

NO. 49417-5-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

In re: PERSONAL RESTRAINT PETITION OF PATRICK McALLISTER,

PATRICK McALLISTER,

Appellant,

Vs.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

MICHAEL E. HAAS
Jefferson County Prosecuting Attorney
Attorney for Respondent
P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

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I. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

- A. Whether Mr. McAllister received effective assistance of counsel?**
- B. Whether the State conducted its case in a proper manner?**

II. AUTHORITY FOR PETITIONER'S RESTRAINT

A Jefferson County Superior Court Jury convicted Patrick McAllister, Petitioner herein, of 13 counts of Rape in the Second Degree, 10 counts of Rape in the Third Degree and eight counts of Assault Fourth Degree on August 10, 2012. See *Appendix A of Petitioner's Personal Restraint Petition* (hereinafter "PRP"). All 31 counts carried a Domestic Violence designation. *Id.* This Court reversed one count of Rape in the Second Degree, Domestic Violence, in Mr. McAllister's direct appeal. See *Appendix D of PRP*. Mr. McAllister, per the Amended Judgment and Sentence, was ordered to serve a standard range sentence of 250 months despite a recommendation for an exceptional sentence of 372 months from the Department of Corrections at the original sentencing hearing. See *Appendix A of PRP and Appendix F of PRP (VRP p. 734)*. He is currently serving that sentence. *PRP, p. 1.*

III. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

- A. Mr. McAllister fails to establish he did not receive effective assistance of counsel.**
- B. Mr. McAllister fails to establish the State engaged in prosecutorial misconduct.**

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IV. STATEMENT OF FACTS

A. Introduction

Five different women obtained protection orders against Mr. McAllister in 1987, 1996, 1999, 2002 and 2003. *Department of Corrections Pre-Sentence Investigation/Attachment A which is incorporated by reference as if fully set forth herein.* In 2006, he was found guilty of Assault 4, pled down from Rape in the Third Degree. *Id.*

In 2011, Mr. McAllister lured SL, a girl from a rural village in Leyte, The Philippines, to Washington with a promise of marriage. She was just barely 20, he was in his mid-40's. Soon after SL's arrival Mr. McAllister began to rape and assault her. SL reported the abuse and local police and Homeland Security/ICE conducted an investigation. As a result of the investigation the State filed multiple charges of Rape in the Second Degree, Rape in the Third Degree, and Assault Fourth Degree (all Domestic Violence).

A jury trial was held on the stated charges in August of 2012, where Mr. McAllister was convicted of 13 counts of Rape in the Second Degree¹, 10 counts of Rape in the Third Degree, and 8 counts of Assault in

¹ As mentioned previously, this Court reversed one count (Count 18) of Rape in the Second Degree in the direct appeal.

the Fourth Degree – Domestic Violence. He was sentenced to 250 months incarceration, at the midpoint of the standard range.

B. Statement of the Case

Restatement of Facts

Mr. McAllister lived alone in a house he owned in Brinnon, Washington. VRP² 263, 512. His friend, Temur Perkins, met and married a woman from the Philippines, Rosemarie (Lorega) Perkins. VRP 198-200, 231-233, 247.

During his visits to the Perkins' home, Mr. McAllister struck up a friendship over the phone with Rosemarie's sister, SL. VRP 202-203. He called her often, sometimes three times a day. VRP 298. He talked about marrying her before they met in person. VRP 299.

In May of 2008, Mr. McAllister traveled to SL's village on Leyte Island in the Philippines to meet her and her family. VRP 240, 300, 518-519. The family home had two bedrooms, a packed dirt floor and a thatched roof; the house lacked running water. VRP 251-252, 522. SL had eight siblings. Only her older sister, Rosemarie Perkins, had moved away from the area. VRP 293-294.

² The Verbatim Report of Proceedings may be found at Appendix F of Petitioner's Personal Restraint Petition.

SL and her parents were adamant that she and Mr. McAllister should not have sex until after they were married. VRP 302-05. When Mr. McAllister rented a room in a hotel on Leyte, for himself and SL, her father insisted on staying with them as a chaperone. VRP 303. Mr. McAllister proposed marriage, and SL accepted. VRP 306.

