IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	**NO. 94418-1**
Respondent,	)	**COA NO. 74333-3-I**
	)	
vs.	)	
	)	
OSCAR R. LOPEZ,	)	
	)	
Petitioner.	)	

APPEAL FROM COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AMENDED
PETITION FOR REVIEW TO
THE WASHINGTON STATE SUPREME COURT

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TABLE OF AUTHORITIES

A. IDENTITY OF THE PETITIONER:

The Petitioner, Oscar R. Lopez, through his attorney, George Paul Trejo, Jr. of The Trejo Law Firm Petitions this court for review of his case designated in Part B of this Petition.

B. COURT OF APPEALS DECISION:

The Petitioner requests the court to accept review of this petition as it involves an issue of substantial public interest that should be determined by the Supreme Court in light of two divisions of our Courts of Appeals which are in conflict with one another.

The Petitioner seeks review of the court of appeals decision where it concludes:

1) The court of appeals erred by ruling that Mr. Lopez' counsel acted effectively despite failing to call witnesses to testify as to Lopez's good reputation for sexual morality in the community when, even the trial court, indicated he would have permitted such testimony despite trial counsel's position that he didn't even think it was admissible.

2) The court of appeals erred by ruling that there does not exist an independent due process right to representation by an attorney who does not suffer from mental illness, have severe depression, who is on the verge of suicide according to his own admission to his long term investigator.

Division 1 of the Court of Appeals ruled the trial court erred by granting a new trial and, the case should be remanded so that Judgment should be entered on

the jury's verdict. The court of appeals decision is State of Washington v. OSCAR R. LOPEZ, No. 74333-3-1. It was filed on March 20, 2017. A copy of the Decision is attached hereto in the Appendix.

C. ISSUES PRESENTED FOR REVIEW:

1. Whether the court of appeals erred by ruling that Mr. Lopez' counsel acted effectively despite not calling witnesses to testify as to Lopez's good reputation for sexual morality in the community.

2. Whether the court of appeals erred by ruling that there does not exist an independent due process right to representation by an attorney who does not suffer from mental illness, here severe depression on the verge of suicide according to his own admission to his long term investigator.

D. STATEMENT OF THE CASE

On March 13th, 2015, Mr. Lopez was convicted of one count of child molestation in the first degree. On June 15, 2015, Mr. Lopez filed his motion for a new trial through his new attorney. The matter before the court is a result of the State appealing the trial court granting of Mr. Lopez's motion.

The motion for a new trial was based on arguments he received ineffective assistance of counsel from, since disbarred attorney, Mr. Steve Witchley. According to Mr. Lopez, the ineffective assistance of counsel argument consists

of a number of actions and conduct, including the failure by Mr. Witchley to call witnesses who would have testified to Mr. Lopez' good reputation for sexual morality in the community.

In addition, Mr. Lopez seeks a new trial based on Mr. Witchley's clinical depression, which was compounded by his pending disciplinary hearings before the Washington State Bar that he knew was going to lead to his disbarment.

On May 13, 2015, two months after Mr. Lopez's conviction, Mr. Witchley resigned permanently from the Washington State Bar in lieu of contesting the disciplinary action against him. This was approximately two months following Mr. Lopez' conviction.

https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=20106

Mr. Lopez submits that Mr. Witchley's troubles with the WSBA and mental health issues are relevant to ineffective assistance of counsel allegations.

Mr. Lopez' motion for new trial raised issues beyond simply the failure to call reputation testimony. Really, the question is whether Mr. Witchley's handling of the entire case, including pretrial investigation and communications with client, was adversely affected by his mental health and personal problems. More importantly, the declaration of Karen Sanderson, Mr. Witchley's long-time investigator, confirmed that this was likely the case. CP at 102. The trial court read a few parts of that declaration as well as the memorandum that shed light on this issue. But the entire declaration of Ms. Sanderson exemplifies Mr. Lopez' argument. CP at 102.

Ms. Sanderson stated in paragraph 5, "I also prepared the attached memo because of my strong belief that Mr. Witchley was suffering from severe depression in the months leading up to Mr. Lopez's trial and including trial. I feel strongly that Mr. Witchley's compromised mental state impacted and restricted his ability to represent Mr. Lopez adequately."

Furthermore, in the memorandum in paragraph B, Ms. Sanderson states, "Steve [Witchley] told me several times that he was having an emotional breakdown, or at least referred to it as this. I have an e-mail where he apologized for his mental breakdown." Ms. Sanderson created the memorandum during Mr. Lopez' trial preparation stage.

Then in paragraph F, Ms. Sanderson states, "Steve told me that everything kind of fell apart for him in October, or whenever the Bar was investigating him. He told me that the Bar was investigating him for the misuse of his trust account. He told me that since the Bar's investigation of him, he basically checked out of Mr. Lopez's case. He told me that he was distracted and depressed. I asked him during this December conversation if he had an obligation to tell Mr. Lopez. He said essentially no. Steve said that he didn't want to get off the case and intimated that he was financially dependent on Mr. Lopez's case."

