

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

JAKE JOSEPH MUSGA,

Petitioner,

vs

STATE OF WASHINGTON,

Respondent.

NO. 46987-1-II

COURT OF APPEALS DIVISION II

PETITIONER'S REPLY TO STATE'S
RESPONSE TO THE PERSONAL
RESTRAINT PETITION

1. THIS COURT SHOULD STRIKE THE DESIGNATED APPENDICES AND ARGUMENTS IN STATE'S RESPONSE TO MR. MUSGA'S PERSONAL RESTRAINT PETITION FOR NONCOMPLIANCE WITH THE RULES OF APPELLATE PROCEDURE.

When the State responds to a personal restraint petition, the State must comply with the requirements of Rule of Appellate Procedure [RAP] 16.9. That rule provides, "The response must answer the allegations in the petition. The response must state the authority for the restraint of petitioner by the respondent and, if the authority is in writing, include a conformed copy of the writing. If an allegation in the petition can be answered by reference to the record of another proceeding, the response should so indicate and include a copy of those parts of the record that are relevant. Respondent should also identify in the response all material disputed questions of fact."

1 [a] *The State's arguments that are unsupported by legal authority must be stricken.*
2 *These arguments are identified in the body of this reply.*

3 In this case, the State has failed to respond to the specific allegations made by Mr.
4 Musga. The State has failed to cite authority for many of its arguments in support of the
5 restraint of Mr. Musga. ““Where no authorities are cited in support of a proposition, the court
6 ... may assume that counsel, after diligent search, has found none.”” (quoting DeHeer v. Seattle
7 Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962))). An appellate court need not
8 consider issues unsupported by citation to authority. State v. Lord, 117 Wn.2d 829, 853, 822
9 P.2d 177 (1991).

10
11 [b] *The State's arguments are not supported by competent evidence and much of that*
12 *evidence must be stricken from the State's response and/or not considered by this court.*

13 Further, the State has failed to demonstrate that there is competent evidence to
14 overcome the sworn declarations that support that relevant factual evidence provided by
15 petitioner.

16 First, the State has filed unsworn police reports made on the night of the incident, a
17 discovery index made by the deputy prosecuting attorney who wrote the State's response to this
18 personal restraint petition, a redacted death certificate which lists the cause of death of “blunt
19 force trauma of the head and abdomen” but cannot identify the perpetrator of such trauma;
20 autopsy photographs which are included to shock this court; an autopsy report without
21 explanation to this court and including reference to tests, such as DNA, which were not
22 complete until *after* Mr. Musga's plea and sentencing.
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1 These documents, especially the self-serving discovery index prepared by the deputy
2 prosecutor responding to this personal restraint petition should be stricken from the State's
3 response. The self-serving discovery report by the deputy prosecutor serves no legitimate
4 purpose except to emphasize **in bold type** the State's theory of the case. Again, this is not
5 competent evidence and should be stricken.

6 Notably, as required by RAP16.9, the State has failed to respond to the specific
7 allegations raised in Mr. Musga's personal restraint petition.

8 Mr. Musga alleged the following in his personal restraint petition:

- 9
- 10 1. Trial counsel's failure to provide effective representation actually and
11 substantially prejudiced Mr. Musga, thereby mandating relief in this
12 collateral attack.
 - 13 2. Trial counsel's ineffectiveness caused Mr. Musga to enter a fatally flawed
14 guilty plea.
 - 15 3. Mr. Musga should be allowed to withdraw his guilty plea where he was
16 misadvised regarding the circumstances under which the State could seek
17 and the court could impose an exceptional sentence under each charge,
18 neither of which applied to that charge. Mr. Musga thus pleaded guilty
19 believing that he could not receive exceptional sentences above the standard
20 ranges.
 - 21 4. Mr. Musga must be allowed to withdraw his fatally flawed guilty plea;
22 alternatively, the matter must be remanded for sentencing within the
23 standard range.
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 - 25

1 (aa) In his plea to Count I, first degree murder, Mr. Musga was
2 misadvised regarding the means for imposition of an exceptional sentence and his sentence was
3 imposed in violation of that advisement. (bb) In his plea to Count II, first degree child rape, the
4 same violation is alleged.

5 5. Mr. Musga was not advised his right to appeal the imposition of an
6 exceptional sentence and thus his right to appeal was denied.

7 These allegations will be addressed in turn.

8
9 **2. RESPONSE TO STATE'S VERSION OF THE FACTS OF THE CASE:**

10 Before addressing the merits of petitioner's allegations, petitioner notes that the State
11 has ignored exculpatory evidence in this case.

12 1. Petitioner signed a sworn declaration that Laura Colley, the child's mother, was with
13 CC off and on throughout the charged event. Appendix G, page 3. Earlier that day Petitioner
14 sent to his mother a photo [text] of CC with bruises on his face. Appendix G, page 4

15 In its response to Petitioner's statement of the case, the State has ignored Petitioner's
16 sworn statement that Laura Colley, the child's mother, was with CC off and on throughout the
17 charged event. Appendix G, page 3. Petitioner had sent to his mother photos of CC with bruises
18 on his face earlier in the day on March 29, 2013. Appendix G, page 4. These bruises were
19 inflicted by CC's mother Laura Colley when CC was uncooperative brushing his teeth, did not
20 want to eat at meal times, resisted getting dressed, and other things. Appendix G, page 4. This
21 is important because it is consistent with Petitioner's sworn statement that Colley and her
22 mother spanked CC a lot and left many bruises on him. Appendix G, page 3.

