

FILED
COURT REPORTER
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No. 35724-1-II

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

IN RE THE PERSONAL RESTRAINT
OF
JEFFREY M. TAYLOR

MASON COUNTY SUPERIOR COURT
The Honorable James B. Sawyer II
003-1-00200-3

BRIEF OF RESPONDENT

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EITHER THAT HIS TRIAL ATTORNEY WAS DEFICIENT OR
THAT TAYLOR WAS PREJUDICED

- 1.A TAYLOR FAILS TO SHOW THAT TRIAL COUNSEL DID NOT CONDUCT AN ADEQUATE PREPARATION.
- 1.B. TAYLOR FAILS TO SHOW THAT TRIAL COUNSEL WAS DEFICIENT IN THE MANNER HE PREPARED FOR OR ADDRESSED TAYLOR’S STATEMENTS TO THE INVESTIGATING OFFICER.
- 1.C. TRIAL COUNSEL WAS NOT DEFICIENT FOR FAILING TO INVESTIGATE OR CALL WITNESSES TO EXPLAIN TAYLOR'S PRIOR CONTACT WITH MENTAL HEALTH PROVIDERS.
- 1.D. TRIAL COUNSEL WAS NOT DEFICIENT FOR PURSUING A DEFENSE OF NO OPPORTUNITY RATHER THAN RISKING ALIENATING A JURY BY ATTACKING A CHILD ON THE STAND.
- 1.E. THIS COURT PREVIOUSLY FOUND NO ERROR IN NOT HAVING THE TRAVEL AND GAS RECORDS ADMITTED.
- 2. APPELLATE COUNSEL PRESENTED ALL MERITORIOUS ISSUES AND WAS NOT INEFFECTIVE IN THEIR REPRESENTATION.
- 3. TAYLOR FAILS TO DEMONSTRATE SUFFICIENT ERROR TO BE ENTITLED TO RELIEF DUE TO CUMULATIVE ERROR.

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A. PETITIONER'S ASSIGNMENTS OF ERROR

- 1.) Mr. Taylor was denied effective assistance of counsel because he was prejudiced by his attorney's deficient performance.
 - (a) Factors contributing to Deficient Performance
 - (b) Failure to attack and move for suppression of Mr. Taylor's alleged "confession."
 - (c) Failure to investigate and call witnesses to explain Taylor's statements to law enforcement that he had seen a mental health professional.
 - (d) Failure to adequately investigate and challenge K.H's statements to law enforcement, the prosecution and her mental health counselor.
 - (e) Failure to argue for admission of physical, documentary evidence to support defense witness testimony regarding Mr. Taylor's lack of opportunity to commit the crime.
- 2.) Mr. Taylor did not receive effective assistance of counsel on appeal.
- 3.) Cumulative Error.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1.) Whether Taylor has met his burden of showing his trial attorney acted deficiently or that Taylor was prejudice by any deficient representation. [Assignment of Error 1].
 - 1(a) Whether trial counsel failed to adequately prepare generally
 - 1(b) Whether trial counsel failed to adequately prepare to address the confession

- 1(c) Whether trial counsel failed to adequately address Taylor's statement of having been to a mental health provider
- 1(d) Whether trial counsel failed to adequately prepare for and address the testimony of the victim.
- 1(e) Whether trial counsel was deficient for failing to argue for admission of gas receipts and time slips.
- 2.) Whether appellate counsel rendered ineffective assistance by not bringing these issues to the Court on direct appeal. [Assignment of Error 2].
- 3.) Whether Taylor has shown sufficient error to invoke the cumulative error doctrine. [Assignments of Error 1-3].

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3, the State concurs with the procedural history. The State adopts the substantive history as recited by ACJ Morgan in the unpublished opinion dated April 12, 2005 (Appended to Petitioner's Brief as attachment I).

The State agrees that the Petition is timely and that Taylor is under restraint as a result of the underlying criminal convictions.

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D. ARGUMENT

**TAYLOR FAILS TO MEET HIS BURDEN OF SHOWING
EITHER THAT HIS TRIAL ATTORNEY WAS DEFICIENT
OR THAT TAYLOR WAS PREJUDICED.**

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. .

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).

As the sole basis for Taylor's petition is ineffective assistance of counsel, the State, in the interest of brevity and to avoid unnecessary repetition, incorporates the above-described legal standards in the arguments below.

