

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

* * * * *

ZACHARY JOSEPH BIGGS, Petitioner

v.

ROBERT McKENNA, Respondent

* * * * *

ON PETITION FOR WRIT OF CERTIORARI TO

WASHINGTON STATE SUPREME COURT

* * * * *

PETITION FOR WRIT OF CERTIORARI

* * * * *

ZACHARY JOSEPH BIGGS

Coyote Ridge Correction Center

P.O. Box 769

Connell, WA 99326

QUESTIONS PRESENTED

* Mr. Biggs alleged that his trial counsel was ineffective for failing to raise the defense of diminished capacity. The facts and evidence in the record contain sufficient proof of Mr. Biggs inability to distinguish between what he thought and what happened. The Washington State Appellate Court, in finding no prejudice, relied upon a diminished capacity defense not being available to a first degree rape conviction due to it contains no mens rea element.

The case thus presents the following question-

Did the Washington State Appellate Court err in finding that Mr. Biggs was not prejudiced by his trial counsel's failure to raise the defense of diminished capacity when the decision is in conflict with the Ninth Circuit decision.

*Mr. Biggs alleged the trial court erred when it found two separate penetrations formed two independent criminal intents which justified a finding that two separate crimes of rape in the first degree were committed. Based upon this finding, Mr. Biggs was *ordered to serve a consecutive sentence*. In finding no error, the Washington State Appellate Court relied upon Mr. Biggs committing each penetration in separate places...eg. on the bed and on the floor.

The case thus presents the following question-

Did the trial court err in finding the two separate penetrations constitute two separate crimes?

List of Parties

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **Do Not** appear in the caption of the case on the cover page.
A list of all parties to the proceeding in the court whose judgment is
the subject of this petition is as follows:

Curt L. Liedkie

Asotin County Deputy Prosecuting Attorney

P.O. Box 220

Asotin, Washington 99402

TABLE OF CONTENTS

OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT.....	9
CONCLUSION.....	

INDEX OF APPENDICES

APPENDIX A	APPELLANTS OPENING BRIEF
APPENDIX B	APPELLANTS SUPPLEMENTAL BRIEF
APPENDIX C	STATES RESPONSE BRIEF
APPENDIX D	COURT OF APPEALS OPINION
APPENDIX E	ORDER DENYING MOTION TO RECONSIDER
APPENDIX F	ORDER DENYING REVIEW BY SUPREME COURT

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>STRICKLAND V. WASHINGTON</u>	
466 U.S. 668, 104 S.CT. 2052 (1984).....	8
<u>WEKLY V. JONES</u>	
56 F.3D 889 (CA 8 1995).....	8
<u>GENISU V. PEPE</u>	
50 F.3D 61 (CA 1 1995).....	8
 <u>STATUTES AND RULES</u>	
U.S. CONST. VI.....	2
U.S. CONST. AMEND XIV.....	2
 <u>OTHER</u>	

**PETITION FOR WRIT OF CERTIORARI TO
THE WASHINGTON SUPREME COURT**

The Petitioner, Zachary Joseph Biggs, respectfully prays that a Writ of Certiorari issue to review judgment and opinion of the Washington State Court of Appeals, rendered in these proceedings on April 10, 2018.

OPINIONS BELOW

The Washington State Court of Appeals affirmed Mr. Biggs' conviction in it Case No. 33721-9-III. The opinion is unpublished and is reprinted in the appendix to this petition at Page 1a, infra. The order of the Court of Appeals denying rehearing is reprinted in the appendix to this petition at Page 2a, infra.

*Mr. Biggs alleged the trial court erred when it found two separate penetrations formed two independent criminal intents which justified a finding that two separate crimes of rape in the first degree were committed. Based upon this finding, Mr. Biggs was ordered to serve a consecutive sentence. In finding no error, the Washington State Appellate Court relied upon Mr. Biggs committing each penetration in separate places...eg. on the bed and on the floor.

The case thus presents the following question-

Did the trial court err in finding the two separate penetrations constitute two separate crimes?

JURISDICTION

The original opinion of the Court of Appeals was entered April 10, 2018. A timely motion to that court for rehearing was overruled on the 22nd day of May, 2018.

