

NO. 49417-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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IN RE THE PERSONAL RESTRAINT

OF

PATRICK McALLISTER,

Petitioner

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REPLY BRIEF OF PETITIONER

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**A. INTRODUCTION**

Petitioner McAllister submits the following arguments and authorities in reply to the State’s Response to his Personal Restraint Petition (“PRP”). In all other respects, Mr. McAllister relies upon evidence, arguments, and authorities in his PRP.

Mr. McAllister’s PRP should be granted because, first, Mr. McAllister was denied effective assistance of counsel to the extent that absence of counsel may have been less prejudicial.

Second, the State’s misconduct resulted in a tainted jury and a verdict that inaccurately reflected the evidence

**B. ARGUMENT**

**1. The Court Should Strike Attachment A to the Response brief and all references to Petitioner’s Labor and Industries (L&I) claim for failure to comply with RAP 16.9**

The State’s response to a PRP must follow RAP 16.9, which requires the State to answer the allegations in the petition and state the authority for the restraint of the petitioner by the respondent. RAP 16.9(a)

In addition to the Judgment and Sentence, presumably filed as authority for the its restraint of Mr. McAllister, the State filed a pre-sentencing report which demonstrating, without appropriate background, prior allegations against Mr. McAllister. This evidence was specifically

excluded from the trial pursuant to a motion in limine that Petitioner does not challenge. *Appendix F to PRP* at 32:7-15.

The pre-sentence report is unnecessarily filed. It does not establish authority for restraint. It is self-serving, irrelevant, and does not support any disputed statements of fact. It is a blatant attempt to improperly sway the Court. It is not competent evidence and should be stricken

The State also makes repeated references to an L&I claim that found Mr. McAllister disabled, alluding to allegations of malingering during the investigation.<sup>1</sup> Dr. Richard Thorson, who recommended Mr. McAllister be found disabled, dismissed these allegations. *PRP Appendix X*. The investigation was not part of the trial; Mr. McAllister's disability status was unchallenged. The claim is irrelevant, and should be stricken.<sup>2</sup>

**2. The Court should consider conceded unchallenged facts**

A PRP response must comply with RAP 16.9(a). The respondent must "identify in the response all material disputed questions of fact."

The Court rules specifically require the respondent to identify material disputed questions of fact. The State, with minimal exceptions, has failed to do this. The evidence ignored by the State cannot be

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<sup>1</sup> This evidence includes a purported surveillance tape that has never been provided to the defense, was not viewed by the jury, and which it is unlikely the State has ever seen.

<sup>2</sup> After viewing the tapes and all other evidence in this case, the state L&I examiner, Dr. Thorson, recommended Mr. McAllister's disability status.

encapsulated into a reply brief and still leave room to reply to what the State did address. Facts ignored by the State are summarized in Appendix A, attached hereto. Undisputed facts should be considered conceded as true by the Respondent.

3. **Mr. McAllister was denied his Sixth Amendment Right to Effective Assistance of Counsel and was Prejudiced Thereby**

i **Failure to Investigate**

The State claims the investigation in this case was adequate, but then cherry-picks just three of the numerous investigative failures highlighted in Petitioner's opening brief, encouraging the Court to examine each in a vacuum by claiming that each individually did not prejudice Mr. McAllister. The State claims counsel's failure to visit the scene, failure to obtain photographs of the United States Embassy in Manila, and failure to have Ms. Lorega's diary translated were each explainable by trial strategy and were not ineffective assistance.

In so limiting its brief, the State concedes the remaining investigative failures in the PRP, including counsel's failure to investigate whether the injuries with which Ms. Lorega presented months after the alleged assault could have been caused by Mr. McAllister, and counsel's failure to review immigration law to ensure favorable testimony from immigration attorney Elizabeth Li. *PRP Appendix J, Exhibits 10 & 11.*

When viewed collectively, rather than individually, these three instances cited by the State, combined with innumerable other instances of neglect and mismanagement, paint a clear picture of the ineffective assistance rendered by counsel.

The State argues that though counsel did not have pictures of the bathtub where Ms. Lorega was allegedly raped, counsel still brought out evidence that Mr. McAllister walked with a limp, and thus properly presented the issue of his disability to the jury. The presence of a limp does not render a man capable of kicking or lowering himself into a rail less bathtub. The State ignores that a photograph of the bathtub, which was not equipped with rails, combined with Doctor Natch's testimony regarding Mr. McAllister's disability, would have clearly demonstrated the impossibility of the alleged bathtub rape. Demonstrating the impossibility of this count would likewise have called into question her veracity as to the other counts, another factor the State ignores.

Photographic evidence that Ms. Lorega was lying about the layout of the United States Embassy may appear tangential but it was yet another missed opportunity to demonstrate Ms. Lorega's ability to fabricate elaborate tales out of whole cloth. The story she told during trial about a

non-existent machine in the Embassy lobby that held her personal effects was just one of the inventions created to support her other lies.<sup>3</sup>

The State also speculates that perhaps trial counsel did not want this facet of the trial to distract from his overall trial strategy. If counsel **had** a discernible trial strategy, the State's point may be well taken.

The State goes on to argue that the information in Ms. Lorega's diary was irrelevant, and that counsel refused to use it for strategic reasons because it may have made her appear more sympathetic, and that any sexual history in the diary would have been inadmissible under the rape shield statute.<sup>4</sup> Leaving aside for the moment that even under the rape shield statute Ms. Lorega could have been impeached by the diary's contents, the State refuses to recognize the real issue: not the content of the diary, but the language in which it was written.

Ms. Lorega kept this personal journal in Tagalog, a language she claimed she did not speak well enough to use a Tagalog interpreter for interviews. The State allowed Ms. Lorega to lean on this crutch to explain the constant changes in her allegations against Mr. McAllister. *PRP Appendix F* at 280:24-281:2. In truth, Ms. Lorega spoke Tagalog fluently

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<sup>3</sup> Ms. Lorega testified to the presence of a fantastical machine in the Embassy lobby that held personal effects, in an attempt to discredit a witness who claimed to have spoken to her Filipino boyfriend while she visited the Embassy. *PRP Appendix F* at 605:21-606:5.

<sup>4</sup> RCW 9A.44.020(3).

from childhood, so the different stories told to the Tagalog and Waray-Waray interpreters had nothing to do with language barriers. *PRP Appendix F* at 367:11-12. The admission of the translated diary into evidence would have exposed another chink in Ms. Lorega's armor of lies.