1 At one point, Laura's mother said she would take over the discipline of CC but there was no
2 decrease in the number of bruises. Appendix G, page 3. During petitioner's 6 week
3 relationship with Laura, he observed her spanking him countless times but never said anything
4 to her. Appendix G, page 3. He did not only never said only anything to her but also he never
5 physically disciplined him. Appendix G, page 3. Laura did not want CC and petitioner later
6 learned that she had placed him up for adoption. Appendix G, page 3.
7

8 2. Laura was home with petitioner on the night of this incident. Appendix G, page 4.
9 She did go out with her sister at some point but she check in and out throughout the night.
10 Appendix G, pages 4, 8. She routinely put alcohol in CC's bottle to "help his sleep". Appendix
11 G, page 4.

12 Petitioner made numerous phone calls to Laura and her family after it appeared that she
13 had badly hurt CC and he would not get up in the early morning. ***

14 Laura had told me that she had numerous referrals to CPS for her treatment of CC and I
15 asked my attorneys to look into those. Appendix G, page 8.

16 During the State's sentencing presentence, the deputy prosecutor made numerous
17 arguments that are not supported by the record and also that have been held by this court to be
18 reversible error. "The fact of the matter is that the defendant violently force-fed CC
19 alcohol...."RP 22. "On that night, after Laura Colley left, at some point the torture begins." RP
20 27. "He probably thought that CC was dead at that point, and so he was just going to dispose of
21 CC's body as if he was nothing more than a piece of trash." RP 31. "It is the State's assertion
22 that he was raped with the defendant's penis." RP 32. "...CC wondering where his mother is.
23 CC wondering when the torture is going to stop." RP 35.
24
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1 According to the *Journal of Forensic Medicine*, bruises of yellowish color are 7-10 days
2 old. Petitioner's Reply Appendix C. There were numerous such bruises documented on CC's
3 torso. Autopsy report, page 4, bates stamped page 000588. There were more than 30 discrete
4 violaceous to red contusions and red to yellow-red abrasions on the back.....again the yellow
5 color affirms that the contusions are not fresh but rather are older. Appendix M, page 5, bates
6 stamped page 000589. Of course, the medical examiner also documented significant older
7 internal injuries. Appendix M.
8

9 Finally, this court should not consider the police reports as proof of any facts of this
10 offense. Police reports are never relied upon as evidence. They are unsworn statements
11 gathered in the haste of an investigation. They are unverified. They do not consider motives
12 and biases of witnesses. For example, in this Saldivia sold drugs to Laura Colley and protected
13 her from police.

14 Likewise, police did not investigate Colley's CPS history with CC nor her adoption
15 placement for him.

16 3. RESPONSE TO THE SPECIFIC ALLEGATIONS:

17 1. PETITIONER HAS ESTABLISHED BY COMPETENT EVIDENCE CLAIMS OF
18 PRE-PLEA INEFFECTIVE ASSISTANCE OF COUNSEL THAT ENTITLE HIM
19 TO RELIEF.

20 The Sixth Amendment right to effective assistance of counsel encompasses the plea
21 process. In re Pers. Restraint of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993); McMann v.
22 Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). Counsel's faulty
23 advice can render the defendant's guilty plea involuntary or unintelligent. Hill, 474 U.S. at
24 56; McMann, 397 U.S. at 770-71.
25

1 To establish the plea was involuntary or unintelligent because of counsel's inadequate
2 advice, the defendant must satisfy the familiar two-part Strickland v. Washington, 466 U.S.
3 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test for ineffective assistance claims—first,
4 objectively unreasonable performance, and second, prejudice to the defendant. Ordinary due
5 process analysis does not apply. Hill, 474 U.S. at 56-58.

6 The *Strickland* test applies to claims of ineffective assistance of counsel in the plea
7 process. In re Pers. Restraint of Peters, 50 Wn. App. 702, 703, 750 P.2d 643 (1988) (citing Hill
8 v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985)). In the context of a
9 guilty plea, the defendant must show that counsel failed to substantially assist him in deciding
10 whether to plead guilty and that but for counsel's failure to properly advise him, he would not
11 have pleaded guilty. State v. McCollum, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997).

12 Defense counsel must, “at a minimum, conduct a reasonable investigation enabling
13 counsel to make informed decisions about how best to represent the client.”
14 In re Personal Restraint Petition of Brett, 142 Wn.2d 868, 873, 601 (2001), quoting
15 Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S.Ct. 1574, 91 L.Ed. 305 (1986)
16 (“Respondent’s lawyer never investigated, nor made a reasonable decision not to investigate,
17 the State’s case through discovery. Such a complete lack of pretrial-preparation puts at risk
18 both the defendant’s right to an “ample opportunity to meet the case of the prosecution” and the
19 reliability of the adversarial testing process.”)

