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AUG 20 2012

King County Prosecutor
Appellate Unit

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NO. ~~67758-64~~

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

STATE OF WASHINGTON,

Respondent,

v.

MARIO MEDINA,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2012 AUG 20 PM 4:09

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

The Honorable Brian Gain, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. STATE V. JAMES¹ DOES NOT FORECLOSE MEDINA'S IMPROPER AMENDMENT OF THE CHARGE CLAIM

The trial court violated Medina's rights under Wash. Const. art. I, § 22 and CrR 2.1(d) by granting the State's motion to amend the charge to second-degree murder five years after Medina was arraigned on first degree manslaughter. The State argues State v. James, 108 Wn.2d 483, 739 P.2d 699 (1987) precludes this claim. Brief of Respondent (BOR) at 22. James, however, is distinguishable on at least four significant grounds and therefore does not control the outcome here.

First, the State overstates the scope of the holding in James. The State claims James stands for the proposition that "the lost opportunity to plead guilty to a lesser crime does not constitute prejudice." BOR at 22. James, however, asserted an unconditional right to withdraw a not-guilty plea, which he attempted to do only after confessing to murder and only in response to the prosecution's motion to amend the information based on the confession. After finding the right to withdraw a plea is conditional rather than unconditional, the Supreme Court concluded based on the record before it that James had failed to show prejudice, noting that the

¹ 108 Wn.2d 483, 739 P.2d 699 (1987).

specter of increased punishment alone was insufficient in this instance. 108 Wn.2d at 489-90. Indeed, the Court evaluated the specific circumstances of James' case in deciding he could not show prejudice. Id. at 490. James did not create a per se rule and does not preclude Medina from arguing that the circumstances of his case, discussed below, demonstrate prejudice

Second, the policy considerations that drove the James decision are not implicated here. The Court in James was concerned with the policy implications of balancing the prosecution's need for sufficient time for discovery and investigations in search of additional evidence and a defendant's right to withdraw a not-guilty plea. 108 Wn.2d at 489. The Court reasoned the right to withdraw was conditional - not absolute. To hold a not-guilty plea was revocable as a matter of right at defendant's option whenever newly discovered evidence could lead to a more severe charge would turn ongoing investigations into "exercises in futility". Id.

Here, the prosecution cannot claim an interest in protecting the fruits of an ongoing investigation. The prosecutor had five years to conduct discovery and investigate for more evidence. CP 20. The prosecutor came forward with none. The prosecutor did not seek to amend the information based on new evidence because none was discovered in

the intervening years. Id.

Third, the United States Supreme Court's recent decision in Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), demonstrates the importance in the criminal justice system of the role of plea bargains. In Frye, the Court noted, "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." 132 S.Ct. at 1407. The criminal justice system "is for the most part a system of pleas, not a system of trials," Id. The Court concluded: "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." Id. Thus, a defendant's right to a fair and informed process with respect to plea negotiation is significant and subject to prejudice from certain prosecution actions. Any suggestion in James to the contrary should be disregarded.

Finally, Medina's showing of prejudice based on the circumstances of his case are compelling and completely unlike those at issue in James. At Medina's arraignment for re-trial, the prosecutor made representations to the equivalent that no greater charge would be sought against Medina. CP 20-25. And Medina relied on those representations to his detriment. CP 20, 22, 75. In fact, the State acknowledges the "unique circumstances

present in this case." BOR at 20. Medina was prejudiced because his "plea negotiations with the State likely would have been different" had Medina known he could face second degree murder charges on retrial. 1RP 5-7; CP 20-82; State v. Ziegler, 138 Wn. App 804, 811, 158 P.3d 647 (2007).

Another equally significant fact is the passage of five years after Medina's arraignment. CP 20. In particular, the prosecution's actions here stand in stark contrast to the actions of the prosecution in James where the Court found the prosecutor "reached its decision to amend with reasonable dispatch." James, 108 Wn.2d at 490; CP 20. Here, to amend five years after the fact is not "reasonable dispatch" rather it is a showing of "specific prejudice resulting from the information amendment." Id. at 489.

In sum, the record shows Medina was severely prejudiced by allowing the prosecution to amend the charge five years after arraignment to a crime it had previously asserted it could not bring on retrial. CP 20-25. Thus it was reversible error to allow the amendment, especially "under the unique circumstances present in this case." BOR at 20.

2. MEDINA IS ENTITLED TO CREDIT FOR TIME SERVED IN CCAP

The trial court erred in failing to award credit for the time Medina served in the King County Community Center for Alternative Programs (CCAP). The State acknowledges that under the Sentencing Reform Act credit should be given for pre-trial confinement. BOR at 28. The State further does not dispute that Medina served pre-confinement time in the CCAP, and that the trial court erred by applying RCW 9.94A.680 to Medina's situation, noting that RCW 9.94A.680 was not in effect and cannot be relied upon. BOR at 25-26; 20RP 17. The State concocts several arguments, however, regarding why credit should not be given to Medina. None of them have merit.