Finally, the State addressed trial counsel's failure to investigate immigration consequences for Ms. Lorega in the absence of marriage to Mr. McAllister. Defense counsel did elicit testimony from immigration attorney Elizabeth Li that suggested that Ms. Lorega must either marry or obtain a U visa to stay in the country. *PRP Appendix F* at 480:14-481:10. However, because he failed to research immigration law, counsel could not ask crucial follow up questions to show the jury that other means of immigration, such as sponsorship by a family member, can take decades and is not guaranteed. The State seized upon this error in closing, suggesting that Ms. Lorega's sister could have sponsored her – a seemingly viable option in the absence of evidence as to its difficulties. *Id.* at 688:3-8. This bolstered the State's argument that Ms. Lorega was testifying to do the right thing, not to stay in the country. *Id.* Despite this, the prosecutor advocated for a visa for Ms. Lorega, writing to support her in obtaining a U Visa to stay in the country to facilitate the prosecution – another letter not provided until after trial. *PRP Appendix M, exhibit i*

The State failed to address any of counsel's other failures to investigate, thus conceding the remaining claims. Significantly, the State ignored a letter written by Ms. Lorega to her "husband." *Defense Exhibit 7*. At trial, Ms. Lorega admitted the letter was not written to Mr. McAllister. *PRP Appendix F* at 361:1-8. Counsel again failed to follow up, asking not one question about this apparent serious relationship, and allowing her to explain her letter as fantasy on re-direct. *Id.* at 366:10-15.

The State also ignores counsel's failure to visit the crime scene as a whole; rendering counsel unable to impeach Ms. Lorega's claims that she was isolated at Mr. McAllister's house. *PRP Appendix F* at 323:6-11, 647:11-15. The State did not address counsel's failure to obtain the medical examination produced concurrent with Ms. Lorega's initial allegations, and failure to review medical records demonstrating Mr. McAllister's disability, thus conceding that these also constituted ineffective assistance. These actions, combined with those the State has highlighted in its brief, and those contained in the attached Appendix A, together paint a picture of counsel that was negligent, if not reckless, in his failure to investigate this case prior to trial.

#### ii Failure to Interview Witnesses

Again, the State cherry picks a few discrete issues, reviews them in a vacuum, and claims they do not rise to the level of ineffective assistance.

The State derisively alleges that testimony by Mr. McAllister's mother and aunt would have been useless, despite knowing that both women spent a great deal of time with the couple. *PRP Appendix O & P*. The State further claims that any testimony regarding Mr. McAllister's disability, other than his own, would have been cumulative. The State cannot be so naïve to think this is true, particularly when the State in the next breath again improperly raises L&I allegations of malingering. These were alluded to in Mr. Perkins' testimony and would have been contradicted by properly prepared witnesses familiar with Mr. McAllister's medical history, including Arthur Mina. *Appendix A. PRP Appendices W & X*. These represent just a few of the instances counsel refused to properly interview or subpoena for trial witnesses to corroborate Mr. McAllister's testimony and contradict that of the State's witnesses.

The State fails to address, and thus concedes, trial counsel's negligence in witness preparation, which consisted of nothing other than a ten-minute group meeting moments before testimony was given was indefensible. *PRP Appendices G, Q-T*. Instead, by cherry picking the few things that counsel *did* achieve, the State effectively played a few good defense lines while ignoring the blooper reel. The defense could not cut testimony so neatly at trial, though; the jury saw it all. Mr. McAllister's witnesses appeared disorganized, ill prepared (one could not even

remember Ms. Lorega's name *PRP Appendix F* at 402:10) and their stories so disparate as to draw remarks from the State in closing. *Id.* at 661:3-12.

The State's confusion as to the significance of Mr. McAllister's medical appointment dates is disingenuous. see *PRP Appendix G*. These are evidence of Mr. McAllister's whereabouts on several dates on which Ms. Lorega claimed she was assaulted or raped. Further, as none of the doctors are close to Brinnon, the records demonstrate the many hours that Ms. Lorega was alone without restriction.

Finally, the State appears to think irrelevant the fact that Ms. Lorega, who claimed in an interview with defense counsel that she was angry at and frightened of men due to her relationship with Mr. McAllister, already had a new boyfriend within months of leaving Mr. McAllister. *PRP Appendix J – K*. Trial Counsel failed to ask a single question of Ms. Lorega, in interviews or trial, about this apparent disparity. *Id.* This not only disproves Ms. Lorega's claims of trauma, but casts doubt on the origin of any bruising that Ms. Lorega may have shown when she was examined months after her supposed ordeal in Mr. McAllister's house. The evidence is plainly of utmost importance, and the State's disingenuous failure to comprehend this is astounding.

### iii Witness Intimidation

The State claims that the evidence, both that presented at trial and that which trial counsel failed to obtain, of the blatant attempt by one of Ms. Lorega's relatives to intimidate one of the defense witnesses in this case was irrelevant and inadmissible. *PRP Appendix G, V*. Therefore, the State concludes, counsel's failure to present this issue to the jury was not ineffective assistance. The State ignores the utter failure by trial counsel to investigate this matter or obtain documents that would have verified the claim of witness tampering, and refuses to acknowledge the significance of this evidence. The rough-up of Mr. Sabiniano implies that Ms. Lorega and her family were using Mr. McAllister in an immigration scam.

Chief among the evidence not obtained or used by defense counsel was a police report filed by Mr. Sabiniano that recorded both the threat and the identity of Ms. Lorega's relative, who made the threat. *PRP Appendix G*. Defense counsel was ineffective in failing to gather sufficient evidence for a proper offer of proof that would have brought this incident before the jury.

iv Failure to pursue the most viable defense

The State argues that trial counsel was pursuing a single defense to the relative exclusion of others, and this explains the exclusion of medical evidence establishing Mr. McAllister's disability. There was ample evidence of Mr. McAllister's medical condition to lead to the conclusion

that Mr. McAllister was physically incapable of assaulting or raping Ms. Lorega in the manner she claimed. *PRP Appendix U, W*. Yet, counsel did not call Dr. Nacht – or any other expert – to testify as to Mr. McAllister’s disability. As argued in the PRP, Mr. McAllister’s physician would have testified on his behalf. Defense counsel’s failure to call medical experts was used by the prosecution in closing to imply Mr. McAllister’s disability may be feigned. *Appendix A; PRP Appendix F* at 689:23-690:6. There is no reasonable explanation for trial counsel to ignore such critical evidence that established a sound defense

The State then cites *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007), quoting with approval the following language:

Defense counsel must, “at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.” This includes *investigating all reasonable lines of defense*, especially “the defendant’s most important defense.” Counsel’s “failure to consider alternate defenses constitutes deficient performance when the attorney neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.”

*Elmore*, 162 Wn.2d at 253. [Emphasis supplied.]