Taylor must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Further Taylor bears the burden of establishing, by a preponderance of the evidence, that he was prejudiced by the alleged errors. *Cook*, 114 Wn.2d at 814, 792 P.2d 506; *In re Hews*, 99 Wn.2d 80, 89, 660 P.2d 263 (1983).

1-A. TAYLOR FAILS TO SHOW THAT TRIAL COUNSEL DID NOT CONDUCT AN ADEQUATE PREPARATION.

Taylor begins with a generalized assertion that trial counsel was unprepared based on a failure to adequately prepare for trial or to argue any pre-trial motions, "no written motion for discovery, no trial brief, no written motions in limine, no proposed jury instructions and no sentencing memorandum." Petition at 11.

There is of course no requirement that one, several or all of the list of things that Taylor complains of be filed in a criminal case. Each case is unique.

For example, Taylor complains that there is no written demand for discovery. Under CrR 4.7(a), the prosecution is required to turn over discovery to defense counsel, and the rule does not require a written demand to trigger the act of providing discovery. See also *In Re Matter of Pirtle*, 136 Wn.2d 467, 477, 965 P.2d 593 (1998). Based on the record, it is obvious that defense counsel had received discovery in that he sought specific, additional discovery at the omnibus hearing (see Omnibus Order as appended to Petition at K, and RP 14-15) and received additional discovery from the prosecution as it came in (RP 21, 33).

Taylor acknowledges that trial counsel did make an oral motion in limine (Petition at 12) wherein the trial court reserved ruling (RP 43). The record shows that the testimony trial counsel sought to exclude was not offered.

Taylor here makes no showing either of deficient representation nor of any prejudice, preferring instead to provide “specific” examples of inadequate representation further on in his petition. These “examples” are limited to discussion of Taylor’s confession, K.H.’s statement and failing to argue for admission of documentary evidence. Taylor offers no

explanation of why or how his generalized complaints of trial counsel outside of those specific complaints was in any way deficient or caused him prejudice.

For these generalized complaints, Taylor fails to meet his burden of persuasion and his petition must fail. As our Supreme Court has noted with approval: ‘naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.’ *Petition of Williams* 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

Likewise, Taylor points to no legal requirement that trial counsel (or trial counsel’s investigator) retain files for any period of time or assist appellate counsel or counsel on collateral attack in any way—particularly when the basis of the collateral attack is a claim of ineffective assistance. Taylor also blatantly misrepresents Detective Gardner’s refusal to speak with his investigator. See Declaration of Jack Gardner, Attachment A.¹ The State respectfully declines to further address these unsupported, baseless and thinly-veiled attempts at currying sympathy unless requested by the Court.

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¹ It is also of note that none of the “declarations” attached to Taylor’s petition comply with GR 13 or RCW 9A.72.085.

1.B. TAYLOR FAILS TO SHOW THAT TRIAL COUNSEL WAS DEFICIENT IN THE MANNER HE PREPARED FOR OR ADDRESSED TAYLOR'S STATEMENTS TO THE INVESTIGATING OFFICER.

Taylor asserts, as one of his "specific" examples of trial counsel's deficient preparation, that trial counsel failed to obtain an expert in confessions and that therefore trial counsel's ability to cross-examine Detective Gardner was fatally inadequate. Taylor's counsel points to his retaining of an expert as proof that trial counsel was deficient. Yet without question under *Strickland*, just because a second attorney, in hindsight, thinks something should be done a different way is not sufficient to say the first attorney was deficient.

The best that Dr. Leo can say of his *post mortem* of the interview and Taylor's statement to Detective Gardner is that Taylor's statement is "ambiguous." See Petition at 20. This is entirely consistent with trial counsel's closing argument. (RP 346). Trial counsel also focused his cross-examination of Detective Gardner on the fact that the interview reflected only a single incident and that Taylor was not interviewed a second time after the victim had given a second interview. (RP 136).

Taylor now urges this Court to read "ambiguity" as proof the confession was a false confession. It is, of course, the province of the jury to decide what testimony is credible and the weight it is entitled to.

“Credibility determinations are within the sole province of the jury and are not subject to review.” *State v. Myers* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Clearly, trial counsel engaged in tactical decisions: trying to limit the confession to a single incident out of several charged and to point out the ambiguous, equivocating nature of the confession.