20 The duty to investigate includes investigating all reasonable lines of defense, especially
21 the defendant’s “most important defense.” Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir.
22 2001). Trial counsel’s failure to consider alternate defendant constitutes deficient performance
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1 when the attorney “neither conducts a reasonable investigation nor makes a showing of
2 strategic reasons for failing to do so. *Id.*

3 The failure to investigate, at least when coupled with other defects, can amount to
4 ineffective assistance of counsel *In re Brett*, 142 Wn.2d at 882-883. The duty to investigate is
5 not excused by an attorney’s belief that his client has confessed or is guilty. False confessions
6 are well documented. See Richard A. Leo, *Bringing Reliability Back In: False Confessions and*
7 *Legal Standards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 480-85 (2006); Steven
8 A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82
9 N.C.L. 891, 904 (2004), *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002).

11 A criminal lawyer owes a duty to defend even a client he believes is guilty. RPC 3.1. A
12 lawyer shall provide competent representation to a client. Competent representation requires
13 thoroughness and preparation reasonably necessary for the representation. RPC 1.2(a). “In
14 criminal case, the lawyer shall abide by the client’s decision, *after consultation with the lawyer*,
15 as to a plea.” (emphasis added); *State v. Osborne*, 102 Wn. 87, 99, 684 P.2d 683 (1984),
16 quoting *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981).

17 Effective assistance of counsel includes assisting the defendant in making an informed
18 decision as to whether to plead guilty or to proceed to trial. The degree and extent of
19 investigation required will vary depending upon the issues and facts of each case, but counsel
20 must reasonably evaluate the evidence against the accused and the likelihood of a conviction so
21 that the defendant can make a meaningful decision as to whether or not to plead guilty. *State v.*
22 *ANJ*, 168 Wn.2d 91,112, 225 P.3d 956 (2010).

1 Moreover, part of providing effective assistance of counsel is informing the defendant
2 of “all the direct consequences of his plea prior to acceptance of a guilty plea.” State v. Barton,
3 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

4 In this case, defense counsel failed to conduct any investigation, save for the creation of
5 an arguably useless timeline. Defense counsel failed to discuss the discovery with Mr. Musga
6 and to advise him on the strengths and weaknesses of this case. Defense counsel failed to
7 pursue potentially exculpatory evidence. Defense counsel met briefly with Mr. Musga to go
8 over pre-filled out plea paperwork. Defense counsel had checked the boxes that applied to Mr.
9 Musga. Defense counsel failed to check an applicable box in [6][h] – failed to check *sub[iv]*,
10 which is the very authority upon which the court relied to impose an exceptional sentence in
11 this case.
12

13 Mr. Musga would not have entered a guilty plea had he received proper advice. He is
14 entitled to withdraw his guilty plea. In this case, Mr. Musga absolutely would not have entered
15 guilty pleas to the crimes charged had his trial attorneys done their jobs and performed
16 competently. He did not know that he was pleading guilty to no plea bargain at all. In fact, he
17 was pleading guilty to the original charges and agreeing that the State could ask for whatever
18 sentence it wanted, no holds barred. Although at the time of entry of the plea, he did not
19 understand that the trial court could impose an unlimited sentence on the charge of first degree
20 murder, he absolutely would not have pleaded guilty to that charge knowing those facts.
21

22 The State has responded that trial counsels “known” investigative activities easily
23 surpassed the minimum constitutional threshold of competency, for counsel:
24
25

1 [a] reviewed discovery, which contained detailed statements from the only
2 identified witnesses to have materials information about the circumstances of CC's life and
3 death; RESPONSE: This is not true as the discovery records did not contain detailed statements
4 from people who knew Laura Colley when she cared for CC prior to going into rehab; records
5 from CC's pediatrician documenting prior physical abuse; records from Child Protective
6 Services documenting concerns about Colley's ability to parent CC; statements from
7 individuals with whom Colley celebrated her birthday who would have testified to her
8 proximity to her Tacoma residence and to her visits to her residence throughout that time;
9 statements from individuals who knew that Colley intended to put CC up for adoption and also
10 records from the adoption agency. All of the materials were relevant and material to the issue
11 of the source of the bruises on CC. This investigation likely would have yielded exculpatory
12 evidence for Mr. Musga. Petitioner's Appendix B

14 [b] retained a private investigator to at least create an independent timeline of
15 the critical events surrounding petitioner's crimes; RESPONSE: This was created by reading
16 the discovery and did not require any particular expertise. The timeline did not further any
17 meaningful investigation.

19 [c] retained a medical expert to review CC's exceedingly incriminating medical
20 records; RESPONSE: The State's language ignores the findings that CC exhibited significant
21 older blunt force trauma injuries; multiple contusions that were at least 7-10 days old; other
22 injuries that easily could have been inflicted during the time CC was in his mother's care.
23 Yes, CC's injuries were many. Here an expert would have been able to determine that CC
24 showed evidence of bruising consistent with battering over a lengthy period of time.

1 CC had a number of old injuries, including old blunt head injury, further described as a
2 “small subdural neomembrane.” CC also exhibited an “old blunt abdominal injury, mesenteric
3 granulation and fibrosis.” [Autopsy report – final diagnosis, page 2; bates stamped page
4 000586].

