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STATE OF WASHINGTON
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NO. 63223-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Appellant.

REC'D
JAN 06 2010
King County Prosecutor
Appellate Unit

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

The Honorable Monica Benton, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. INEFFECTIVE ASSISTANCE DENIED JONES THE RIGHT TO MAKE AN INFORMED DECISION ABOUT THE STATE'S PLEA OFFER.
 - a. The Failure To Independently Investigate Whether a Prior Conviction Is a Washington Strike Offense Is Deficient Performance by Counsel.

The State argues Jones' attorney fulfilled his duty as counsel by advising Jones of the potential that his Florida assault conviction could be a strike despite the prosecutor's representations to the contrary. Brief of Respondent at 21. This advice does not absolve counsel of his duty to independently investigate. State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Effective assistance in a three strikes case requires actual investigation of whether a prior conviction is a strike under the Persistent Offender Accountability Act (POAA), not merely advice that it might be. Crawford, 159 Wn.2d at 99. Here, defense counsel advised Jones his Florida assault conviction could be a strike, but stated on the record he did not independently investigate whether this was so. 2RP 16. That failure to investigate was unreasonably deficient performance. Crawford, 159 Wn.2d at 99.

b. The Constitutional Harm Caused by Ineffective Assistance During Plea Negotiations Requires a Remedy.

The State argues that there is no remedy when a defendant is denied effective assistance of counsel during plea negotiations if a fair trial ensues. Brief of Respondent at 24 (citing State v. Greuber, 165 P.3d 1185, 1188 (Utah 2007)). But this Court should reject the reasoning and outcome of Greuber, as many courts across the country have done. First, the constitutional violation in this case is more serious than in Greuber, and second, Greuber's reasoning should be rejected because it does not reflect the full scope and import of the constitutional right to effective assistance of counsel.

In Greuber, the State offered to allow the defendant to plead to murder in exchange for dismissing a second charge of aggravated kidnapping. Id. at 1186-87. After Greuber rejected the offer, but before trial, defense counsel received additional discovery negating a crucial link in the defense theory. Id. at 1187. However, counsel failed to review this discovery before trial. Id. During a hearing on Greuber's ineffective assistance claim, his attorneys contradicted his testimony that he would have accepted the plea offer, if his attorneys had reviewed the discovery. Id. According to his attorneys, Greuber was unwilling to accept any plea that included a murder charge. Id. On appeal, the Utah Supreme Court

concluded Greuber was not prejudiced because he received a fair trial. Id. at 1188.

First, the Greuber court recognized that across the country, numerous courts have held that ““if the offer is rejected because of the ineffective assistance of counsel, the fact that the defendant subsequently receives a fair trial does not ameliorate the constitutional harm that occurred in the plea process.”” Id. at 1189 (quoting Commonwealth v. Mahar, 442 Mass. 11, 809 N.E.2d 989, 993 (2004)). Among these cases include cases such as this one in which the defendant was misadvised or unaware of sentencing consequences. Greuber, 165 P.3d at 1189 n. 4 (citing United States v. Rashad, 331 F.3d 908, 909 (D.C.Cir.2003); Coulter v. Herring, 60 F.3d 1499, 1502 (11th Cir.1995); United States v. Day, 969 F.2d 39, 40 (3d Cir.1992); Lewandowski v. Makel, 949 F.2d 884, 886 (6th Cir.1991); People v. Curry, 178 Ill.2d 509, 227 Ill. Dec. 395, 687 N.E.2d 877, 881 (1997); State v. Taccetta, 351 N. J. Super. 196, 797 A.2d 884, 886 (2002)). Even under the Greuber reasoning, outright denial of counsel, rather than mere deficient performance, may require reinstatement of the plea offer as a remedy. Greuber, 165 P.3d at 1187 n.3, 1189 n.4. This Court should follow the many courts that have required either dismissal or reinstatement of the offer as a remedy for ineffective assistance causing rejection of a favorable plea offer.

Second, unlike Greuber, Jones was actually prejudiced by counsel's failure to investigate. In Greuber, counsel's failure to review the discovery did not cause Greuber to reject the plea. The discovery negating his defense was not even available to defense counsel until *after* the offer had been rejected. Id. at 1187 n.1, 1190. Thus, it was the timing of the plea offer, rather than counsel's failure to investigate, that led to the rejection. By contrast, Jones' attorney knew of his potential strike offenses and failed to investigate while a plea offer was available. 2RP 16-17.