The State claims this supports its hypothesis that defense counsel’s decision not to pursue a case theory that Mr. McAllister was incapable of committing the offenses charged and was being preyed upon by a woman conducting an immigration scam was a reasonable tactical decision taken

after reasonable investigation in lieu of pursuing other trial strategy, and that this evidence was properly ignored. Again, the State's arguments might have credence if a review of the record led to a discernible trial strategy. No reasonable strategy or theory can justify the numerous tactical and evidentiary errors trial counsel committed in this case.

v. Failure to Hire Experts

The State appears to excuse this failure, just as it excuses others, by pointing to counsel's covert trial strategy and alleging an expert witness would have sidetracked it. It appears the State is arguing that Mr. McAllister's disability, and hence his inability to commit the crimes charged, should not have been centrally placed during the trial. The State's failure to recognize what would certainly have been a winning strategy is almost as inexplicable as trial counsel's refusal to do so.

Perhaps the State fails to comprehend the scope of Mr. McAllister's disability because it, like defense counsel, failed to review the opinion of Dr. Jefferey Nacht that Mr. McAllister could not have kicked Ms. Lorega as she claimed. *PRP Appendix U*. Dr. Nacht was never contacted by Mr. McAllister's attorney regarding this case, rendering it impossible for trial counsel to know the content of his testimony. *Id.* It is then ludicrous for the State to claim counsel's failure to call Dr. Nacht was a tactical decision.

Counsel's failures here are comparable to trial counsel's deficient performance in *State v. Fedoruk*, 184 Wn. App. 866, 339 P.3d 233 (2014). There, Division II found that there was extensive evidence of mental illness, all of which had been available to the defense from the commencement of the case, making the decision not to have Mr. Fedoruk evaluated until the day before jury selection one that "fell below an objective standard of reasonableness." *Fedoruk*, 184 Wn.App. at 882. When weighed against the amount of circumstantial evidence the State had against Mr. Fedoruk, the Court observed that "the failure to obtain an independent expert evaluation appears even less reasonable." *Id.* Like the State in this case, the State in *Fedoruk* cited the *Elmore* decision, in which the Court found reasonable defense counsel's decision not to present mitigating mental health evidence at sentencing. *Elmore*, 162 Wn.2d at 245. However, the *Fedoruk* Court distinguished *Elmore*, observing that counsel in that case "had retained an expert prior to trial and fully investigated the defendant's mental health situation." *Id.*

As in *Fedoruk*, trial counsel failed to order the most basic medical evaluation, or even speak with his client's treating physician. No expert medical opinion was sought, let alone dismissed as unhelpful. Trial counsel simply discarded the notion Mr. McAllister's disability would prove exculpatory. Counsel's decisions fall well below an objective

standard of reasonableness, particularly considering that counsel's determination was in error. *Appendix A, PRP Appendix U, W.*

As with the testimony of Dr. Nacht, the State has utterly failed to address the Declaration of Dr. Philip Welch, who opined that the vaginal bruising and lesions seen during Ms. Lorega's June 16, 2010 exam were not caused by Mr. McAllister, whom she had not seen since April 26, 2010. *PRP Appendix F* at 311:26-312:1, *PRP Appendix Y*. Dr. Welch concluded that Ms. Lorega's STD was likely contracted prior to her arrival in the U.S. *PRP Appendix Y*

The State's experts testified that bruising that Ms. Lorega displayed months after the alleged assaults could not have occurred through consensual sex and was consistent with sexual abuse. *PRP Appendix F* at 373:6-18, 376:10-15. Dr. Welch's testimony would have discredited this claim. The State's was the only expert to claim Ms. Lorega had been raped, testimony that likely tipped the scales in the State's favor. Defense counsel's refusal to hire an expert in rebuttal was unreasonable and incomprehensible.

Ms. Lorega's chastity was raised multiple times by the State in its case in chief. The presence of a pre-existing STD, when Mr. McAllister had none, could have been used to impeach Ms. Lorega. *PRP Appendix F* at 313:22-24. Mr. McAllister's clean bill of sexual health further raises

questions about Ms. Lorega's truthfulness. Ms. Lorega's claimed chastity was a topic ripe for impeachment with reasonable trial preparation. The state's peculiar allegation that there was some possible logic or strategy behind counsel's failure to retain either a disability expert or a sexual assault expert is specious and should be disregarded.

vi. Ineffective Cross Examination

With the following quote by Lord Brougham Francis Wellman begins "The Art of Cross-Examination:

"The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."

Francis L. Wellman, *The Art of Cross-Examination*, page 21

Touchstone Book, Fourth Edition, Revised and Enlarged.

What Lord Brougham believed and Wellman demonstrated is as true now as it was then. Petitioner understands that trials are rarely like those demonstrated on television, and did not hope for a Perry Mason moment, but for an effective cross examination that gently, but firmly, chipped away at the State's witnesses' stories, particularly Ms. Lorega's vulnerable victim façade, for that is what it was. With proper cross examination, any sympathy the jury might have initially felt for Ms. Lorega would have slowly deteriorated, never to be resurrected.

Instead, trial counsel chose to avoid confrontation, poke at a few inconstancies and sit down. His cross-examination of the State's star witness was pathetic. It was aimless and showed no purpose. Trial counsel overlooked the vast majority of inconsistencies in Ms. Lorega's story. For example, with proper preparation, counsel would have known that Mr. McAllister could never have kicked Ms. Lorega in the way she described. *Appendix A*. Counsel then could have pressed her credibility on this issue, simultaneously discrediting her in front of the jury. Memory and language issues were likewise part of Ms. Lorega's façade and could also have been stripped away with skillful questioning. Counsel did garner an admission (in rebuttal cross-examination) that Ms. Lorega spoke Tagalog fluently, but failed to ask a single follow up question, including questioning her inability understand the Tagalog interpreters she had been provided for interviews. *PRP Appendix F* at 367:11-13. It appears that trial counsel could not be bothered to expend the time and effort to question Ms. Lorega about each inconsistent tale.

Despite the State's claimed knowledge of the art of cross-examination, witnessed by the condescending tutorial in its brief, the State urges that trial counsel be granted deference and presumed to have a trial strategy where none can be found in the record.

vii Failure to Follow Client's Wishes

The State takes the entire section above titled in the PRP and distills it to a claim that Mr. McAllister was not deprived of his right to allocution if he was not prevented from testifying. Denial of the right to allocution constitutes error. *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). The object of the common law right of allocution “was to afford the prisoner an opportunity to move in arrest of judgment pleading specific legal defenses available to him.” Jonathan Scofield Marshall, Comment, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?* 62 TUL. L. REV. 207, 210 (1987).

The State’s claim oversimplifies the issue. The issue is not that Mr. McAllister was prevented from testifying. It is that Mr. McAllister was threatened and bullied by defense counsel into testifying to defense counsel’s specifications and against Mr. McAllister’s wishes.

Trial counsel then set Mr. McAllister up for failure, first telling him to produce a calendar of his medical appointments to prove the dates he was away from home, and then, without warning, prohibiting him from using this in his testimony, too late for Mr. McAllister to memorize the contents. *Appendix A, PRP Appendix G.*

Counsel disregarded his client’s wishes and his theory of the case, in complete violation of the rules of professional conduct mandating that

counsel do just the opposite. *Appendix A*. His failure is astounding given the magnitude of evidence that supported his client's theory of defense.