According to Ms. Sanderson, "Steve told me in December that he had other worries and concerns that would make him contemplate suicide. He was also contemplating filing for bankruptcy and had some medical issues. He was

going to start some new experimental treatment for his depression. He told me he was going to have some type of alternative electric shock therapy."

In paragraph H, Ms. Sanderson stated, "I don't think that Steve ever pulled his head out from depression before or during the trial."

And then lastly, in paragraph I, Ms. Sanderson stated, "Steve told me that he had e-mailed the court that morning and called in sick." And this was when Mr. Witchley was 80 minutes late for court ***during trial***. "He told me that he shouldn't have taken the case to trial and that he was not emotionally capable of working on it. He said that he struggled to get out of bed in the morning and never wanted to come to court."

So much of what the trial court read in open court repeats in much greater detail what Mr. Witchley stated in his declaration that he filed with the court when the court was sanctioning him based on his tardiness. 11RP 1314. The court quoted from Mr. Witchley's October 21 e-mail where he stated, "I can see from recently filed pleadings that my medical condition at the time of trial has already been put into play.[1] The disclosure of the mental health parts of my declaration do not significantly add to my loss of privacy." The court agreed with Mr. Witchley, and unsealed the part of the declaration beginning on page 2, line

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[1] This court should disregard the baseless accusation by the State that somehow Mr. Witchley was attempting to help Mr. Lopez. See State's opening brief at p. 54, fn. 11. Counsel for Mr. Lopez never even spoke to Mr. Witchley before or after the filing of the motion for a new trial.

25 to the end, including the letter from Mr. Witchley's psychologist, Dr. Hatchmay Ladd (ph.). 11RP 1315.

The court read into the record only a few portions of Mr. Witchley's declaration, which corroborated what Ms. Sanderson testified to at the hearing. On page 2, line 25, Mr. Witchley wrote, "I think the court was also inviting me to include in this declaration any information that might explain how on the one hand I appeared to be a reasonably competent trial attorney while on the other hand I can't master something as basic as showing up for court on time, despite being warned repeatedly about being late. I certainly don't want to sound dramatic, but it is not far from the truth to say that any day that I got out of bed and made it out the door is a victory of sorts. With this declaration, I have included a letter from my primary therapist who briefly summarizes my mental health situation."

The letter that Mr. Witchley referred to is dated March 6, 2015, and it reads as follows. 11RP 1315-1316. "To Who It May Concern: This letter is intended to document diagnosis for the treatment of Steve Witchley's major depression recurrent severe over several years. I have seen Steve for individual psychotherapy since 2006 and am part of a treatment team that includes a psychiatrist and consultant from the Pacific Center for Neuro Stimulation. His symptoms have worsened due to multiple global stressors in the past year affecting his productivity and ability to manage life and professional affairs. Despite these difficulties, Steve is able to work very productively in focused

areas, though has difficulty with managing the various demands of a full-time legal practice."

The trial court made it clear that, taking the mental health issues into consideration, that this case really is not a typical Strickland analysis because under Strickland, the court would be required to actually find that as a result of Mr. Witchley's depression that Mr. Lopez was convicted and that the result would have been different. However, the trial court continued on to state that had Mr. Witchley not been handicapped by his depression, he would have been more effective. And even though the court finds it difficult to make any conclusions on a more probable than not basis as to what the result would have been had Mr. Witchley been functioning at full capacity, it seems to the court that, as a matter of due process, a defendant is entitled to be represented by somebody who is not suffering from mental illness. And so this is essentially a different way of approaching the issues, and it's really an independent basis for finding that Mr. Lopez should be given a new trial. Apparently a case of first impression.

E. ARGUMENT

I. LEGAL STANDARDS FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioners' trial counsel declined to interview or present witnesses who were willing to testify and who would have provided evidence important to the defense. To render effective assistance, an attorney must be familiar enough with the relevant facts and law to make informed strategic choices. Informed choices

are those based on adequate investigation. Trial counsel did not conduct an adequate investigation. Had either of them conducted such an investigation, one of them would have discovered there was evidence that bolstered the Lopez defense and that would have provided actual reputation testimony. Because trial counsel failed in his respective duties to investigate, trial decisions were uniformed and prejudiced the defendant. A new trial was appropriate and his convictions vacated.

Mr. Lopez contends that, by failing to prepare his case properly, his trial attorney rendered ineffective assistance. Mr. Lopez indicated to his attorney he had witnesses that wished to testify at trial, but his attorney failed to investigate to have his investigator contact the witnesses.

Mr. Lopez' trial counsel failed to render effective assistance, because he failed to investigate the case adequately. Counsel declined to interview witnesses who had facts relevant to the defense, who had facts that undermined the primary claim of the State's case, and otherwise produce witnesses on behalf of Mr. Lopez who had made known their willingness to testify.

Counsel's failure even to interview these witnesses meant that the investigation was insufficient to allow him to make informed choices. These uninformed choices prejudiced Mr. Lopez. Trial counsels' performance affected the result of the trial. The trial court's order granting a new trial should be affirmed.

II. The Failure to present evidence of the Defendant's Reputation for Good Sexual Morality and Decency was Admissible and the Failure to Present such Evidence was Deficient Performance by Trial Counsel

Under the Strickland test, in order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

The first prong of the test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. And the second prong requires a showing that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different.