5 In addition, CC had old yellow-orange contusions on the right and left sides of his face
6 and temples, most concentrated on the right side. [Autopsy report, page 4; bates stamped page
7 000588]

8 CC also had red-yellow abrasions on the abdomen between the bottom of the ribcage
9 and the waistline and concentrated on the right side of the midline near the umbilicus. [autopsy
10 report, page 4’ bates stamped page 000588]

11 CC also exhibited multiple contusions and abrasions of the back and buttocks, some of
12 which were red-yellow. [autopsy report page 5, bates stamped page 000589]

13 The older blunt force mesenteric laceration was confirmed through evaluation with iron
14 and trichrome stains.[autopsy report, page 8, bates stamped page 000592]

15 The injuries were “incriminating.” But the issue was whom did they incriminate?
16 Again, the State’s response begs the question and assumes that Mr. Musga was the perpetrator.
17

18 Had an investigator interviewed Ms. Colley and her mother, the defense would have
19 developed exculpatory evidence.
20

21 [d] retained a DNA expert to independently test the sample examined by the
22 State; RESPONSE: The State’s DNA testing was not finished until *after* Mr. Musga had
23 pleaded guilty and been sentenced. At that point, the DNA evidence was of no consequence
24 and the defense DNA expert did nothing. It would have been different had the DNA actually
25 been tested prior to any decision to plead guilty.

1 [e] researched a jail informant who attributed inculpatory statements to petitioner;
2 RESPONSE: Unknown what was done. Certainly counsel would do this. Possibly a LINX
3 check would reveal prior convictions that would be relevant. Determining what the informant
4 wanted in exchange for his testimony also would be relevant. A quick LINX check establishes
5 that the informant was charged in Pierce County Superior Court no. 11-01888-3 with dealing in
6 depictions of minors engaged in sexually explicit conduct and computer trespass, multiple
7 counts. His case was resolved after Mr. Musga's case. It is not uncommon for sex offenders to
8 seek plea bargains for every possible reason.
9

10 [f] strategized as a defense team; RESPONSE: That is their job. Unknown how
11 much time they spent on this case. File was in pristine condition. Client never saw discovery.
12 There is little, if any, evidence to support this barebones assertion.

13 [g] discussed the case with petitioner in person for *many hours* over many in
14 person visits during which counsel *seemingly* confronted him . . . [italics added]. Counsel spent
15 fewer than 29 hours with Mr. Musga over the course of five+ months. This is not much time at
16 all in a case with 821 pages of discovery to discuss and numerous issues to consider. Mr.
17 Musga denies that this occurred.
18

19 To the contrary, Mr. Musga swore that his attorneys informed him on *August 29, 2013*
20 that he needed to decide that day whether to plead guilty or he would be charged with
21 aggravated murder that carried a possible death sentence. This visit lasted less than an hour.

22 Appendix G, page 5.

23 The plea paperwork was already filled out when Mr. Musga's attorneys went over it
24 with him. He was told that the boxes/paragraphs that applied to his cases were marked/checked.

25 Appendix G, page 6.

1 In this case, Mr. Musga alerted his attorneys early on that Ms. Colley had been in and
2 out of the residence all night, that she habitually gave CC alcohol to make him sleep, and that
3 she had a long history of physical abusing him. Mr. Musga's statements were corroborated by
4 the medical examiner's findings that CC was covered with bruises of various ages, some of
5 which were far older than a few hours. Mr. Musga also informed trial counsel that Ms. Colley's
6 mother also had a history of physically abusing CC and asked them to talk to her. He believed
7 it was possible that other people had seen CC with bruises while in the care of these women.
8 Neither trial counsel nor their investigator followed up on these important leads.
9

10 [g] discussed the case with petitioner in person for *many hours* over many in
11 person visits during which counsel *seemingly* confronted him . . .

12 Between March 30, 2013 [the date of arrest] and September 9, 2013 [the date of plea],
13 trial counsel spent 22.6 hours with Mr. Musga. In a case with 821 pages of discovery, that
14 would not be an excessive amount of time, assuming of course that Mr. Musga in fact had seen
15 his discovery.

16 Trial counsel appears not to have discussed the defense with Mr. Musga because he was
17 not aware that the defense had consulted with any expert, that they had failed to contact any
18 witnesses, and that they had failed to take any action except attempt to negotiate with the
19 prosecutor.
20

21 2. ATTORNEY TODD MAYBROWN'S OPINION THAT TRIAL COUNSEL PROVIDED
22 INEFFECTIVE ASSISTANCE OF COUNSEL IS SUPPORTED BY COMPETENT
EVIDENCE.

23 The State's response to Mr. Maybrown's opinion is that Mr. Maybrown lacked
24 sufficient materials upon which to render an opinion. Of course, the State's response is entirely
25 speculative and demonstrates at best a lack of knowledge regarding not only the standard

1 content of defense attorney files but also what materials are required to form the opinion that
2 Mr. Maybrow rendered.

3 Mr. Maybrow noted that the State's case appeared strong. In that circumstance, it is
4 even more important for counsel to conduct a thorough and vigorous pretrial investigation.