A timely motion to the Supreme Court for discretionary review was denied on October 3, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, informed of the nature and cause of the accusation: to be confronted with the witnesses against him: to have compulsory process for obtaining witnesses in his favor and the assistance of counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property without due process of law: nor deny any person within its jurisdiction the equal protections of the law.

STATEMENT OF THE CASE

Mr. Biggs was charged with two counts of first degree rape of his estranged wife, Stacey Biggs. The case file showed evidence of Mr. Biggs inability to stand trial. Ms. Biggs stated that for the last several years, Mr. Biggs had been showing signs of mental illness and he started becoming violent toward her. She recounted an incident where Mr. Biggs woke up in the morning falsely believing that someone had drugged and raped them previously. During the December 10, 2013 incident, Mr. Biggs told Ms. Biggs that he had recently been raped three times and his assailants had made a mask of his face. He also stated it was being worn as a disguise and the wearer was getting into trouble. During the assaults, Mr. Biggs began digging at her face, lips, nose and eyes telling Ms. Biggs " I'm seeing if it's the real Stacey" .

Later, he told her, "if you don't make love to me like my wife, I'm going to stab you" . While having vaginal intercourse

with her on the floor, he stopped (pulls up) and tells her "that's not how my wife does it" and he reached for a machete. Ms. Biggs apologized and explained that her back hurt and asked to get up on the bed. Once on the bed, they resumed intercourse. Ms. Biggs stated that Mr. Biggs was experiencing a total breakdown from reality during the incident.

Mr. Biggs' attorney and the State moved for a competency examination and an Order for Examination was entered. It was determined that Mr. Biggs had the capacity to understand the court proceedings and participate in his own defense. Mr. Biggs' diagnosis was entered as a personality disorder (Schizotypal and Antisocial Features).

Mr. Biggs was originally set for a bench trial. However on April 7, 2015, Mr. Biggs pleaded guilty to an amended information charging him with rape in the second degree. On June 1, 2015, Mr. Biggs moved to withdraw his guilty plea. The grounds for the motion was the defendant's counsel had erroneously informed him that he would be eligible for the Special Sex Offenders Sentencing Alternative. Mr. Biggs relied on the accuracy of that information when he entered

his plea. The court granted the motion for withdrawal of the guilty plea on June 16, 2015.

A trial was set for July 30, 2015. The court found Mr. Biggs guilty as charged. The court described the facts and its reasoning stating what troubled him most was the bizarre nature of Mr. Biggs' statements, and the fact that no attempt had been made during the trial to explain them. He said, "I'm left to guess that this would be the result of some kind of mental illness on Mr. Biggs part. Some kind of disassociation disorder that he has. Nobody has ever connected the dots. Neither the prosecution or the defense".

Sentencing was scheduled for August 20, 2015. At that hearing, the State and Defense counsel concentrated on the issue wheter the two counts of rape should be considered the same criminal conduct and sentenced concurrently under RCW 9.94A.589(1)(a) or separate and distinct criminal conduct to be sentenced consecutively under RCW 9.94A.589(1)(b).

The court concluded that at the point where Ms. Biggs started crying, and says "look, if you are going to do this, at

least let me get off the floor" sounded like an excellent opportunity to cease and desist at that point. The court found the two separate and distinct acts and sentenced Mr. Biggs two rape convictions consecutively.

Mr. Biggs appealed arguing he recieved ineffective assistance due to counsel failed to raise the defense of diminished capacity. He also argued the trial court erred by determining the two rape convictions as separate and distinct criminal conduct. The Court of Appeals affirmed. No. 33721-9-III.

REASONS FOR GRANTING THE PETITION

In Washington State, when a defendant has been tried and convicted of multiples offenses, the court is permitted to impose consecutive rather than concurrent sentences if it finds separate and distinct criminal acts.....and explains its reason for the imposition of consecutive sentences. Washington Rev. code 9.94A.589(1)(b). Because petitioner was convicted of two violent crimes, he was subject to the consecutive sentence provision under RCW 9.94A.589(1)(b), unless the court found the two serious violent crimes constituted the same criminal conduct than RCW 9.94A.589(1)(a) demands that the two serious violent crimes count as one crime.