Retaining an expert to verify the obvious—that the confession was obtained in an interview regarding one of several incidents and that it was ambiguous—would have had no discernable impact on the trial or its result. Trial counsel knew of, questioned on and argued these exact issues. The non-impact is particularly clear when Taylor’s own hindsight expert can only suggest that the confession was ambiguous, entirely consistent with trial counsel’s argument and the testimony of Detective Gardner. (RP 128).

Taylor fails in his burden to show that trial counsel was deficient and also shows no prejudice.

1.C. TRIAL COUNSEL WAS NOT DEFICIENT FOR FAILING TO INVESTIGATE OR CALL WITNESSES TO EXPLAIN TAYLOR'S PRIOR CONTACT WITH MENTAL HEALTH PROVIDERS.

The testimony at trial by Detective Gardner was that Taylor told him “I have been to a psychologist in the past for doing impulsive things and being rebellious towards my parents and family.” (RP 127). On

cross-examination, trial counsel brought out that Taylor volunteered the information about going to a psychologist (RP 135), and that Detective Gardner did not know and had not asked if the psychological visits had been related to sexual issues. (RP 136). This was reinforced during closing argument. (RP 346-47).

Based on the nature of the cross-examination and closing arguments on this issue, the issue was argued by trial counsel to Taylor's benefit—Taylor was honest and forthcoming with a personal issue (going to a psychologist) in his interview with Detective Gardner even though the treatment dealt subjects unrelated to the interview. (RP 135—not even the subject of the question). Further, trial counsel exploited the fact that Detective Gardner didn't follow-up to determine if the “impulsive” behavior was sexual in nature. (RP 136, 347).

Even if trial counsel's cross-examination was not of the burning quality now sought by Taylor, “even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation.” *Pirtle* at 489.

A tactical decision to minimize a potentially problematic statement and, in practice, turn it to a positive for the defendant, cannot be said to be deficient. Further, Taylor can point to no prejudice from not expounding on an issue of non-relevance.

1.D. TRIAL COUNSEL WAS NOT DEFICIENT FOR PURSUING A DEFENSE OF NO OPPORTUNITY RATHER THAN RISKING ALIENATING A JURY BY ATTACKING A CHILD ON THE STAND

The obvious pattern of the defense is one of truthfulness and lack of opportunity. Trial counsel's closing argument echoes with refrain in three-part harmony: 1) that Taylor simply could not have done the acts alleged since he never had the opportunity; 2) that Taylor was forthcoming and truthful with the detective and; 3) that K.H.'s testimony was inconsistent and she was unable to produce sufficient detail to make her credible. (RP 343-48). Counsel started his closing by reminding the jury "you can't let sympathy play a part in your deliberations." (RP 343).

Again, a legitimate trial tactic is not a basis for a finding of ineffective assistance of counsel.

1.E. THIS COURT PREVIOUSLY FOUND NO ERROR IN NOT HAVING THE TRAVEL AND GAS RECORDS ADMITTED.

Taylor previously raised the argument in his direct appeal that trial counsel was ineffective for failing to argue for admission of gas receipts and time slips. This argument was previously rejected in Taylor's direct appeal. (See unpublished opinion, COA 305952-1-II, page 11).

Because identical contentions were considered and rejected in his direct appeal, Taylor cannot raise them in a subsequent personal restraint petition unless he demonstrates that reconsideration will serve the ends of justice. *In re Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992).

Taylor has made no such showing.

2. APPELLATE COUNSEL PRESENTED ALL MERITORIOUS ISSUES AND WAS NOT INEFFECTIVE IN THEIR REPRESENTATION.

The State agrees that a defendant is entitled to effective representation on appeal. In this case, Taylor did receive effective assistance as appellate counsel presented all of the meritorious issues.

Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance, however. Rather, the exercise of independent judgment in deciding which issues may be the basis of a successful appeal is at the heart of the attorney's role in our legal process. *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *Jones v. Barnes*, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983)). *See also* RPC 3.1 (lawyer shall not bring claim upon frivolous basis). Moreover, in order to prevail on the appellate ineffectiveness claim, Lord must show the merit of the underlying legal issues his appellate counsel failed to raise or raised improperly and then demonstrate actual prejudice. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Matter of Personal Restraint of Lord 123 Wn.2d 296, 314, 868 P.2d 835 (1994).

As demonstrated above, none of the issues now raised are of sufficient merit to have been raised during direct appeal.