5 To the contrary, in this case Mr. Maybrow noted numerous deficiencies in trial
6 counsel's preparation. See Maybrow's report, Appendix bb.

7
8 It must be noted that whenever the State has no response to the merits, the State argues
9 that defense experts are being paid for their work. Of course they are. Police officers, medical
10 examiners, police and other individuals who work for the State are paid for their work in a
11 criminal case. Other professionals who work on cases are also compensated.

12 3. INVESTIGATOR PATRICK PITT'S OPINION THAT AN INADEQUATE
13 INVESTIGATION WAS CONDUCTED IS SUPPORTED BY COMPETENT
14 EVIDENCE.

15 The State's response to Mr. Pitt's opinion is based on a speculative assumption
16 that homicides are investigated differently in Great Britain than in the state of Washington.
17 Given Mr. Pitt's experience as a homicide investigator in some of the most serious homicide
18 cases in Pierce County, Mr. Pitt is more than qualified to opine on the sufficiency of an
19 investigation.

20 In fact Mr. Pitt is an experienced homicide investigator in this jurisdiction. He routinely
21 investigates the most serious criminal cases. The following cases are but a small sampling of
22 the cases in which Mr. Pitt has been the sole defense investigator. He worked as the defense
23 investigator in *State v. Anthony Ralls*, Pierce County Superior Court No. 13-1-01703-4 [first
24 degree murder]; *State v. Ervin Banks*, Pierce County Superior Court 13-1-00732-2 [attempted
25

1 first degree murder; *State v. Tyree Jefferson*, Pierce County Superior Court 13-1-02796-0
2 [attempted first degree murder]; *State v. Dorcus Allen*, Pierce County Superior Court 10-1-
3 00938-0, aggravated murder in the first degree. [See Declaration of Barbara Corey, Appendix
4 gg].

5 In fact, Mr. Pitt reviewed the work of the defense investigator in this case and noted that
6 he had produced only a time-line of events. The investigator had not interviewed even a single
7 witness. The investigator had not been to the scene of the alleged homicide to determine, for
8 example, whether the witnesses who reported hearing sounds could in fact hear noises from the
9 Colley-Musga residence. The investigator did not interview Colley or any of the individuals
10 who were present at the residence that night.

11
12 The reasons for Pitt's inability to interview the defense attorneys/investigator are set
13 forth in the Declaration of Barbara Corey, Appendix gg.

14 Although the State avers that defense attorneys often conduct their own investigations,
15 the State is simply incorrect. Because defense counsel cannot testify at trial, defense counsel
16 rarely, if ever, conduct any portion of an investigation.

17 The State's assertion that Mr. Pitt's opinion is based upon a desire to increase his
18 earning potential is unsupported by any evidence and, frankly, is insulting to any professional.

19
20 Petitioner's Appendix A

21
22 4. THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT
23 PETITIONER'S CLAIM THAT TRIAL COUNSEL HAD STRATEGIZED AS A
24 DEFENSE TEAM.

25 Again, there is nothing in the file to support any argument that the defense team did
anything other than attempt to negotiate a settlement with the State.

1
2 5. DEFENSE COUNSEL DID NOT DISCUSS THE CASE WITH MR. MUSGA
3 FOR MANY HOURS AND PROVIDE ADVICE TO HIM.

4 The State speculates on what must have occurred during the approximately 29 hours
5 trial counsel spent with Mr. Musga during the course of their representation of him. Of course,
6 there are no notes about this.

7 What is clear is that trial counsel failed to give him the information essential to making
8 the decision to plead guilty.

9 It is axiomatic that a defendant who is pleading guilty must be advised of the direct
10 consequences of entering the plea. There is no evidence that trial counsel provided to Mr.
11 Musga the advice that he genuinely needed in order to make a knowing, intelligent and
12 voluntary decision to plead guilty.

13 The Statement of Defendant on Plea of Guilty to Non-Sex Offense [in this case, Murder
14 in the First Degree] informed Mr. Musga that the State would make the following
15 recommendation to the judge, "open recommendation – state seeking exceptional". The State
16 also noted the prosecutor will recommend as stated in the plea agreement, which is
17 incorporated by reference." Paragraph [5][f]. [g]. Of note, there is no plea agreement attached
18 to the plea paperwork.

19 The same plea paperwork explained to Mr. Musga how an exceptional sentence might
20 be imposed. In pertinent part, the plea paperwork provided, "The judge may also impose an
21 exceptional sentence above the standard range if the State and I stipulate that justice is best
22 served by imposition of an exceptional sentence and the judge agrees that an exceptional
23
24
25

1 sentence is consistent with and in furtherance of the interests of justice and the purposes of the
2 Sentencing Reform Act.” Appendix B, Pages 4-5, paragraph [5][h][iii].

3 Mr. Musga did not stipulate that justice would be best served by the imposition of an
4 exceptional sentence. To the contrary, his attorneys asked the court to impose a mid-range
5 standard range sentence of 300 months on the murder count. RP 11/21/13 43.