In finding Witchley's representation constitutionally deficient, the trial judge noted that opinions from other appellate divisions treat the issue differently. See State v. Griswold, 98 Wn. App. 817, 828-29, 991 P.2d 657 (2000) (Division Three-characterizing Harper's discussion as dicta but choosing to follow it); State v. Harper, 35 Wn. App. 855, 859, 670 P.2d 296 (1983) (Division Two-allowing for such evidence in an opinion criticized by the Jackson court, 46 Wn. App. at 365). The trial court also cited to State v. Thomas, 110 Wn.2d 859, 757 P.2d 512 (1988). In that

rape in the third degree prosecution, evidence of the defendant's reputation for being "sexually moral" was admitted. Thomas, 110 Wn.2d at 863. However, the appellate challenge at issue was not to the admission of this evidence but, rather, to the absence of a jury instruction informing the jury of how to properly consider the evidence. Thomas, 110 Wn.2d at 864. The Thomas opinion not only did not overrule Jackson, it did not even mention it.

Nevertheless, based on the Thomas, Griswold, and Harper opinions, in finding Witchley's representation to have been below accepted professional standards, the trial judge stated that had Witchley made a compelling argument, the judge would likely have admitted such "sexual morality" evidence, notwithstanding the holding in Jackson.

The trial court cited Witchley's failure to call reputation witnesses as the sole basis for declaring his representation constitutionally ineffective. The record discloses that the missing sexual morality testimony would have greatly augmented the evidence actually provided to the jury. The trial court acknowledged how difficult these type of cases are for the State to prevail. But no witness testified as to Mr. Lopez' good moral character in the community for sexual morality in the community.

Mr. Lopez's failure to investigate claim relates primarily to Mr. Witchley's failure to contact and call certain witnesses to testify. Mr. Lopez

argues that Mr. Witchley should have called a number of witnesses to provide positive reputation character evidence, from the following. Mr. Lopez submits that a defendant is allowed to present testimony that he has a good reputation or a pertinent character trait under 401(a)(1).

In this case, the pertinent character trait is sexual morality or decency. Mr. Lopez submitted declarations from Ricardo and Cecilia Rivera; Ruth Acosta; Jocelyn Leon; and Helen Smith. These witnesses would have provided reputation testimony on behalf of Mr. Lopez. They were either friends of Mr. Lopez or part of the daycare community who would have been prepared to offer reputation evidence regarding Mr. Lopez's sexual morality and decency had Mr. Witchley asked them to. But Mr. Witchley failed to do so. And the reason that he did not is that he concluded, on his own accord, that such evidence was inadmissible or otherwise failed to present the same to the trial court for an independent determination. Judge Heller indicated in his ruling that had he been presented with the evidence, he would have found it to be admissible.

Again, as Mr. Witchley stated in the June 25 interview with Deputy Prosecutor Celia Lee, "It was hard for me to come up with a theory under which any of those people had admissible testimony. If I'm wrong, I'm happy to be corrected on that." The court determined that Mr. Witchley was in fact wrong.

Was Mr. Witchley wrong? And if so, is there a reasonable probability that the failure to put on reputation evidence affected the outcome of the trial?

In State v. Thomas, 110 Wn.2d 859 (1988), the defendant was accused of statutory rape. The trial court permitted three character witnesses to testify that the defendant had a good reputation for being sexually moral or sexually righteous, and for being sexually decent person. The issue before the Washington Supreme Court was whether the trial judge should have given a jury instruction that addressed the character evidence. The Supreme Court affirmed the trial judge's failure to give the instruction, but in doing so, the Supreme Court stated, "Defendant's evidence of a character trait was admitted in careful compliance with ER 404 (a)(1)." Id at p. 864.

Contrary to Division One, Division Two and Three have both permitted reputation evidence regarding sexual morality. And those are State v. Griswald, 98 Wn. App. 817 (Div III 2000), and State v. Harper, 35 Wn. App. 855 (Div II 1983) where, in dicta, the court expressed approval of admitting such reputation evidence.

As Judge Heller ruled, " . . . had this court been presented with these cases and asked to decide whether to admit reputation evidence regarding Mr. Lopez's sexual morality, the court would have followed the Supreme Court in Thomas and permitted that testimony. And the court concludes that the fact that the case law is somewhat muddy in this area does not mitigate or excuse Mr. Witchley's failure to call the reputation witnesses. It would be one thing if Mr. Witchley's failure to call the witnesses was a tactical decision. But we know that it wasn't because in his e-mail to the court dated October 21, 2015, which has been

provided to counsel, Mr. Witchley stated very candidly that he did not have any tactical reasons for not calling the reputation witnesses." 11RP 1309.

Judge Heller continued, "Similarly, if Mr. Witchley had examined the case law and concluded that he could not make the argument in good faith, then this would be a closer question. But here, Mr. Witchley simply failed to spot the issue. And this, the court concludes, was a serious mistake and constitutes deficient performance under the first prong of Strickland. Id.