SL arrived in the United States on March 14, 2010. VRP 350. Mr. McAllister picked her up at the airport and took her to his home in Brinnon. VRP 350. SL was menstruating at the time. VRP 308.

On March 18, 2010, Mr. McAllister decided to have intercourse with SL. VRP 309. She objected and asked him to stop, but he ignored her. VRP 310-11.

Mr. McAllister had non-consensual intercourse with SL many times until April 26, 2010, when she moved to her sister's house. VRP 312. SL testified that Mr. McAllister repeatedly forced her to engage in oral and vaginal intercourse between March 18th and April 26, 2010, and kicked her while ignoring her protests. VRP 313-36. On April 28, 2010, SL reported her abuse to the police.

The state charged Mr. McAllister with 17 counts of Rape in the Second Degree, and 11 counts of Rape in the Third Degree. Each of these charges also carried an allegation that the offense was a domestic violence crime committed with deliberate cruelty. The state also charged Mr.

McAllister with 10 counts of Assault in the Fourth Degree - DV. CP 1-

12.³ Mr. McAllister denied all of the allegations.

The jury voted to convict on all remaining charges, and they endorsed each alleged aggravator. VRP 705-715.

Mr. McAllister's attorneys moved for a new trial based on prosecutorial misconduct, alleging that the state unlawfully shifted the burden to the defense during its closing argument. VRP 723-731; Revised Motion and Memorandum for New Trial, Supp. CP. The court denied the motion. VRP 731. Motion to File for New Trial, Supp. CP; Motion and Affidavit for New Trial, Supp. CP; Memorandum in Support of New Trial, Supp. CP; State's Response, Supp. CP; Revised Motion and Memorandum for New Trial, Supp. CP.

After noting a basis for an exceptional sentence, the court imposed a standard range prison term of 250 months. VRP 749; CP 13-28.

V. ARGUMENT

Relief by way of a collateral challenge to a conviction is extraordinary, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment. *Cook*, 114 Wash.2d at 810–12, 792 P.2d 506. Among other things, personal restraint petitioners who have had prior opportunity for judicial review must show that they were actually and substantially prejudiced by constitutional error or that their trials suffered from a fundamental defect of a nonconstitutional nature that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Elmore*, 162 Wash.2d 236, 251, 172 P.3d 335 (2007)

³ The state dismissed Count 39, an assault charge, on the first day of trial. VRP 40-41; CP 12.

(heightened standard); *In re Pers. Restraint of Isadore*, 151 Wash.2d 294, 299, 88 P.3d 390 (2004) (no prior opportunity for review); *Cook*, 114 Wash.2d at 810–12, 792 P.2d 506

In re Personal Restraint of Coats, 173 Wn.2d 123, 132, 267 P.3d 324 (2011).

A. Mr. McAllister was not denied effective assistance of counsel

1. Standard of Review.

Review of a challenge to effective assistance of counsel is *de novo*. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). Appellate courts start with the strong presumption that counsel's representation was effective. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). This requires the defendant to demonstrate from the record the absence of legitimate strategic or tactical reasons to support counsel's challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Reversal is required if defense counsel provides deficient performance and the accused is prejudiced. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyлло*, 166 Wn.2d at 862; RAP 2.5(a)(3).

2. Mr. McAllister fails to demonstrate the alleged failure of his counsel to adequately investigate his case constituted ineffective assistance of counsel.

Mr. McAllister alleges his counsel failed to adequately investigate his case by: 1) failing to examine the bathtub at his home, 2) failing to obtain information about the layout and use of cell phones at the U.S. Embassy in the Philippines, 3) failing to have SL's diary translated, and 4) failing to examine the immigration consequences of the case.

Bathtub: No trial is perfect and neither is any investigation. There are time pressures that force trial attorneys to focus on the most pertinent facts and law related to a case. Site visits can be important but they are not always essential, particularly when the client can give an adequate description of the scene. Here Mr. McAllister alleges he suffers from a disability and had his attorney gone to his home and taken pictures of the bathroom in question, it would have demonstrated how unlikely it was that he could have raped SL in such a small room.