3. **The State committed prosecutorial misconduct that prejudiced the jury pool and rendered a fair trial impossible.**

i *Brady* Violations

The State argues that it committed no *Brady*<sup>5</sup> violations in this case, yet concedes all but two of petitioner's claims. The State first alleges that it never had an Embassy letter advising Ms. Lorega that no cell phones were allowed in the embassy, and arguing this letter was in any case irrelevant, despite the fact it would have demonstrated yet another of Ms. Lorega's lies, as argued *supra*.

Included in the missing evidence that the State refuses to acknowledge is Exhibit 3, an email sent from the prosecutor's office to defense counsel that was clearly missing a third page. This page appeared only after the trial. The email alleges that Mr. McAllister raped Ms. Lorega once on April 9 and kicked her twice on April 17. However, Mr. McAllister was convicted of nine crimes that were alleged to have occurred after April 9, seven for rape in the third degree, and two for assault in the fourth degree. This statement would have served as impeachment evidence to Ms. Lorega's calendar and testimony for each of

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<sup>5</sup> *Brady v. U.S.*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963)

those convictions. The third page of the statement, which was faxed to Detective Garrett by Mr. Perkins on May 10, 2010, is lacking a Bates Stamp. *See PRP Appendix M at Exhibit 6.* An August 18, 2011 note from the State asking for the third page of the statement demonstrates the prosecutor's awareness that the statement was missing. *See Appendix A, Appendix K page 282.*

Similarly, exhibits 4 and 5 to Appendix M are incident reports that are lacking Bates stamps, showing that they were never made part of discovery given to the defense. Both contradict some of the State's proffered testimony at trial. *Appendix F at 539:3-7.* In the same vein, exhibit 8 to Appendix M is a detailed interview given to the Department of Homeland Security by Mr. Perkins that shows his profound involvement in the prosecution of this case, something he downplayed at trial. *Appendix F at 249.* Another email, not written by Ms. Lorega but adopted as her own, claims she is angry at and frightened of all men, yet Ms. Lorega already had a new boyfriend at that point. *PRP Appendix J.* Both emails were yet another tool that could have been used to impeach Ms. Lorega, and as such the State was required to disclose them. CrR 4.7(a)(3). For the convenience of the Court, Appendix M to the PRP is reproduced as Appendix C to this response.

The State completely ignores, and must therefore concede, the validity of the remaining allegations in the PRP, including over thirty (30) emails from Mr. Perkins to the State that were included with documents only turned over in response to a public records request after the conviction. PRP Appendices J, K, and M.

Appendix M alone lists over a dozen crucial documents that the State concedes it failed to provide to trial counsel. All would have been exculpatory or impeachment evidence. For instance, Exhibit 1 to Appendix M is a letter from the State to Ms. Lorega informing her that they cannot prosecute Mr. McAllister unless she obtains a special visa reserved for domestic violence victims, contrary not only to expert testimony *PRP Appendix F* at 499:17-21, but the State's arguments in closing *PRP Appendix F* at 687:3-8.

Also included are the results of a background check Mr. Perkins purportedly hired done on Mr. McAllister prior to Ms. Lorega's arrival in the United States. Other emails from Mr. Perkins to the State emphasize the depth of Mr. Perkins' involvement in this case and could have been used as impeachment evidence to show the scheme developed by Ms. Lorega, with Mr. Perkins' assistance, to remain in the country. These emails, all from Mr. Perkins, include information about the United States embassy claiming to show Ms. Lorega's virginal status, emails about new

visas for Ms. Lorega, and an email asking the detective in the case to fill out a Visa form for Ms. Lorega. In yet another email Mr. Perkins attempts to secure a Waray-Waray translator for Ms. Lorega in lieu of a Tagalog interpreter, likely to maintain the ruse that Ms. Lorega was not fluent in Tagalog.

The State claims that even if Ms. Lorega's medical records had been in the State's possession, there was nothing to prevent the defense from subpoenaing the records, either from the State or from the hospital. It is the State's duty to turn over exculpatory or impeaching evidence. CrR 4.7(a)(3). It is not the defendant's burden to hunt it down. For instance, it was later learned that the Embassy would not do a vaginal exam, and certainly would not attest to the virginal status of an immigrant. No test results demonstrating Ms. Lorega's claimed virginity were ever produced – and likely never existed. Instead, it appears this information was used first to incite the State into pushing for a prosecution and then to play on the passions of the jury.

In *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009), Division II upheld a trial court's dismissal of a criminal prosecution due to the State's discovery violations. Included was a failure by the State to produce police reports and a victim's statement. *Id.* The Court was unpersuaded by the State's claim that the information was not within its

control, finding it had access to the information and was obligated by discovery rules to provide it. *Id.* at 385-386. The Court observed that the “delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion,” and dismissal was proper. *Id.* at 390.

The State’s failings here are on par with those in *Brooks*. The State failed and refused to disclose voluminous records that not only prevented trial counsel from timely trial preparation, but prevented trial counsel from *effective* trial preparation, as counsel was completely unaware of things occurring behind the scenes that would have cast Ms. Lorega’s tale in a much different light, rendering an acquittal more likely.

Similarly, the United States District Court for the D.C. Circuit, on the motion of the Department of Justice, in 2011 dismissed the conviction then Senator Ted Stevens due to prosecutorial misconduct, notably the “systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and serious damaged the testimony and credibility of the government’s key witness.” *Order In Re Special Proceedings*, No. 09-0198 (EGS), November 21, 2011, attached hereto as Appendix B.

The violations here are similar those in *Stevens*, and the Court should be guided by Judge Sullivan’s outrage that led to the dismissal of Senator Steven’s convictions. Mr. McAllister has been in custody for five

years due to the State's misconduct. Given the State's inability to comprehend its own misconduct and its willful disregard of exculpatory evidence, Mr. McAllister's conviction should be dismissed with prejudice.

ii. Eliciting False Testimony

The State argues that it cannot be accused of eliciting false testimony merely because a witness' story changes. Again, the State oversimplifies this matter and ignores the true issue. While it may be one thing for a witness to forget minor details, such as what she cooked for dinner the night before, it is quite another when a witness claims on one occasion that she had a happy visit with her soon to be fiancé in her home country and on another claim that he raped her during that same visit. *PRP Appendix F* at 345:10-21, *PRP Appendix K* at 55-57. The State chooses the issue regarding who made the 911 call as another example of what it considers a minor misstep, claiming that it should not matter whether Mr. or Mrs. Perkins was the one to call 911. In fact, it was Ms. Lorega who claimed to have made that call, and constructed another elaborate fantasy surrounding it. *PRP Appendix U*.<sup>6</sup> The State clearly did

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<sup>6</sup> In a November 4, 2011 defense interview at 66:3-13, Ms. Lorega related the 911 call: I told-- tell to the policemen-- he asked me like, "What's wrong? Tell me so I know what's wrong with you." I'm like, "I want to leave with my boyfriend because he's so mean. He's not nice. He's abusing me." That's what I told to the policemen.  
Q Okay. And where did you learn those words?

not care to investigate the statements of its witnesses sufficiently to ensure their credibility, and then declined to stop demonstrably false testimony.