The possibility of prejudice was also negated in Greuber because the defendant himself knew the factual information the attorney failed to investigate. 165 P.3d at 1190. By contrast, the investigation in this case related not to factual information but to a complex legal analysis that Jones could not have been expected to perform.

Since the Greuber decision, the Tenth Circuit has explicitly rejected its reasoning and outcome, declaring that while it may be difficult to perfectly restore the parties to pre-trial positions, "the balance should be struck in favor of providing a remedy where a defendant has been deprived of a plea agreement due to ineffective assistance." Williams v. Jones, 571 F.3d 108, 1093 (10th Cir. 2009). Even a subsequent fair trial cannot negate the prejudice that results when ineffective assistance leads a defendant to reject a favorable plea offer. Id. at 1093-94.

2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE WITNESSES AND OBJECT TO INADMISSIBLE TESTIMONY THAT THE STATE'S WITNESS WAS AFRAID OF JONES.

a. The Failure to Interview Eyewitnesses Was Unreasonably Deficient Given the Nature of the Incident and the Defense Theory of the Case.

The State argues counsel was not ineffective in failing to interview witnesses with testimony helpful to the defense, citing In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998). Brief of Respondent at 15. But Benn does not dictate the outcome of this case. The State correctly asserts defense counsel need not perform exhaustive investigation or call every possible witness; “the standard, rather, is one of reasonableness.” Benn, 134 Wn.2d at 900. In Benn, defense counsel received competency reports from four of five doctors. Id. The fifth was appointed as a treating physician with an express proviso that all conversation and information would be privileged and inadmissible for any purpose. Id. The Benn court held under the circumstances it was not unreasonable to appoint one doctor solely for treatment and not to call additional witnesses on competency. Id.

By contrast, here it was unreasonable to fail to interview each eyewitness because the defense theory rested on what those eyewitnesses saw. There were not so many eyewitnesses as to render it unreasonable to contact each. Jones does not, and need not, argue that in every case defense counsel must interview every possible witness. Contra Brief of Respondent

at 16. The standard, as noted in Benn, is one of reasonableness. 134 Wn.2d at 900. It was unreasonable under the circumstances to fail to determine whether each eyewitness would support the defense theory.

b. Counsel Was Ineffective in Failing to Object to Bennett's Mother's Testimony Because It Undermined Jones' Self-Defense Claim and Aggravated the Prejudice Caused by the Aggressor Instruction.

The State argues counsel was not ineffective in failing to object when the mother of the State's main witness testified she was afraid for him to testify. Brief of Respondent at 18. In support of this argument, the State asserts this testimony was not central to the State's case. Id. On the contrary, the outcome of this case rested on who the jury believed was the aggressor. Particularly in light of the disfavored aggressor instruction, see Brief of Appellant at 36-39, Bennett's mother's testimony was likely to influence the jury's decision on Jones' self-defense claim. With no testimony from Alford himself, other depictions of his group's involvement in this incident were central to the State's case. The failure to object was ineffective because the testimony directly impacted the central question in the case.

3. DIMINISHED CAPACITY WAS NOT A DEFENSE TO JONES' 1988 FLORIDA ASSAULT CHARGE.

The State argues the diminished capacity defense would have been available to Jones in 1988 at the time of his aggravated assault conviction, citing State v. Bias, 653 So.2d 380 (Fla. 1995). But Bias does not support the State's assertion. The Bias court upheld the longstanding rule in Florida that diminished capacity evidence is inadmissible for the purpose of negating the intent element of a crime. Id. at 382. "We continue to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea." Id. The Bias court carefully limited evidence of mental conditions affecting voluntary intoxication so as not to let that defense become a disguise for the forbidden diminished capacity defense. Id. at 382-83. Thus, while a mental disorder that affected a voluntary intoxication defense might have been admissible, a diminished capacity defense based on a mental disorder not amounting to insanity was not available. Because the availability of this defense directly impacts the element of intent, the Florida offense is not legally comparable and Jones' persistent offender sentence should be reversed. See In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005).

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Jones requests this Court reverse his conviction and vacate his sentence of life imprisonment without possibility of release.

DATED this 6th day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63223-0-1
)	
LEROY JONES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF JANUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEROY JONES
DOC NO. 815973
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF JANUARY 2010.

x *Patrick Mayovsky*