6 Because the imposition of the exceptional sentence on the murder charge violated the
7 language of the plea paperwork and thus the legitimate and reasonable expectations of any
8 criminal defendant entering a guilty plea, Mr. Musga must be allowed to withdraw his guilty
9 plea.
10

11 The State’s response to Mr. Musga’s argument here is to ignore the checkmarks that his
12 counsel put by what he obviously considered the relevant paragraphs in the plea paperwork.

13 However it is readily apparent that Mr. Musga’s attorneys put checkmarks by the
14 paragraphs they believed applied to him. Statement of Defendant on Plea of Guilty to Non-Sex
15 Offense. Mr. Musga recalls that is how his attorneys went over the plea paperwork with him in
16 the one hour, seven minutes during which they went through both statements on plea of guilty.

17 At the sentencing hearing, the trial court imposed 608 months [50.6 years] on the court
18 of first degree murder. Judgment and Sentence.

19 ///

21 ///

23 ///

1 CONCLUSION:

2 For the foregoing reasons, Mr. Musga respectfully asks this court to grant his personal
3 restraint petition.

4 DATED this 30th day of July, 2015

5
6 
7 _____
 Barbara Corey, WSB #11778
 Attorney for Jake Musga

8 I declare under penalty of perjury under the laws
9 of the State of Washington that the following is a true
10 and correct: That on this date, I delivered via ABC- Legal
11 Messenger a copy of this Document to: Appellate Division
12 Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946
13 Tacoma, Washington 98402 and to Jake Joseph Musga, DOC#368830
14 Washington State Penitentiary, 1313 North 13th Ave.
15 Walla Walla, WA 99362.

13 7/30/15
14 Date

13 
14 _____
15 Signature

APPENDIX A

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5 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

6 DIVISION II

7 JAKE JOSEPH MUSGA,

8 Plaintiff,

9 vs.

10 STATE OF WASHINGTON,

11 Defendant.

NO. 46987-1-II

DECLARATION OF BARBARA
COREY

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13
14 1. I am over the age of 18 and competent to make this declaration.
15 2. During the preparation of this personal restraint petition, I requested the entire file
16 of attorneys Maybrown and Warner. The documents received are correctly set forth
17 in the State's response to the personal restraint petition at pages 11-21.
18 3. There are no work product documents that I know are provided to other defense
19 counsel when a file is requested. *In fact, when there is a claim of ineffective*
20 *assistance of counsel [IAC] all file materials are turned over.* The file belongs to
21 the client, not the attorney, and when the client requests the file, the file is turned
22 over.
23 4. Further the file customarily includes phone call logs/interview logs and a log of all
24 action taken in a case.
25 5. Based on my experience as well as the reports of my peers who handle personal
26 restraint petitions, attorneys who are alleged to be IAC refuse to be interviewed
27 until/if an appellate court orders a hearing. Even then, they will not testify absent an
28 order from the court.
29 6. Mr. Maybrown's review of the file is standard for an attorney expert in personal
30 restraint cases.
31 7. Mr. Pitt has decades of experience as a police officer with Scotland Yard. He has
32 investigated hundreds of homicides. There is little difference in homicide
investigation between Great Britain and the United States. Indeed, the deputy
prosecutor who responded to this personal restrain petition previously has made this
argument in the Pierce County Superior Court in an effort to keep Mr. Pitt from
testifying and his argument failed.

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8. Mr. Pitt has investigated numerous homicide cases and other serious cases as an investigator in this country, and in this county. The following cases are a small sampling of the cases in which Mr. Pitt has been the sole defense investigator. He worked as the defense investigator in *State v. Anthony Ralls*, Pierce County Superior Court No. 13-1-01703-4 [first degree murder]; *State v. Ervin Banks*, Pierce County Superior Court 13-1-00732-2 [attempted first degree murder]; *State v. Tyree Jefferson*, Pierce County Superior Court 13-1-02796-0 [attempted first degree murder]; *Dorcus Allen*, Pierce County Superior Court 10-1-00938-0, aggravated murder in the first degree.
 9. As defense counsel in hundreds of cases, I understand that my obligation includes reviewing all of the discovery with my clients. I do this because I want to know what, if anything, my clients know about the information in the discovery.
 10. I also discuss with them the various decisions that must be made during the course of trial. Four decisions belong to the defendant alone regardless of any advice I give: [1] to plead guilty or not guilty at arraignment; [2] to proceed to trial or enter a plea; [3] if a trial, to have a bench trial or a jury trial; [4] if convicted, to allocate or not. Although trial strategic decisions ultimately rest with counsel, I always discuss them with the client.
 11. Petitioner provided the emails he received from trial counsel. I requested and emails from trial counsel. I have no reason to believe that trial counsel did not provide their complete file to me.

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The State relies on cases on direct appeal for the proposition that the party seeking review has the burden to perfect the record. See State's response to personal restraint petition, page 15.

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As noted in Petitioner's opening personal restraint petition, petitioner requested a complete copy of his file and received the emails. At least one of the emails was redacted. PRP Appendix K. There is nothing in the file that is a follow-up to this email.

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The State conjectures that other emails exist, that petitioner could have obtained these theoretical emails, etc. Of course, where petitioner asked trial counsel for his entire file, petitioner must assume that trial counsel provided the entire file.