In terms of the prejudice prong, Judge Heller continued,

> So the next question is whether there is a reasonable probability that the absence of reputation evidenced affected the outcome. In other words, would the verdict likely have been different with such reputation testimony? And the court answers this question in the affirmative.
>
> I think most prosecutors would acknowledge that obtaining a conviction in child molestation cases is often difficult. Child molestation often occurs away from the public eye, which means that there are rarely any third-party witnesses and there's often no physical evidence one way or the other. And this case was no exception. Ultimately, the jury had to decide who they believed: the alleged victim or Mr. Lopez. And given the high burden of proof on the State, any additional evidence favorable to the defense would likely have been significant.
>
> And the court believes that reputation evidence can be particularly impactful. When asked during voir dire what kind of evidence they would expect to hear, jurors commonly mention prior pattern of behavior by the defendant. They want to know what kind of person the defendant is before they make a judgment about whether he committed a crime. In a way, they hunger for character evidence, but they rarely get o hear it, and for good reason, because the rules of evidence are structured to force jurors to based their verdict on the evidence that's related to the crime, not on the defendant's disposition to either commit or not commit a crime.

> Reputation evidence is an important exception to this rule because it allows jurors to view the defendant in a broader context. Depending on the credibility of the witnesses giving this type of character evidence, it can potentially have a significant impact on the out come, particularly in close cases. And this was a close case. It could have gone the other way. And for the this reason, the court concludes that the failure to put on reputation evidence prejudiced Mr. Lopez." 11 RP 1311.

While this failure by itself justifies a new trial, Mr. Witchley's mental health before and during the trial also influenced the court in its ultimate decision that a new trial is warranted.

III. THE DEFENSE THAT TRIAL COUNSEL PROVIDED WAS DEFICIENT AND FAR FROM EXCELLENT AS ARGUED BY THE STATE

I will not reiterate the factual recitation contained throughout this brief. However, through counsel's own admission and the trial court's oral ruling, it is clear that Mr. Witchley's trial performance was deficient. It is incredulous that the State would make such a ludicrous argument that Mr. Witchley's performance was "excellent" given his mental health problems, suicidal ideologies and own admission that he was in no state of mind to conduct the trial or present key evidence.

The e-mail from Mr. Witchley regarding the unsealing of this March 23rd, 2015 declaration contains information about Mr. Witchley's severe depression. In the e-mail to the trial Court, Mr. Witchley raised the question of why his mental health is relevant. As he put it, "My performance at trial was either deficient or it wasn't." Mr. Witchley is correct if the focus is just on his failure to call

reputation witnesses. As the trial court ruled, "Whether that failure to call reputation witnesses was the result of depression or simply legal misjudgment, it still constitutes ineffective assistance of counsel." 11RP 1312. It certainly does not amount to an excellent defense.

It is no wonder that the court found that it is fairly obvious that Mr. Witchley was severely handicapped by his depression both before and during the trial. And as Mr. Witchley told his longtime investigator, Ms. Sanderson, he shouldn't have taken the case to trial because he was not emotionally capable of working on it. In fact, the trial court concluded that this in and of itself warrants a new trial.

Justice Talmadge put it best in In re Brett, 142 Wn.2d 868 (2001), "We should find as a matter of law that counsel's representation of a client falls below an objective standard of reasonableness as a matter of law when the lawyer is disbarred for conduct contemporaneous in time with representation and that conduct affects their representation and that conduct affects their representation of that client."

Brett, supra, was a capital murder case, but the rationale there applies equally here. In fact, the trial court focused less on Mr. Witchley's disbarment as it is on the fact that Mr. Lopez' trial appears to have contributed to Mr. Witchley's severe depression. And as the court noted in the beginning of its oral ruling, one of the recurrent themes in the Washington State Bar charges were Mr. Witchley's failure to communicate adequately with his client.

IV. TRIAL COUNSEL'S DEFICIENT PERFORMANCE BOTH IN TERMS OF HIS MENTAL HEALTH PROBLEMS, PENDING DISBARMAENT AND SUICIDAL IDEOLOGIES COUPLED WITH HIS LONGTIME INVESTIGATOR'S TESTIMONY CLEARLY ESTABLISH PREJUDICE AT TRIAL

The State also contends that the trial court erred by ruling that there exists a Fourteenth Amendment due process right to representation by counsel who is not suffering from mental illness. This is so, the State avers, because no such per se rule of ineffective representation exists; the performance of an attorney suffering from mental illness is governed by the Strickland test, and it is the Sixth Amendment, not the Fourteenth Amendment, which governs the right to counsel. The State is correct.

> In its ruling on defendant's motion for a new trial, the trial court stated:
>
> > [I]t seems to the court that, as a matter of due process, a defendant is entitled to be represented by somebody who is not suffering from mental illness. And so this is essentially a different way of approaching the issues, and it's really an independent basis for finding that Mr. Lopez should be given a new trial.

No modern Supreme Court decision has grounded the right to effective assistance of counsel in the due process clause of the Fourteenth Amendment. The most notable case to have done so was Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In Powell, the Supreme Court found a denial of due process where the state trial court effectively failed to appoint counsel until the date of trial in a capital case. Powell, 287 U.S. at 56.

