failure to do so prejudiced Mr. Brown. The prosecution's other evidence of intoxication was not strong, consisting only of Cadet Thorpe's subjective observations, Mr. Brown's performance of one field

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<sup>1</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

sobriety test, and the HGN testimony. The added testimony that Mr. Brown's VGN established "a high level of alcohol consistent with a higher level of impairment" added significantly to the strength of the state's case. RP (6/5/08) 227, 243.

Accordingly, Mr. Brown's conviction must be reversed. The case must be remanded to the trial court for a new trial. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

B. Defense counsel should have sought to bifurcate Mr. Brown's trial and/or to remove his four prior offenses from the jury's consideration.

The use of propensity evidence to prove a crime violates due process under the Fourteenth Amendment.<sup>2</sup> U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778.

Once the jury was informed that Mr. Brown had four prior offenses, conviction was inevitable, regardless of the strength of the state's case, and regardless of any cautionary instructions. Defense counsel

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<sup>2</sup> The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 02 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

should have sought to bifurcate the trial or to remove the prior offenses from the jury's consideration. Respondent's claim that the Supreme Court has foreclosed bifurcation or removal of priors from the jury's consideration is incorrect. Brief of Respondent, p. 9-15, *citing State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008).

In *Roswell*, the Supreme Court held that an accused person is not *entitled* to a bifurcated trial as a matter of right; instead, “[a] trial court’s decision on bifurcation is generally reviewed for an abuse of discretion.” *Roswell*, at 192.<sup>3</sup> By failing to make a motion to bifurcate and/or to remove the prior offenses from the jury’s consideration, defense counsel deprived the trial court an opportunity to exercise its discretion. As the Supreme Court reiterated, trial courts “should strive to afford defendants the fairest trial possible.” *Roswell*, at 197. The trial court here may well have decided that the facts of Mr. Brown’s case (including the relative weakness of the state’s evidence and the prejudice stemming from the four prior convictions) warranted a bifurcated trial.

Mr. Brown was prejudiced by his attorney’s failure to seek bifurcation and/or to remove his prior offenses from the jury’s

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<sup>3</sup> See also *Roswell* at 198 (“We hold that the trial court did not abuse its discretion in refusing to grant Roswell’s motion to bifurcate.”)

consideration. His conviction must be reversed and his case remanded for a new trial. *Reichenbach, supra.*

**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.**

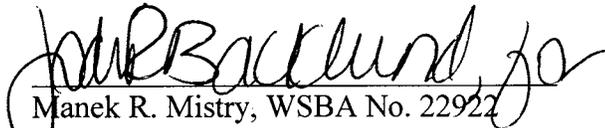
Mr. Brown rests on the arguments set forth in his Opening Brief.

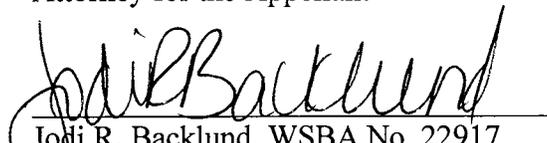
**CONCLUSION**

Mr. Brown's convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted on February <sup>18</sup>~~17~~, 2009.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

James Brown, Jr. DOC #852638  
Olympic Corrections Center  
11235 Hoh Mainline  
Forks, WA 98331

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 February <sup>18</sup>17, 2009.

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 February <sup>18</sup>17, 2009.

  
\_\_\_\_\_  
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Attorney for the Appellant

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