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12. It is the best practice of criminal defense attorneys to meet with their clients to go over guilty plea forms when there is no time constraint. It is also good practice to take another individual as a witness when the forms are completed. I have the client read the form to me line by line, paragraph by paragraph. We then discuss it and I explain what the section means. Nothing is crossed out or initialed except in the client's presence. I also take along the Washington State Adult Sentencing Guidelines Manual, a copy of the prosecutor's written recommendation, and the amended information, if there is one. In my experience it takes about 2 hours to go through a plea form in a "simple" felony case such as an assault 2. The entry of a

1 guilty plea is a significant event. I go over the plea forms at least a day in advance
2 of the plea and leave a copy of the form with my client. I then meet with my client
3 prior to the entry of the plea to address any questions that may have arisen.

4 13. The plea paperwork for the first degree murder charge was defective and cannot be
5 cured. Mr. Musga therefore is entitled to withdraw his plea. Petitioner failed to
6 receive proper notice that an exceptional sentence would be sought in this case. As
7 argued herein, the parties and the court failed to advise Mr. Musga that paragraph
8 6[h][iv] applied. This option was not checked. Thus there was no notice to Mr.
9 Musga that the procedure set forth therein would apply in his case.

10 The State cannot cure the defects in the plea paperwork by asking this court to ignore
11 advisements in the plea paperwork that were not properly given to Mr. Musga and that are
12 detrimental to the State.

13 Further, in the Statement of Defendant on Plea of Guilty to Non-Sex Offense [First
14 Degree Murder], the prosecutor failed to provide adequate notice:

15 Paragraph 6(g): The prosecuting attorney will make the following
16 recommendation to the jury: Open recommendation – State seeking exceptional. The State has
17 checked the box by the following: “The prosecutor will recommend as stated in the plea
18 agreement, which is incorporated by reference.”

19 *There is no plea agreement incorporated by reference attached to this document.*

20 14. I do not conduct investigations in my own criminal cases. Instead I rely on
21 licensed investigators to do so. Not only do they bring a specialized set of skills to this area but
22 also they are able to testify for impeachment purposes [and other reasons as well] should a
23 witness change their testimony at trial.

24 FURTHER YOUR AFFIANT SAYETH NAUGHT.

25 SIGNED this 30th day of July, 2015 at Tacoma, WA.

26
27 
28 BARBARA COREY, WSBA#11778

APPENDIX B

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

JAKE JOSEPH MUSGA.

Petitioner.

vs

STATE OF WASHINGTON.

Respondent.

NO. 46987-1-II

COURT OF APPEALS DIVISION II

DECLARATION OF JAKE JOSEPH
MUSGA

1. I am over the age of 18 and competent to make this declaration.
2. I am the petitioner in this personal restraint petition.
3. Although I was required to enter a factual plea to take advantage of this plea offer to an unknown sentence, I wanted to discuss at sentencing the role of Laura Colley, CC's mother. She was present for much of the night on March 29, 2013. She repeatedly struck and injured CC, gave him alcohol "to help him sleep" and committed other acts on him.
4. I took no action to stop her, consistent with my actions in the past.
5. I loved Laura more than I had ever loved anyone. Or so I thought. She was my first serious girlfriend.

- 1 6. When I told my attorneys what I wanted to say to the psychologist, the
2 presentence report writer, and the judge at sentencing, they told me not to say
3 anything except to take "full responsibility" for CC's death. They told me that
4 anything else would result in a very high sentence and would make the judge
5 think I was ducking responsibility.
- 6 7. Because of this, I was denied the opportunity to tell the truth.
- 7 8. I absolutely should have stopped Laura.
- 8 9. When I went over the plea paperwork with my attorneys, my attorneys already
9 had put check marks by paragraphs that they said applied to me. This is very
10 clear from looking at the plea form in its entirety. When we went through the
11 plea form, my attorneys checked the sections that applied to me and did not
12 read the sections that were not checked. Rather my attorneys just told me that
13 those sections did not apply to me.
- 14 10. Between the date we decided to enter guilty pleas and the date of entry of the
15 pleas, my attorneys spent one hour, 7 minutes with me [minus time to get to
16 my unit in the jail and back out again]. This is hardly time to go over two
17 lengthy plea forms in detail.
- 18 11. I see now that I did sign a notice of collateral attack at the time of sentencing.
19 This document also discussed appeal rights. I signed a lot of paper at
20 sentencing, including an order for HIV testing, order for DNA testing,
21 stipulation to prior record, order for hearing, judgment and sentence.
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1 Except for the order for the DNA testing and a discussion of sex offender
2 registration, none of these other orders were discussed on the record. RP
3 11/21/13 56-58. Again, I did not know about my appellate rights because my
4 attorneys never discussed them with me. The statements on guilty plea informed
5 me that by pleading guilty I would be waving "the right to appeal a finding of guilty
6 after a trial as well as other prior motions such as time for trial challenges and
7 suppression issues." [Statement on Plea of Guilty, Section 5[f]].
8

9 12. I entered guilty pleas only because my attorneys told me that I would be getting
10 a standard range sentence on the murder charge. They said that the box
11 6[h][iv] was not checked because it did not apply and that was the only way the
12 court should impose an exceptional sentence.