The State argues that former RCW 9.94A.120(16) (now codified as RCW 9.94A.505(6) pursuant to 2001 c 10 § 6), which requires the granting of credit, should be ignored because CCAP was not in effect when Medina committed his crime. BOR at 28-29. Further, the State argues the 1997 SRA applies to Medina and "what constituted 'confinement' in a 'facility or institution' for 'a substantial portion of each day' for purposes of 'partial confinement' was not further defined in the 1997 SRA. BOR at 28-29. It is indisputable that the State placed Medina in the CCAP program. And there is not dispute that Medina served in the

program under the definition of "confinement" for nearly four years. RCW 9.94A.030(8);² RCW 9.94A.680; 20RP 19.

The only question is whether Medina's placement into the CCAP program constitutes "confinement" for which he is entitled to credit. The fact that the CCAP program was not in effect at the time of the crime is of no note. The CCAP program was created pursuant to RCW 9.94A.680 to be an alternative to total confinement. RCW 9.94A.680 provides that sentencing credit for participation in that program should be granted. The legislature's intent is clear. The SRA acknowledges credit should be given for full or partial confinement. Harmonizing the SRA and RCW 9.94A.680 demonstrates the legislature's intent to give credit for confinement in CCAP. It was the State that placed Medina in CCAP and the State cannot now use its decision as a basis for denying Medina's right to receive credit for time served in CCAP.

Second, the State argues no credit should be given because Medina was ineligible for the CCAP program. BOR at 30-31. If the State's argument that the statute does not apply to Medina holds true, then this Court must find Medina was placed in CCAP confinement not pursuant to

² RCW 9.94A.030(8) provides in full, "'Confinement' means total or partial confinement."

RCW 9.94A.680, but pursuant to the Court's general authority to hold a person awaiting trial who is unable to afford bail to secure release. Wash. Const. art. IV, § 6; RCW 2.08.010, .20 & .190; RCW 9A.04.030; RCW 10.21.020 & .030. Thus, if RCW 9.94A.680 does not apply to Medina then this Court must apply the requirement of former RCW 9.94A.120(16) (current RCW 9.94A.505(6)) and give Medina credit for all confinement time served in CCAP.

At a minimum, the rule of lenity applies because the application of current RCW 9.94A.505(6) and RCW 9.94A.680 is ambiguous. "Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.'" American Legion Post # 149 v. Washington State Dep't of Health, 164 Wn.2d 570, 588, 192 P.3d 306 (2008) (internal quotations omitted). When the SRA statutes at issue here are read together, they are ambiguous when applied to the facts of this case because RCW 9.94A.505(6) requires that Medina be given credit for all confinement time served before sentencing, yet under RCW 9.94A.680 Medina was not eligible for the very program wherein he actually served pre-sentence time for purposes of "confinement."

In City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009) the Supreme Court held that "[i]f after applying statutory construction we conclude that a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." (Internal quotations omitted). Applying the rule of lenity, the ambiguity must be resolved in Medina's favor and he must be given credit for the 1,505 days he was confined in the CCAP prior to his retrial in 2011. 20RP 18-19.

Regardless of the SRA statutory scheme, the failure to give Medina credit for time served in the CCAP program offends fundamental fairness and violates Medina's constitutional rights. In Ranier v. Smith, 83 Wn.2d 342, 346-347, 517 P.2d 949 (1974), the Supreme Court held that failure to give credit for post-arrest, pre-conviction confinement violates constitutional principles of fundamental fairness, equal protection and double jeopardy:

Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence. Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release.

Thus, two sets of maximum and mandatory minimum terms would be erected, one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release. Aside from the potential implications of double jeopardy in such a situation, it is clear that the principles of due process and equal protection of the law are breached without rational reason.

In summary, the SRA requires that Medina be given full credit for time confined in CCAP. To the extent RCW 9.94A.505(6) and RCW 9.94A.680(3) create an ambiguity, the rule of lenity requires that the ambiguity be resolved in Medina's favor and that he been given full credit for his time in the CCAP program. Regardless, full credit must be given under the Washington Constitution. The trial court erred. Therefore, the Court should remand to the trial court to consider Medina's participation in CCAP as time served in confinement.

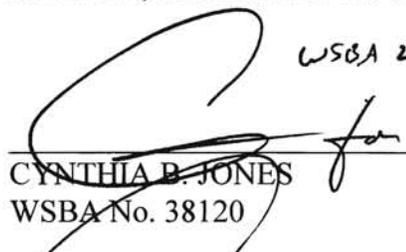
B. CONCLUSION

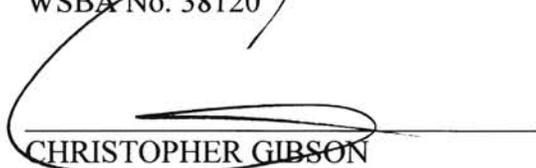
For the reasons stated here and in the opening brief, this Court should reverse Medina's conviction and remand for a new trial on first degree manslaughter. Alternatively, this Court should direct that Medina be given credit for time served in CCAP.

DATED this 20th day of August, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67758-6-I
)	
MARIO MEDINA,)	
)	
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 20TH DAY OF AUGUST, 2012, 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] MARIO MEDINA
22302 42ND AVENUE E.
SPANAWAY, WA 98387

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF AUGUST, 2012.

x *Patrick Mayovsky*