The Powell opinion, of course, predates Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), in which the Supreme Court held that the Sixth Amendment right to counsel requires that States appoint counsel for indigent defendants in criminal cases. In the years since Gideon, no subsequent decision has grounded the right to effective assistance of counsel in the due process clause.

The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. Thomas, 109 Wn.2d at 225-26.

Mr. Lopez incorporates by reference the factual rendition in this brief as if fully set forth herein. Apart from the trial court's finding of its belief that given the closeness of the case and that the failure to introduce reputation evidence prejudiced Mr. Lopez, by way of brief recap, to illustrate the multitude of manners in which Mr. Lopez was prejudiced, he points the following out to this court regarding Mr. Witchley;

1. He was pending disbarment in which he opted to resign in lieu of disbarment approximately two months following Mr. Lopez conviction;
2. He was suffering from severe depression during trial;
3. He had suicidal ideologies during trial;
4. He knew he should not take the case to trial;
5. He could barely get out of bed each morning;

6. He was suffering from medical issues;

7. He was preparing for electro shock therapy;

8. He was on the verge of bankruptcy;

9. He could not withdraw from Mr. Lopez' case because of his financial needs to list some.

This partial list of Mr. Witchley's shortcomings clearly establishes how Mr. Lopez was prejudiced by his trial counsel's numerous problems. This does not even take into account his failure to investigate, failure to meet with certain identified witnesses and failure to present character evidence. Contrary to the State's argument, Mr. Witchley did not provide Mr. Lopez with an excellent defense.

V. THE TRIAL COURT DID NOT ERR WHEN IT FOUND, AS INDEPENDENT BASIS FOR A NEW TRIAL THAT THE DEFENDANT HAS A DUE PROCESS RIGHT TO COUNSEL FREE FROM ILLNESS OR DISABILITY.

Under Strickland, the defendant "must show that the deficient performance prejudiced the defense-"counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. For this prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Id. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The failure to present key significant evidence such as reputation testimony in, as the trial

court indicated, a close trial, undermines the confidence in the outcome.

Even so, Strickland observed that, "[i]n certain Sixth Amendment contexts, prejudice is presumed". Id. at 692, 104 S.Ct. 2052 (emphasis added). Such contexts were described as "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance". Id. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Id. It is submitted that the prejudice in the instant case is easy to identify so as further inquiry is not necessary.

In United States v. Cronic, 466 U.S. at 666, 104 S.Ct. 2039 the Court observed "[t]here are □ circumstances □ so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified". Cronic, 466 U.S. at 658, 104 S.Ct. 2039. Such circumstances include where counsel fails to subject the prosecution's case to meaningful adversarial testing." Id.

"[T]he fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect". Cronic, 466 U.S. at 662 n. 31, 104 S.Ct. 2039.

It is absurd to argue that an attorney suffering from mental illness or disability can represent a defendant effectively at trial. This is the very core of the Sixth Amendment and Article 1, §22 of the Washington State Constitution. Any accused person, who is represented by an attorney with these shortcomings is

deprived of the right to the effective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 225-26, (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). The trial court found this as a separate basis to grant Mr. Lopez a new trial.

F. CONCLUSION

Mr. Lopez respectfully requests that this court grant his Petition for Review so clarity can be sent to the lower courts.

Respectfully submitted this 9th day of May 2017.

THE TREJO LAW FIRM

GEORGE PAUL TREJO, JR. WSBA 19758
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have electronically delivered this document to the following:

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DATED this 9th day of May 2017.

THE TREJO LAW FIRM

George P. Trejo Jr.
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant, v. OSCAR RAUL LOPEZ, Respondent.	)	DIVISION ONE No. 74333-3-I UNPUBLISHED OPINION FILED: March 20, 2017

DWYER, J. — The State of Washington appeals from an order granting Oscar Lopez's motion for a new trial. The State contends that the trial court erred by ruling that Lopez's counsel acted ineffectively by not calling witnesses to testify as to Lopez's good reputation for sexual morality in the community. The State also contends that the trial court erred by ruling that there exists an independent due process right to representation by an attorney who does not suffer from mental illness, here severe depression.

Pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an attorney provides constitutionally ineffective assistance when the lawyer commits errors so serious that the lawyer no longer functions as the "counsel" guaranteed by the Sixth Amendment and when, as a result, this deficient performance prejudices the defense, depriving the defendant of a fair trial. Here, defense

counsel's performance was not deficient nor did it deprive Lopez of a fundamentally fair trial. Furthermore, there is no independent due process right to counsel free from mental illness.

The trial court erred by granting Lopez a new trial. Accordingly we reverse.

I

Lopez worked for several years at Bethel Christian Center Day Care as a bus driver and maintenance worker. As a bus driver, he was responsible for driving children to several local schools in the morning and returning them to the day care in the afternoon. One of the students in his care was L.M., age six.

L.M. had recently lost her father. Her mother worked long shifts, leaving L.M. at the day care for many hours each day. Due to the bus schedule, L.M. would sometimes be the only child on the bus with Lopez.