13 13. The prosecutors had threatened to change my charge to aggravated first degree
14 murder. The possible sentences there were life without parole or death. I knew
15 that my attorneys had not done anything on my case - they had talked to any
16 witnesses, had not received CC's medical records, CPS records, Laura's
17 adoption application where she talked about why she wanted to get rid of CC,
18 etc. I knew that I did not have a chance.

19
20 14. I absolutely did not want to plead guilty. My attorneys told me over and over
21 that I needed to take the deal or I would be worse off. I was just worn down.

22 15. I did not ever want to plead guilty. I did not get the chance to say what I wanted
23 to say at my allocution.
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16. I had two attorneys who did not tell me what the State's evidence was, what my chances were at trial, what the strengths and weaknesses of our case would be, what trial strategies might be.

17. I always told them I did not want to plead guilty.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. I FURTHER DECLARE THAT I HAVE EXAMINED THE PERSONAL RESTRAINT PETITION FILED IN CONJUNCTION WITH MY DECLARATION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT IS TRUE AND CORRECT. SIGNED AT WALLA WALLA, WASHINGTON. THIS 30TH DAY OF JULY, 2015.


JAKE JOSEPH MUSGA
7/30/15

APPENDIX C



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BRUISES -TYPES, CAUSES, FACTORS, COLOR CHANGES AND SIGNIFICANCE

in Forensic Medicine and Toxicology

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Extravasation of blood into the tissues due to rupture of capillaries, venules and small arterioles usually as a result of trauma, is called a bruise.

Types of Bruises

Depending on the location, bruises are classified into

1. Subcutaneous bruises
2. Intradermal bruises
3. Deep bruises or contusions

Causes

1. Blunt trauma is the common cause of bruising, e.g. with stick, stone, stick or fist.
2. Pathological bruising may also occur due to trivial trauma, as in hemophilia and other bleeding disorders.

Bruises often co-exist with abrasions and lacerations. The degree of violence required to produce bruise varies from firm gripping to heavy blows, depending on many other factors

Factors Affecting Bruising

1. Tissue type

Loose connective tissue type sites e.g. eye, face, genitalia, show more bruising. Bruises are also more marked in sites overlying bones, but are rarely seen on the scalp, palms or soles

2. Severity of Trauma

More severe is the trauma, more bruising occurs

3. Age

Infants and elderly bruise easily. Infants have loose and delicate skin while elderly have lost elasticity of skin and blood vessels

4. Sex

Women bruise more easily than men

5. Skin color

Fair skinned persons have more obvious bruises

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- Ophthalmology
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- Random Stuff

6. Diseases

Blood dyscrasias, hypertension patients bruise more easily.

7. Gravity Shifting

Fascial planes more prevent blood from torn vessels to reach the surface, thus bruise appears in remote areas. E.g.

- a person having fracture of upper end of humerus may show bruising in elbow
- a person hit on forehead may show bruising over eyes (Spectate nematoma, black eye)
- fall on the vertex -bruise may be behind the ear (Battle's sign)

Aging of Bruise/Color Changes

These are due to degradation products of blood

Color	Approximate Time	Cause
Red	Fresh	Haemoglobin
Blue	24 hours	Extrapolated haemoglobin
Pluish black	2-4 days	Haemosiderin
Greenish	5-7 days	Biliverdin
Yellow	7-10 days	Xanthin
Disappears	2-4 weeks	

Exception is subconjunctival hemorrhage (or bruise, black eye) which follows the following sequence

Red → Yellow → Disappears

Yellow color or yellow tinge in a bruise does not appear before 18 hours. In regions of dense fatty tissue e.g. back, bruise does not appear quickly and is also slow to disappear

Characteristics of Bruise

- Bruises may not always show at the original impact site due to gravity shifting
- Size of the bruise may not necessarily commensurate with the severity of trauma
- Deep bruises may take 1-2 days to become visible externally, therefore re-examination after 1-2 days is recommended
- Deep bruises may never show up externally (e.g. in vehicular accidents). Deep incisions at autopsy are necessary to demonstrate them.

Forensic Significance

1. Nature of trauma i.e. blunt
2. Indicator of antemortem nature
3. Site of trauma (Gravity shifting must be kept in mind)
4. Degree of violence
5. Identity of weapon
6. Time of injury
7. Purpose of injury
8. Whether homicidal, suicidal or accidental

Conditions Simulating a Bruise

1. In dead -hypostasis
2. In living -irritant skin lesions

Differentiating Bruise from Hypostasis

Hypostasis

Due to engorged vessels extending into dependent epidermal vessels

Situation is on dependent parts only

Bruise

Due to ruptured vessels, which may or may not be located deep

Can be treated early, heal

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Human Arterial System

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Has clearly defined margins which are horizontal

Margins differ may be present the same as any area

There is no swelling and no abrasions

Flattened and flat base may be present

If a cut is made, blood oozes out which can be washed out easily

In a cut by needle blood oozes out which can be easily washed easily

No inflammatory evidence on microscopic examination

Always evidence of inflammation

Uniform color

It may be variegated in color

Blood elements are found within blood vessels

Blood vessels are found in the center of the lesion

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