Further, the State had seen Mr. McAllister's medical records and knew, or should have known, he was incapable of the crimes committed. The State declines to address this issue. This too should be deemed conceded, and calls into question the ethicality of State's entire prosecution. There can be no more obvious case of misconduct than one in which the State knew charges should not be filed.

iii Arguing facts not in evidence

The State claims to be unable to see how its closing was improper. This is concerning, especially considering that the State has already been admonished by this Court for similar misconduct, In *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012), cited in Petitioner's opening brief, Division II overturned a double homicide conviction after finding that the Jefferson County Prosecutor's closing arguments, made in the first person singular and attributing repugnant and amoral thoughts to the defendant based purely on speculation, were an improper appeal to the passion and prejudice of the jury and likely affected the verdict. *Id.* at 1170-1.

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A For myself. I don't know. Just like miracle that I say that word, because I know how to speak English, but I just -- I don't know. I have some trouble speaking English. I don't know. It's a miracle at the time.

Given the *Pierce* decision, the State's apparent inability to understand its errors during closing in this case is truly mystifying. The petitioner is left wondering if the State was likewise unable to comprehend the remaining intricacies in the PRP. The State's brief does nothing to alleviate these concerns. The State crossed a line in its closing argument, placing the jury in the shoes of Ms. Lorega, alone in the forest, trembling as she awaited Mr. McAllister's return. The argument was prejudicial, and affected the outcome of the trial.

**C. CONCLUSION**

Mr. McAllister filed this PRP after the Court on direct appeal advised it could not consider complaints of ineffective assistance and prosecutorial misconduct, dependent as they were upon facts not in the record, and suggested a PRP was the proper venue. Mr. McAllister's rights were violated by counsel's gross ineptitude, and by the State's misconduct. Absent this, a conviction was unlikely. Justice demands his conviction be dismissed or remanded for retrial.

Respectfully Submitted this 17 Day of January, 2017



John C. Cain, WSBA #16164  
Attorney for Mr. McAllister

## Appendix A

## APPENDIX A

The State in its reply brief failed to address many of the factual statements in Petitioner's PRP.

The facts summarized below represent the most pertinent of those ignored by the State. These facts should be deemed conceded. Exhibits of particular importance to this Reply Brief appear

next to the Appendix number.

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<b>PRP Appendix Number</b>	
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<b>G</b>	
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	Declaration of Patrick McAllister referencing information that was not part of the record and unavailable on direct appeal. This is a detailed account of Petitioner's appeals to counsel to review crucial evidence and obtain critical medical records and interviews regarding Mr. McAllister's disability, and his counsel's refusal to investigate whether he was the victim of an immigration scam.
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**PRP Appendix  
Number**

**J, Ex. 3, 4, 8, 9,  
12**

Declaration of John C. Cain referencing attached documents either unused by trial counsel or unavailable due to the State's discovery violations.

These include emails demonstrating Mr. Perkins involvement in the case.

Of note are Exhibits 3 and 4, appellate counsel's attempts to obtain the results of an examination of Ms. Lorega conducted immediately after she left Mr. McAllister's house that was never disclosed. Exhibit 8 shows that Wendy White did not in fact have sexual assault training. Exhibit 9 demonstrates Ms. Lorega could not take her phone into the embassy, and Exhibit 12, the police report filed by Mr. Sabiniano after he was threatened by Ms. Lorega's relatives about testifying at Mr. McAllister's trial. Counsel never used this letter to lay a foundation for witness tampering evidence.

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**PRP Appendix  
Number**

**K- p. 26, p.43,  
p. 281, p.387**

An accurate copy of discovery as provided by the State, used as the Record on direct appeal. Noted for the absent information that demonstrates the State's failure to disclose certain discovery, including partially disclosed statement by Ms. Lorega. Also included are Ms. Lorega's continually changing statements and interview responses, changes that were not utilized for impeachment by trial counsel. For example, at Bates 26, Ms. Lorega tells a story about how Mr. McAllister offered to let her live with her sister, but that he was driving recklessly at the time, while at Bates 43 she details living with her grandmother while in Manila, a statement never made again. Medical records in this discovery also reveal that while Ms. Lorega was questioned about her sexual history, a physical exam was not performed and there was nothing attesting she was a virgin, a status made much of at trial by the State as a play on the jury's emotions. Finally, at Bates 281 is an email from the State to Detective Garrett complaining of the lack of page three of a three-page note sent by Mr. Perkins. This establishes that the State had, and failed to disclose, this crucial document.

**L**

Investigative report of Joe Holcomb from an interview of Ms. Lorega in the prosecutor's presence. Ms. Lorega was directed to create a timeline of events. The interview was not disclosed prior to trial.

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**PRP Appendix  
Number**

**M – Ex. 3, 7**

Declaration of Lance Hester referencing attached documents that he does not recall having received prior to the trial. Many do not have a Bates stamp. Included at Exhibit 3 is the last page of a three-page statement of Ms. Lorega in which she claims. she was not raped after April 9, 2010. This is in direct contradiction of trial testimony and charging documents, and clearly constitutes a significant *Brady* violation. This packet also includes a report by Detective Garrett detailing an anonymous call claiming that Mr. McAllister had prior convictions, none of which the Detective was able to locate. Mr. Perkins later brought her the results of his attorney's investigations that included some allegations that were not proven.

**N**

Declaration of Manny DeCampo referencing translations of Ms. Lorega's journal, written in Tagalog and English. Ms. Lorega claimed an inability to speak either language from her first contact with Detective Garret, thus allowing her to explain away inconsistent statements in her interviews. The translation should have been used to impeach several statements, including an April 26, 2010 statement to a standby deputy that she had not been physically abused, and an April 28, 2010 statement to Detective Barb Garrett claiming she had unwanted sex five times. As this diary was not translated by trial counsel, but by appellate counsel, this also demonstrates ineffective assistance by trial counsel in failing to pursue this evidence.