On June 6, 2014, L.M. told her mother that Lopez had touched her "butt" the previous day. L.M. elaborated that Lopez had put his hand inside her shorts and "all the way into my butt and then he started like . . . itching it." Although L.M. lacked mature notions of anatomy, further questioning revealed that Lopez "itched" or rubbed L.M.'s vaginal area.

L.M.'s mother reported the incident to the police and the day care center. Lopez was subsequently charged with one count of child molestation in the first degree and, after a jury trial, convicted.

Following his trial and conviction, Lopez dismissed his trial attorney and, after obtaining new counsel, filed a motion to set aside the verdict and for a new

trial. He argued that his trial counsel, Steven Witchley, had provided constitutionally ineffective assistance by failing to sufficiently investigate the case, present evidence of Lopez's reputation for sexual morality, and communicate plea offers. Lopez also claimed that a new trial was warranted because Witchley was suffering from severe depression during the trial, which compromised his efforts in defending the case.

During the posttrial motion hearing, Lopez argued that, while his trial was ongoing, Witchley was being investigated by the Washington State Bar Association Disciplinary Board concerning allegations that Witchley had violated client trust fund rules and rendered ineffective assistance of counsel (in matters unrelated to Lopez's case).[1] The trial court received a declaration from Karen Sanderson, Witchley's longtime investigator, concerning his behavior during Lopez's trial. She stated that, while working on Lopez's trial, Witchley was depressed and had confided in her that he was struggling due to the disciplinary investigation and financial problems. The trial court also received a declaration from Witchley's therapist stating that although Witchley could work very productively in a focused area, he had struggled over the past year due to the many demands of managing a full time law practice combined with the stress of the disciplinary investigation.

At the conclusion of the motion hearing, the trial court granted Lopez's motion to set aside the verdict and ordered a new trial. The trial court rejected

[1] After Lopez's trial, Witchley ultimately resigned from the Bar Association in lieu of disbarment.

the claims that Witchley's investigations were insufficient or that he failed to properly communicate plea offers. However, the trial court did find that Witchley's assistance was ineffective due to his failure to call witnesses who would have testified as to Lopez's reputation for sexual morality in the community.

The trial court also found that Witchley rendered ineffective assistance of counsel due to his depression, holding that this constituted an alternative and independent basis upon which to grant a new trial. As a matter of due process, the court ruled, Lopez was entitled to be represented by an attorney free of mental illness.

II

The State contends that the trial court erred by granting Lopez a new trial based on defense counsel's failure to present evidence of Lopez's reputation for sexual morality in the community. We agree.

The grant or denial of a new trial is a matter within the trial court's discretion. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). A trial court abuses its discretion when its discretion is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Ineffective assistance of counsel claims are analyzed under the two part test articulated in Strickland. A defendant must establish that (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based upon consideration of all the circumstances and (2) the

defendant was prejudiced, meaning that the ineffectiveness was so egregious that it "undermined the proper functioning of the adversarial process," such that "the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

A

A reviewing court, in analyzing the reasonableness of counsel's performance, must resist the "natural tendency to speculate as to whether a different trial strategy might have been more successful." Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. A court should not look for "perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (citing Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)).

Under the first prong of the Strickland test, America's highest court has held that counsel is not required to predict a change in the law that might be favorable to his client. Maryland v. Kulbicki, __ U.S. __, 136 S. Ct. 2, 4, 193 L. Ed. 2d 1 (2015) (counsel was not required to anticipate that certain ballistic evidence relied on by the prosecutor would years later be deemed inadmissible by an appellate court); accord In re Det. of Coe, 175 Wn.2d 482, 491, 286 P.3d 29 (2012) (counsel was not ineffective by

declining to request a jury instruction that then-current legal authority stated was unnecessary); State v. Brown, 159 Wn. App. 366, 371-72, 245 P.3d 776 (2011) (counsel has no duty to pursue novel legal theories, no duty to pursue strategies that appear unlikely to succeed, and no duty to anticipate changes in the law); State v. Slighte, 157 Wn. App. 618, 624, 238 P.3d 83 (2010) ("[S]ufficient performance by counsel does not require anticipating changes in the law."). Furthermore, counsel is not required to call all possible witnesses. In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

Thirty years ago, we held that evidence of a defendant's good reputation for sexual morality is not admissible in cases involving sexual offenses against children. State v. Jackson, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986). Rejecting the notion that such evidence was proper in a case involving illegal sex with a child, we explained:

> We doubt the validity of this assertion. The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One's reputation for sexual activity, or lack thereof, may have no correlation to one's actual sexual conduct. Simply put, one's reputation for moral decency is not pertinent to whether one has committed indecent liberties or incest. The trial court properly refused to permit Jackson's witnesses to testify concerning his reputation for sexual morality and decency.

Jackson, 46 Wn. App. at 365.

The trial herein took place in King County. Thus, this court's decision was directly applicable.

Lopez's claim is based upon his belief—adopted by the trial court posttrial—that Jackson was wrongly decided. Such a belief, however, is entirely irrelevant when evaluating whether an attorney provided constitutionally effective representation.