3. TAYLOR FAILS TO DEMONSTRATE SUFFICIENT ERROR TO BE ENTITLED TO RELIEF DUE TO CUMULATIVE ERROR.

Taylor bears the burden of proving that an accumulation of error is of sufficient magnitude that retrial is necessary. *Lord* at 332.

“[C]laims, which alone are insufficient to grant habeas relief, do not suddenly become meritorious by simply aggregating these claims into one claim.” *Pirtle* at 497. As argued above, Taylor has shown no error by either trial counsel or appellate counsel much less sufficient cumulative error of such magnitude that retrial is necessary.

But when no prejudicial error is shown, as is the case here, cumulative error could not have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). In such a case, the doctrine of cumulative error would not even apply.

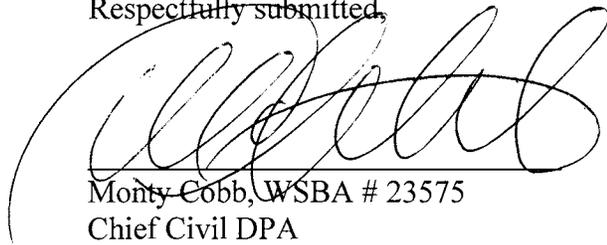
E. CONCLUSION

Based on the foregoing, Taylor has not shown that his trial or

appellate counsel were deficient in their representation or that he has suffered any prejudice from their alleged deficient acts. The personal restraint petition should be dismissed.

DATED this 27th day of April 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Monty Cobb', written over a horizontal line.

Monty Cobb, WSBA # 23575
Chief Civil DPA
Attorney for Respondent

Appendix A

TO

STATE'S REPSONSE

Court of Appeals, Division II
No. 35724-1

IN RE PERSONAL RESTRAINT
OF

JEFFREY M. TAYLOR

Mason County No. 03-1-00200-3

COURT OF APPEALS, DIVISION II STATE OF WASHINGTON	NO. 35724-1-II
In Re Personal Restraint of JEFFREY M. TAYLOR	DECLARATION of JACK GARDNER

COMES NOW, JACK GARDNER, and declares as follows:

I am a detective with the Mason County Sheriff's Office and was involved in the investigation of Jeffrey Taylor and testified at his trial. I have reviewed that portion of Taylor's personal restraint petition wherein Taylor's attorney asserts that I have refused to speak to his investigator on advice of the Prosecuting Attorney.

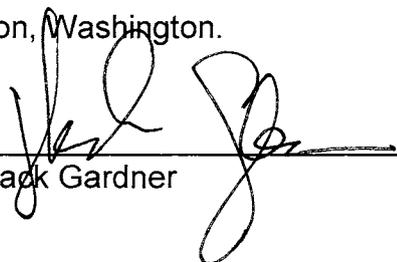
I was contacted by an investigator on behalf of Mr. Taylor. Prior to communicating with the investigator, I sought the advice of the Prosecuting Attorney's Office on whether I was required to speak with the investigator.

I was advised by Monty Cobb, Deputy Prosecutor, that I could speak to the investigator if I wished to, that I could decline to speak to the investigator if I wished to, or that I could request a member of the Prosecutor's Office be present at any interview. Mr. Cobb advised that the choice was mine to make. This was consistent with advice I have received previously from Mr. Cobb and other members of the Prosecuting Attorney's Office when investigators request interviews.

I did decline to speak with the investigator. I did so of my own choice. At no time did Mr. Cobb or any other member of the Prosecutor's Office advise, request, or direct me to not to talk to Taylor's investigator.

I CERTIFY OR DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE IS TRUE AND CORRECT.

DATED this 27th day of April 2007 at Shelton, Washington.



Jack Gardner

DECLARATION of J. Gardner
PRP of Taylor

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

STATE OF WASHINGTON,)	
)	No. 35724-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
JEFFREY M. TAYLOR,)	
)	
Appellant,)	
_____)	

07/10/07 11:11 AM
STATE OF WASHINGTON
BY [Signature]
CLERK OF COURT

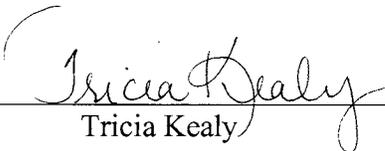
I, TRICIA KEALY, declare and state as follows:

On April 30, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Michael J. Kelley
Van Siclen Stocks & Firkins
721 45th St. NE
Auburn, WA 98008-1303

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 30th day of April, 2007, at Shelton, Washington.



Tricia Kealy

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