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**PRP Appendix  
Number**

- R** Declaration of Arthur Mina, who was prepared to testify that he had facilitated phone calls between Ms. Lorega and Mr. McAllister while she lived in the Philippines, and she spoke Tagalog. Mr. Mina was also prepared to testify as to Mr. McAllister's physical limitations.
- U** November 4, 2011 defense interview of Ms. Lorega. The interview contains inconsistent statements not used in cross-examination, and highlights counsel's failure to thoroughly examine Ms. Lorega. For example, he did not question Ms. Lorega about her new boyfriend or the length of their relationship, which may have predated the June 16, 2010 exam showing vaginal bruising and lesions.
- V** Declaration of Gerardo Sabiniaro providing details regarding the threats made against him should he testify at Mr. McAllister's trial. Mr. Sabiniaro contradicts Ms. Lorega's description of the American Embassy in Manila, demonstrating she fabricated that story, and likely others, to allow her to remain in the United States.

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**PRP Appendix  
Number**

**W**

Declaration Dr. Jeffery Nacht, one of one of Mr. McAllister's physicians. Mr. McAllister was under Dr. Nacht's care during the time Mr. McAllister lived with Ms. Lorega. Dr. Nacht was not interviewed by trial counsel, but would have been able to provide an expert opinion that Mr. McAllister was incapable of kicking Ms. Lorega as she claimed. Dr. Nacht would have testified that the alleged bathtub rape was nearly impossible.

**X**

Declaration of Dr. Thorson who performed an Independent Medical Exam on Mr. McAllister in response to allegations of malingering. The allegations of malingering were determined to be unfounded and the doctor recommended Mr. McAllister be granted disability. The video allegedly showing this malingering referenced in the State's Response has never been provided in Discovery and was not part of the trial in this case.

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**PRP Appendix  
Number**

<b>Y</b>	Declaration of Dr. Phillip Welch, who could have been retained by trial counsel as a sexual assault. This may have resulted in the exclusion of Ms. White's testimony, as she was not a sexual assault expert. Had Ms. White nonetheless testified, Dr. Welch's testimony would have rebutted the allegation that Ms. Lorega's vaginal bruising was caused by the Petitioner, rebutted the implication that he had given her a STD, and negated Ms. Lorega's claim that she was a virgin during the first rape, a fact used to play on the sympathies of the jury.
<b>Bb</b>	CAD Report demonstrating Temur Perkins made the 911 call at issue.
<b>Cc</b>	Defense Interview of Temur Perkins.
<b>Dd</b>	Declaration of Ron Ness, Esq, providing an expert opinion that defense of Mr. McAllister was inadequate and ineffective
<b>Ee</b>	Defense Interview of Rosemarie Perkins, during which she claimed to have no recollection of most of the events she later testified to in trial. This was not used for impeachment purposes
<b>Ff</b>	Declaration of John McKay, who was not called by trial counsel to testify. However, Mr. McKay remained in the courtroom and observed Ms. Lorega's testimony regarding the alleged kicking. Based upon Mr. McKay's knowledge of Mr. McAllister's disability, Mr. McKay is certain Ms. Lorega's testimony was false.

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## Appendix B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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In Re SPECIAL PROCEEDINGS : Misc. No. 09-0198 (EGS)  
:  
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ORDER

In the fall of 2008 in highly-publicized proceedings before this Court, then-U.S. Senator Theodore F. Stevens was indicted, tried and found guilty of making false statements, by failing to disclose gifts he received on his Senate Financial Disclosure Forms, in violation of 18 U.S.C. § 1001(a)(1) and (2). During the course of the five-week jury trial and for several months following the trial, there were serious allegations and confirmed instances of prosecutorial misconduct that called into question the integrity of the criminal proceedings against Senator Stevens. On April 1, 2009, after acknowledging some of the misconduct and specifically admitting two instances in which the prosecution team had failed to produce exculpatory information to the defense in violation of the government's constitutional obligations,<sup>1</sup> the Department of Justice moved to set aside the verdict and dismiss the indictment of Senator Stevens with prejudice.

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<sup>1</sup> See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

On April 7, 2009, after granting the government's motion, and in recognition of (1) the significance of the government's decision to dismiss the indictment and not to seek a retrial; (2) the government's admission that it committed *Brady* violations and made misrepresentations to the Court during the prosecution of Senator Stevens; (3) the prosecutorial misconduct that permeated the proceedings before this Court to a degree and extent that this Court had not seen in twenty-five years on the bench; and (4) the likelihood based on events during and after the trial, including the information revealed by the Department of Justice in support of its motion to vacate the verdict and dismiss the indictment, that the prosecution team may have committed additional constitutional and procedural violations during the *Stevens* prosecution that had yet to be discovered or addressed, the Court appointed Henry F. Schuelke, III to investigate and prosecute such criminal contempt proceedings as may be appropriate against the six Department of Justice attorneys responsible for the prosecution of Senator Stevens. See Order Appointing Henry F. Schuelke, *United States v. Stevens*, No. 08-cr-231 (Apr. 7, 2009).

Mr. Schuelke has informed the Court that he has concluded his investigation, and he has submitted to the Court *in camera* a five-hundred page report detailing the findings of his investigation. In order to discharge his obligations and fully

investigate the prosecutors' conduct during the *Stevens* prosecution, Mr. Schuelke and his esteemed colleague, William B. Shields, reviewed more than 150,000 pages of documents, interviewed numerous witnesses, conducted twelve depositions, and, by necessity, acquired a comprehensive understanding of the government's investigation, charges, pre-trial and trial proceedings not only in the *Stevens* matter, but also in relevant aspects of at least two other federal prosecutions brought by the Department of Justice's Public Integrity Section against Alaskan state officials, including *United States v. Kott*, No. 07-30496, 2011 U.S. App. LEXIS 6058 (9th Cir. Mar. 24, 2011), and *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011). Mr. Schuelke informs the Court that pursuant to this Court's directive, officials at the Department of Justice have cooperated fully with his investigation.

Based on their exhaustive investigation, Mr. Schuelke and Mr. Shields concluded that the investigation and prosecution of Senator Stevens were "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." See Report to the Honorable Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's April 7, 2009 Order ("Mr. Schuelke's Report" or "Report") at 1 (currently on

file under seal and *in camera*). Mr. Schuelke and Mr. Shields found that at least some of the concealment was willful and intentional, and related to many of the issues raised by the defense during the course of the *Stevens* trial. Further, Mr. Schuelke and Mr. Shields found evidence of concealment and serious misconduct that was previously unknown and almost certainly would never have been revealed - at least to the Court and to the public - but for their exhaustive investigation.