1. THE WASHINGTON STATE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT DECISION FINDING SEPARATE AND DISTINCT CRIMINAL CONDUCT

Under Washington State Statutory Scheme, in order

for two crimes to count as one crime, they must constitute the (1) same criminal intent, (2) entail the same time, (3) place and (4) involve the same victim. State v. Lesley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Petitioner argued forced vaginal and oral copulation constituted one criminal act of rape in the first degree despite the acts occurred in separate locations, i.e. on the floor and on the bed. The trial judge found the two crimes entailed the same time and place and also involved the same victim, however did not meet the same criminal intent requisite.

According to State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), the relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next. 139 Wn.2d at 123. In Tili, the victim was thrown on the floor and anally and vaginally raped. The trial court convicted Tili of three counts of rape and ruled that each count constituted separate criminal conduct for purposes of RCW 9A.04.010. The Supreme Court reversed and decided that Tili's intent re-

mained the same throughout the attack.

The record in this case supports no indication that the petitioner's intent did not remain the same throughout the attack of his wife. This court should vacate the judgement and remand the consecutive sentence issue for concurrent sentencing.

2. THE TRIAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO RAISE DIMINISH CAPACITY DEFENSE

Instead of seeking a diminished capacity defense, counsel simply abandoned his client's only defense. The expert presented at trial determined that petitioners' sanity. He diagnosed a personality disorder (Schzotypal and Antisocial Features). He stated in his report at times of substantial stress it it possible that individuals with such a personality disorder may experience brief psychotic episodes. Those episodes of psychosis are typically transient and will fade without any medication.

The court appointed psychiatrist testified that petitioner was mentally deficient, but not criminally irresponsible.

Defense counsel accepted this.

To prove ineffective assistance, Mr. Biggs must show (1) counsels' representation fell below an objective standard of reasonable and (2) counsels' deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104, S.Ct 2052 (1984). See also *Weekly v. Jones*, 56 F.3d 889 (CA 8 1995) and *Genisu v. Pepe*, 50 F.3d 61 (CA 1 1995). Here there is no justifiable tactical or strategic reason whatsoever for the counsels' failure to raise the defense. As reflected in the trial testimony and the courts finding of the fact, the record contains more than sufficient evidence of Mr. Biggs inability to distinguish between what he thought and what happened. There was already an issue as to Mr. Biggs' competency to stand trial. (CP 45-49). He was found competent. (CP 58-66 , 67-68). His counsel did not raise the insanity defense. But competency to stand trial, an insanity defense. and a diminished capacity defense are not the same.

In the cited cases, *Genisu v. Pepe*, the defendant was charged with the murder of his girlfriend and made court

appointment of an attorney. A court appointed psychiatrist testified that the defendant was mentally deficient, but not criminally responsible as in the instant case. Defendants's counsel accepted this. In the doctor's opinion, defendant was not insane, and did not have a mental defect, but his mentality was sufficiently diminished at the time to distract...from the extreme atrocity that would make first degree murder in the the absence of proof of premeditation. The court went on to note, while incompetency to stand trial is not equivalent to insanity, it is a serious condition, that should have flagged the possibility. Where insanity would have been a complete defense, it was inexcusable not to pursue it. The Court held, whether counsel made it deliberately or by default, we cannot find is within the most tolerable standard of competence.

Likewise, in Weekly v. Jones, counsel failed to obtain records of Weekly's past hospitalization for paranoid delusions direct toward his wife the court granting habeas relief on the grounds counsel was ineffective for not seeking the insanity defense. Here, the record shows counsel chose not to present an insanity defense as relief on general denial. (CP 72-73).

With the first degree rape charge carrying a minimum term and a maximum term of life. Mr. Biggs was owed a defense available to him. Diminished capacity should have been one. Clearly counsel was aware of his client's mental issues and noted them in his sentencing memorandum. (CP 158-159).

Counsel's own memorandum acknowledges he was fully aware that there was a substantial amount of evidence suggesting his client was not in his right mind at the time of the offense. (CP 159). This is the essence of the diminished capacity defense. To provide reasonable representation, counsel was obligated to retain an expert showing his client had a mental disorder that impaired his ability to form the culpable mental state to commit the crime charged.

Atsbeha, 142 Wn.2d at 914. He did not. In these circumstances, counsel had no legitimate tactical or strategic reason for not presenting the insanity defense.

The court itself was troubled by it and like in both cases cited above this fell below the objective standard of reasonableness and was ineffective assistance warranting a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Zachary J. Biggs

Date: *January 15th 2019*