The Washington Supreme Court has never overruled or disavowed the Jackson decision. In over three decades, no panel of Division One judges has ever declined to follow it. Nevertheless, in finding Witchley's representation constitutionally deficient, the trial judge noted that opinions from other appellate divisions treated the issue differently. See State v. Griswold, 98 Wn. App. 817, 828-29, 991 P.2d 657 (2000) (Division Three—characterizing Harper's discussion as dicta but choosing to follow it); State v. Harper, 35 Wn. App. 855, 859, 670 P.2d 296 (1983) (Division Two—allowing for such evidence in an opinion criticized by the Jackson court, 46 Wn. App. at 365). The trial court also cited to State v. Thomas, 110 Wn.2d 859, 757 P.2d 512 (1988). In that rape in the third degree prosecution, evidence of the defendant's reputation for being "sexually moral" was admitted. Thomas, 110 Wn.2d at 863. However, the appellate challenge at issue was not to the admission of this evidence but, rather, to the absence of a jury instruction informing the jury of how to properly consider the evidence. Thomas, 110 Wn.2d at 864. The Thomas opinion not only did not overrule Jackson, it did not even mention it.

Nevertheless, based on the Thomas, Griswold, and Harper opinions, in finding Witchley's representation to have been below accepted professional standards, the trial judge stated that had Witchley made a compelling argument,

the judge would likely have admitted such "sexual morality" evidence, notwithstanding the holding in Jackson. This musing by the trial judge is entirely irrelevant to an evaluation of counsel's performance.[2]

While it may be so that an excellent attorney could have made a persuasive argument for the admission of the contested evidence, such advocacy is far beyond the level of competency guaranteed by the constitution. Witchley followed the applicable case law of this division and had no duty to go "'looking for a needle in a haystack,'" when there was "'reason to doubt there is any needle there.'" Kulbicki, 136 S. Ct. at 4 (quoting Rompilla v. Beard, 545 U.S. 374, 389, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)). Overwhelming legal authority holds that it is not constitutionally ineffective to litigate in accordance with existing law. In order to provide constitutionally effective assistance of counsel, Witchley was not required to cobble together a theory of admissibility that was contradicted by existing, applicable appellate case law. Indeed, a lawyer who follows the law can hardly be deemed to have ceased to function as the "counsel" referenced in the Sixth Amendment. See Kulbicki, 136 S. Ct. at 2.

Moreover, while Witchley did not have a duty to call such reputation witnesses, the standard for reasonable performance considers counsel's entire performance and not merely a single act or omission. Strickland, 466 U.S. at 687-88. A reviewing court must evaluate whether, when taken as a whole, trial

[2] Perhaps pertinent to the trial court's comment that it might not have followed the directly controlling decision in Jackson is this observation from the Supreme Court: a defendant "has no entitlement to the luck of a lawless decisionmaker." Strickland, 466 U.S. at 695.

counsel's performance fell below an *objective* standard of reasonableness. Strickland, 466 U.S. at 687-88.

The trial court cited Witchley's failure to call reputation witnesses as the sole basis for declaring his representation constitutionally ineffective. In fact, while Lopez also claimed that Witchley was ineffective for not properly communicating plea agreements and failing to properly investigate, the trial court explicitly rejected these assertions. Furthermore, the trial court complimented Witchley's overall performance on multiple occasions, stating that "Mr. Witchley, despite his tardiness, for the most part did a good job." It further stated that Witchley was a "very able trial attorney," and was "a competent trial attorney for the most part, except for the evidentiary issues."

Review of the record shows that Witchley, in spite of his personal struggles, did do a good job; he handled the case deftly and elicited testimony fairly equivalent to the contested reputation evidence (as more thoroughly set forth below). He delicately examined L.M.—who proved to be a difficult witness—displaying a level of tact and skill that eventually led L.M. to make some admissions, in spite of her initial refusal to answer most questions. He also aggressively litigated pretrial motions and evidentiary issues that arose during trial. Taken as a whole, Witchley's performance did not fall below an objective standard of reasonableness. The trial court erred in ruling otherwise.

B

Under the second prong of the Strickland test, a defendant must show that counsel's ineffectiveness "undermined the proper functioning of the adversarial

process," such that "the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). A reviewing court must assume that the decision-maker was "reasonably, conscientiously, and impartially applying the standards that govern the decision." Strickland, 466 U.S. at 695.

The record discloses that the missing sexual morality testimony would not have greatly augmented the evidence actually provided to the jury. Several witnesses testified at trial to the effect that Lopez was trusted, respected, and well-liked by his family, the day care employees, and the parents of the children. Implicit in all of this testimony was that the witnesses did not believe Lopez to be the type of person who would molest a child; were this otherwise, he would not have enjoyed the level of trust testified to.

Thus, even had testimony as to Lopez's reputation for sexual morality been offered, it is unlikely that such testimony would have changed the outcome of Lopez's trial. There is no "substantial" likelihood that the result of the trial would have been different. Harrington, 562 U.S. at 112. We have no concern that this was a trial that "cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Prejudice is not demonstrated.