Despite his findings of significant, widespread, and at times intentional misconduct, Mr. Schuelke is not recommending any prosecution for criminal contempt.<sup>2</sup> Mr. Schuelke bases his conclusion not to recommend contempt proceedings on the requirement that, in order to prove criminal contempt beyond a reasonable doubt under 18 U.S.C. § 401(3), the contemnor must disobey an order that is sufficiently "clear and unequivocal at the time it is issued." *See, e.g., Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955). Upon review of the docket and proceedings in the *Stevens* case, Mr. Schuelke concludes no such Order existed in this case. Rather, the Court accepted the repeated representations of the subject prosecutors that they

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<sup>2</sup> Mr. Schuelke "offer[s] no opinion as to whether a prosecution for Obstruction of Justice under 18 U.S.C. § 1503 might lie against one or more of the subject attorneys and might meet the standard enunciated in 9-27.220 of the Principles of Federal Prosecution." *See* Mr. Schuelke's Report at 514 n.76 (citing Indictment, *United States v. Convertino, et al.*, No. 2:06-cr-20173 (E.D. Mich. Mar. 29, 2006)).

were familiar with their discovery obligations, were complying with those obligations, and were proceeding in good faith. See, e.g., Transcript of Motions Hearing, P.M., at 14-15, Stevens, No. 08-cr-231 (Sept. 10, 2008) ("THE COURT: I'm not going to write an order that says 'follow the law.' We all know what the law is. The government - I'm convinced that the government in its team of prosecutors is thoroughly familiar with the decisions from our Circuit and from my colleagues on this Court, and that they, in good faith, know that they have an obligation, on an ongoing basis to provide the relevant, appropriate information to defense counsel to be utilized in a useable format as that information becomes known or in the possession of the government, and I accept that.").<sup>3</sup> Because the Court accepted the prosecutors' repeated assertions that they were complying with their obligations and proceeding in good faith, the Court did not issue a "clear and unequivocal" order directing the attorneys to follow the law.

This Court has always recognized the public's interest in these proceedings and has maintained from the outset that the Court intends to make public the results of Mr. Schuelke's

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<sup>3</sup> Mr. Schuelke also notes that "[i]t should go without saying that neither Judge Sullivan, nor any District Judge, should have to order the Government to comply with its constitutional obligations, let alone that he should feel compelled to craft such an order with a view toward a criminal contempt prosecution, anticipating its willful violation." Mr. Schuelke's Report at 513.

investigation. See, e.g., Transcript of Hearing 46:7-11, *Stevens*, (April 7, 2009) (“[T]he events and allegations in this case are too serious and too numerous to be left to an internal investigation that has no outside accountability. This court has an independent obligation to ensure that any misconduct is fully investigated and addressed in an appropriate public forum.”). The public’s interest in the results of this investigation, which reveal failures of supervision and/or misconduct by attorneys in the Department of Justice’s Public Integrity Section in the prosecution of a sitting United States Senator, is as compelling today as it was on April 7, 2009. In fact, as recently as November 8, 2011, Attorney General Eric Holder was questioned by members of the United States Senate during a hearing before the Senate’s Judiciary Committee about the Department of Justice’s investigation into the *Stevens* prosecution, and the Attorney General acknowledged the public’s important interest in these matters. See Sean Cockerham, *Review of Stevens Prosecution Nears Completion, Holder Says*, Anchorage Daily News, Nov. 9, 2011 (“What I have indicated was that I want to share as much of [the Office of Professional Responsibility report] as we possibly can given the very public nature of that matter and the very public decision I made to dismiss the case.”).

While providing the public with the full results of Mr. Schuelke's investigation has been and remains the Court's intent, in view of the Amended Protective Order entered in these proceedings on December 13, 2009, and this Circuit's holding in *In re North*, 16 F.3d 1234 (D.C. Cir. 1994), the Court has determined that Mr. Schuelke's complete report should not be made public at least until the Department of Justice has had the opportunity to review the report. The Court has further determined that it is appropriate to afford the subject attorneys and Senator Stevens's attorneys the opportunity to review the report, under the terms and conditions set forth below. The Court will then consider any objections to making Mr. Schuelke's Report public; any such objections shall be filed in accordance with this Order, as set forth below. Regrettably, and contrary to this Court's commitment to the public's right of access, these interim proceedings may need to be conducted under seal until the Court has considered any objections raised by either the Department of Justice or the subject attorneys. The Court will schedule any further proceedings, sealed or otherwise, at the appropriate time. Accordingly, it is hereby

**ORDERED** that the Department of Justice shall forthwith move to unseal the relevant pleadings in *United States v. Boehm*, Case 04-cr-003 (D. Alaska) and *United States v. Stevens*, and transcripts in *United States v. Kott*, No. 07-cr-056 (D. Alaska)

and *United States v. Kohring*, No. 07-cr-0055 (D. Alaska), or, by no later than December 5, 2011, shall inform this Court why the Department of Justice objects to such unsealing.<sup>4</sup> It is further

**ORDERED** that the Report shall not be disclosed during the pendency of these proceedings except as follows:

1. Mr. Schuelke shall provide five copies of the Report to the Department of Justice, and two copies to each of the subjects of the Report and to Senator Stevens's attorneys.

Initially, the Department will receive unredacted copies of the Report; the copies provided to the subject attorneys and Senator Stevens's attorneys will be redacted to protect the contents of

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<sup>4</sup> The relevant sealed materials are as follows: In *Boehm*, (1) Gov't Mot. in Limine to Limit Cross Examination of B. Tyree, filed July 26, 2004. (Note that this motion was filed publicly as an exhibit to the government's opposition to defendant's motion to dismiss in *Kott*, Sept. 26, 2011.) (2) Gov't Reply in Supp. of Mot. in Limine, filed Aug. 17, 2004. (Note this was filed publicly (with redactions) in *Boehm* on Nov. 4, 2009.) (3) Judge Sedwick's Decision on Mot. in Limine, Order, Sept. 14, 2004. (4) Gov't Opp'n to Def.'s Motion for Recons. of Decision re: Mot. in Limine, Oct. 6, 2004. (Note this was filed publicly (with redactions) in *Boehm* on Nov. 4, 2009.) In *Kott*, (1) Tr. of Sealed Hr.'g, Sept. 13, 2007. In *Kohring*, (1) Tr. of Sealed Hr.'g Oct. 25, 2007. In *Stevens*, (1) Gov't Mot. in Limine to Exclude Inflammatory, Impermissible Cross Examination under Rule 608(b), filed Aug. 14, 2008. (Note this motion was withdrawn during a hearing on Sept. 5, 2008.) (2) Def.'s Opp'n to Gov't Rule 608(b) Motion, filed Aug. 25, 2008. (3) Def.'s Opp'n to Gov't Mot. to Seal, filed Aug. 25, 2008. (4) Gov't Reply in Supp. of Mot. to Seal and Request to Strike Def.'s Opp'n to Mot. in Limine to Exclude Inflammatory, Impermissible Cross, filed Sept. 2, 2008. Note that this Court unsealed all hearings in *Stevens* with the consent of the parties. See Order, Feb. 24, 2009 (Doc. No. 323); see also Hr.'g Tr. 44:16 - 45:10 (Apr. 7, 2009).

the still-sealed materials in *Boehm, Kott, Kohring, and Stevens*. Following the unsealing of some or all of those materials, Mr. Schuelke shall provide unredacted copies of the Report to the subject attorneys and Senator Stevens's attorneys.

2. Disclosure of the Report shall be limited to five individuals at the Department of Justice to be selected by the Department, two for each of the subjects of the Report to be selected by the subject, and two of Senator Stevens's attorneys to be selected by his attorneys. Prior to disclosure of the Report to him or her, each individual who will have access to the Report shall sign a Confidentiality Agreement agreeing, *inter alia*, not to disclose or discuss the Report, or its contents, except as provided in the Confidentiality Agreement. The individuals to whom the Report shall be disclosed shall contact Mr. Schuelke to make arrangements to execute the Confidentiality Agreement and receive the Report. It is further

**ORDERED** that pursuant to the Amended Protective Order, if the Department of Justice believes that any of the Material(s) or sealed pleadings or transcripts identified by Mr. Schuelke in his report should be withheld from the public, the Department of Justice shall file a motion under seal by no later than January 6, 2012, specifically identifying the Material(s) and/or sealed pleadings and/or transcripts it believes should be withheld and the precise legal basis for the proposed withholding (*i.e.*, the

basis for any privilege, whether the material is covered by Federal Rule of Criminal Procedure 6(e), etc.).<sup>5</sup> In considering whether to file such a motion, the Court strongly encourages the Department of Justice to consider the very significant public interest in these proceedings, the fact that much of the information in the Material(s) and pleadings may already be known to the public and/or subject to future disclosure, the fact that the investigations and prosecutions related to these matters are now concluded, and the benefit of promptly bringing these regrettable events to closure, not just for the benefit of the public and the late Senator's family, but for the Department of Justice, as well. It is further

**ORDERED** that any other individual seeking to withhold from the public information contained in Mr. Schuelke's Report shall file a motion under seal, and, if appropriate, any comments or

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<sup>5</sup> The Amended Protective Order simply provides that if "any Materials [provided by the Department of Justice] are to be included in applications or submissions filed with or submitted to the Court, or disclosed during court proceedings, other than under seal, Mr. Schuelke will advise the Department of Justice five business days in advance of such submission or proposed disclosure so that, if deemed necessary, the Department of Justice has the opportunity to present its position on the public disclosure of such Materials to the Court for consideration." Amended Protective Order at 2, *In re Special Proceedings*, No. 09-mc-198, (Dec. 13, 2009). The Court, however, has determined that it is appropriate to afford the Department of Justice the opportunity to review Mr. Schuelke's Report in its entirety, rather than just be notified of Materials relied on in the report, and to give the Department of Justice substantially more time than the five days contemplated in the Amended Protective Order.

factual information regarding the Report, by no later than January 6, 2012, and shall provide the basis and nature of the relief sought. Any such person shall be mindful, however, that (1) the Court has already expressed its intent to make the results of Mr. Schuelke's Report public to the greatest extent possible; (2) in response to previous efforts by the Stevens prosecution team to withhold from the public information related to allegations of prosecutorial misconduct in the Stevens case, the Court has already addressed the significant constitutional protections providing public access to court proceedings under these or similar circumstances, *see, e.g.,* Memorandum Opinion & Order 16-17, Stevens, No. 08-cr-231, (Dec. 19, 2008) at 16-17 ("Under [the *Globe Newspaper*] test, the first amendment protects public access to an aspect of court proceedings if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct." (emphasis added) (quoting *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991))); (3) the identities of the subjects of this investigation have already been disclosed and therefore this situation is not analogous to a grand jury investigation in which the subject of the investigation is not identified to the public and the subject may be prejudiced if her identity is revealed - in fact, under these circumstances, some or all of the subjects may be prejudiced by withholding the results of Mr.

Schuelke's Report from the public; (4) the matters Mr. Schuelke investigated stem from allegations and events that occurred in a highly-publicized trial of a sitting United States Senator and therefore the public interest in this matter is well-documented and not a matter of mere speculation; and (5) the public availability of the results of Mr. Schuelke's Report will facilitate the public's understanding of the Court's rulings in the *Stevens* case and the constitutional and procedural requirements inherent in our criminal justice system, and will better enable the public to follow and place in context the developments in the *Stevens* case, all of which, again, were widely publicized at the time. See, e.g., *In re North*, 16 F.3d at 1240 (discussing factors to be weighed in determining whether to publicly release special prosecutor's report). Accordingly, while the Court will give appropriate consideration to any legal argument to withhold Mr. Schuelke's Report from the public, the Court notes that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

**SO ORDERED.**

**Signed: Emmet G. Sullivan  
United States District Judge  
November 21, 2011**

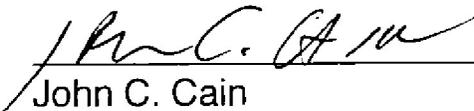
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## Certificate of Emailing

I, John C. Cain, certify under penalty of perjury of the laws of the state of Washington that on January 17, 2017, I emailed to Edward Haas, Prosecutor of Jefferson County the Reply Brief of Petitioner at the following email address:

[mhaas@co.jefferson.wa.us](mailto:mhaas@co.jefferson.wa.us)

Dated January 17, 2017, at Tacoma, WA.

  
\_\_\_\_\_  
John C. Cain

1/18/2017 10:28 AM

NO. 49417-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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IN RE THE PERSONAL RESTRAINT

OF

PATRICK MCALLISTER

Petitioner

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**Certificate of Service**

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John C. Cain  
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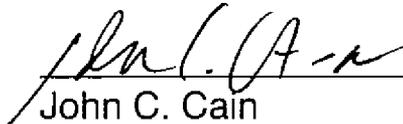
I, John C. Cain, certify under penalty of perjury of the laws of the state of Washington that on January 18, 2017, I emailed to Michael Edward Haas, Prosecutor of Jefferson County the Reply Brief of Petitioner at the following email address:

[mhaas@co.jefferson.wa.us](mailto:mhaas@co.jefferson.wa.us)

Reply Brief was previously emailed on January 17, 2017 to an incorrect email address for Mr. Haas, [mhaas@co.jefferson.wa.us](mailto:mhaas@co.jefferson.wa.us). I also sent on January 17, 2017, the Reply Brief to Sarah Martin, Sr Legal Assistant for Jefferson County at [smartin@co.jefferson.wa.us](mailto:smartin@co.jefferson.wa.us) who informed me she forwarded it to Mr. Haas.

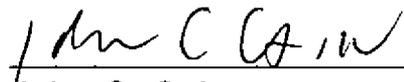
The Reply Brief was filed with Court of Appeals on January 17, 2017.

Dated January 18, 2017, at Tacoma, WA.

  
\_\_\_\_\_  
John C. Cain

This Certificate of service was emailed to Mr. Haas on January 18, 2018 to [mhaas@co.jefferson.wa.us](mailto:mhaas@co.jefferson.wa.us)

Dated January 18, 2017, at Tacoma, Washington.

  
\_\_\_\_\_  
John C. Cain