III

The State also contends that the trial court erred by ruling that there exists a Fourteenth Amendment due process right to representation by counsel who is not suffering from mental illness. This is so, the State avers, because no such

per se rule of ineffective representation exists; the performance of an attorney suffering from mental illness is governed by the Strickland test, and it is the Sixth Amendment, not the Fourteenth Amendment, which governs the right to counsel. The State is correct.

In its ruling on defendant's motion for a new trial, the trial court stated:

> [I]t seems to the court that, as a matter of due process, a defendant is entitled to be represented by somebody who is not suffering from mental illness. And so this is essentially a different way of approaching the issues, and it's really an independent basis for finding that Mr. Lopez should be given a new trial.

No modern Supreme Court decision has grounded the right to effective assistance of counsel in the due process clause of the Fourteenth Amendment. The most notable case to have done so was Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In Powell, the Supreme Court found a denial of due process where the state trial court effectively failed to appoint counsel until the date of trial in a capital case.[3] Powell, 287 U.S. at 56.

The Powell opinion, of course, predates Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), in which the Supreme Court held that the Sixth Amendment right to counsel requires that the states appoint counsel for indigent defendants in criminal cases. In the years since Gideon, no subsequent decision has grounded the right to effective assistance of counsel in the due process clause.

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[3] In Powell, several black men were accused of raping two white women on a train. Powell, 287 U.S. at 49-50. Although the trial court asked members of the state bar to represent the defendants, no specific attorney was appointed to represent the defendants prior to the day of the trial and the subsequently-appointed attorneys had virtually no opportunity to investigate and prepare a defense. Powell, 287 U.S. at 53-59.

Recognizing that the United States Supreme Court has never held that an attorney's mental illness warrants an automatic presumption of ineffectiveness, the Ninth Circuit noted that mental illness is "too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney's performance fell below the constitutional norm." Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987); see also Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (holding that an attorney diagnosed with Alzheimer's disease was not per se ineffective counsel).

Rather than deeming mentally ill attorneys as automatically constitutionally ineffective, courts properly review the performance of a mentally ill attorney under the Strickland test. See Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000) (holding that the Strickland test should be used to evaluate an ineffectiveness claim against an attorney with bi-polar disorder). The Strickland standard encompasses an *objective* standard of reasonableness. Therefore, even when an attorney is mentally ill, if the performance delivered meets professional standards, the attorney has not rendered constitutionally ineffective assistance. See Strickland, 466 U.S. at 688.

There is no basis in law for the trial court's ruling that the Fourteenth Amendment's due process clause provides criminal defendant's with a right to be represented by an attorney free of mental illness.

The trial court erred by deeming trial counsel constitutionally ineffective. Accordingly, the trial court erred by granting a new trial. Judgment should be entered on the jury's verdict.

Reversed.

We concur:

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. OSCAR RAUL LOPEZ, Appellant.	)	No: 14-1-04275-9-KNT
	)	**KAREN SANDERSON'S DECLARATION**

KAREN SANDERSON, do hereby declare:

1. I am a private investigator, licensed with the State of Washington. I have been a licensed investigator for 11 years. Prior to that, I worked full time as a staff investigator at The Defender Association (TDA) in Seattle, Washington. I have over 15 years of experience working full time doing criminal defense investigation.
2. In July 2014 I was hired by defense attorney Steven Witchley to work for him on Oscar Lopez's case. Mr. Witchley obtained funding for me through the Office of Public Defense.
3. I have worked with Mr. Witchley for all of my career as an investigator. We began working together while both working at TDA in Seattle. I do not have the data to confirm how many cases we worked on together at TDA, although I recall it was approximately 8-12 cases over the course of several years. We also worked on a capital

case together at TDA. The capital case ultimately went to trial. We worked together on that case for approximately two years.

4. Mr. Witchley and I continued working together after both of us left TDA. Since becoming a private investigator, I have maintained data on my cases and recently calculated that I have worked with Mr. Witchley on 16 cases as a private investigator. Of these cases, two of them were capital cases where we spent a great deal of time working together. In one of the capital cases, Mr. Witchley and I worked together for almost two years, where I billed almost 1400 hours.

5. In March of 2015, after Mr. Lopez was convicted in the above referenced case, I prepared a memo that I placed into my investigation file. I prepared the memo in part because Mr. Witchley asked me to. I also prepared the memo because of my strong belief that Mr. Witchley was suffering from severe depression in the months leading up to Mr. Lopez's trial and including trial. I feel strongly that Mr. Witchley's compromised mental state impacted and restricted his ability to represent Mr. Lopez adequately. I have only on one other occasion, ever prepared such a memo for my file, where I felt that it was necessary to document defense counsel's behavior or actions in a case. The last time I prepared such a memo was ten years ago on a case involving other defense counsel than Mr. Witchley.

6. I am prepared to testify as to the facts set out in my memo. The memo is titled "Problems with Defense Counsel." I have attached a copy of the memo to this declaration.

7. I have reviewed the memo I prepared several times prior to preparing this declaration. The contents set out in the memo are true and correct to the best of my recollection. I am prepared to testify under oath and

under penalty of perjury that everything contained in the memo is true and correct.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED in Seattle, Washington this 7th day of October, 2015.

Karen Sanderson

KAREN SANDERSON