Mr. McAllister testified he had a knee replacement that did not work well, that he had had two surgeries since and he had shattered an ankle at work. VRP 512-513, 550, 551. Additionally, his counsel highlighted the obviousness of Mr. McAllister's limp as Mr. McAllister walked up to the witness stand. *Id. at 512*. With respect to the actual rapes that took place we know that they were in the form of penis to

vagina intercourse and oral sex performed by her on him. VRP 316 -335.

With respect to the sole event that occurred in the bathroom, out of 31 incidents of rape or assault, we do not know whether it was vaginal intercourse or oral sex. VRP 328. Either form satisfies the element of Rape in the Second Degree per RCW 9A.44.050 and RCW 9A.44.010 which provides in pertinent part:

- (1) "Sexual intercourse"
 - (a) has its ordinary meaning and occurs upon any penetration, however slight, and
 - (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
 - (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

Of course oral sex would not be difficult, even in a small room.

The jury need not be unanimous as to which form of "sexual intercourse" took place, as long as sufficient evidence supports each of the means relied on by one or more jurors. *State v. Fortune*, 128 Wn.2d 464, 909 P.2d 930 (1996).

U.S. Embassy: It is difficult to see how the layout of the U.S. Embassy in the Philippines or where cell phones may be utilized in the area of the Embassy is relevant to whether Mr. McAllister raped SL on the

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dates alleged in Brinnon, Washington. Although there may have been some discrepancy in the accuracy of SL's testimony, this is not the type of testimony that presents a "gotcha" moment. Counsel may well have decided to not pursue this avenue of cross-examination due to the fact that it might prove a distraction to the primary point defense counsel was attempting to make during the cross-examination of SL. Further, evidence which is not relevant is not admissible. *ER 402*.

Diary: Once again, the information contained in SL's diary about her childhood, being abused and working in the rice fields at age 10 is not relevant per *ER 402*. Furthermore, disclosure of such information may have made SL even more sympathetic than she was already. Counsel rightfully avoided this topic. Furthermore, with respect to SL's past sexual relationship with men, such evidence would most likely have been excluded under the Rape Shield Statute, codified at RCW 9A.44.020.

Immigration: The defense examination of Attorney Ms. Li amply demonstrated that in SL's case she either remained in the United States pursuant to her Fiancé Visa (K-1) or a U-Visa. VRP 490, 676. Defense Counsel also demonstrated quite clearly the requirements for a U-Visa.⁴ VRP 499. Based on this information Defense Counsel was able to argue the only way SL could remain in the country legally if her relationship

⁴ Appendix F of PRP is missing pages 474 and 475. They are attached as Attachment B and are incorporated by reference merely to have a more complete record.

with Mr. McAllister ended was with a U-Visa. “... *the bottom line under this scenario, the only option for a hypothetical, but under this scenario, the only option for [S.L.] to stay here is to claim to be a victim of a crime.*”
VRP 676.

Defense Counsel could have sent an investigator out to chase down any number of rabbit holes in search of computers SL may or may not have used to research the issue of what she needed to do to remain in the United States after her relationship with Mr. McAllister disintegrated and what, if any, visa she needed (to include Mr. McAllister’s computer, any smart phones SL had access to and computers at the local library). This same investigator could have tracked all of SL’s phone calls to see if she called anyone to find out about U-Visas. The plain reality of course, is that such labor intensive work would have been unnecessary given the manner with which defense counsel was able to establish that SL had but one option to remain in the U.S. after her relationship with Mr. McAllister ended – the implication being SL had to allege criminal charges to remain in the Country.

3. Mr. McAllister fails to demonstrate the alleged failure of his counsel to adequately interview witnesses or have witnesses appear constituted ineffective assistance of counsel.

Mr. McAllister alleges his legal counsel did not issue subpoenas in a timely manner to his mother and to his aunt. *PRP* at 14. In his mother’s

declaration there is a comment that SL looked lovely in a wedding dress Mr. McAllister's mother gave her. *Appendix O of PRP*. There is no indication of what she would have testified to or how it would have been helpful to the defense. The declaration of the aunt is even less useful, only indicating she did not receive a subpoena despite the fact Mr. McAllister wanted her to testify at trial. *Appendix P of PRP*. Without more information, this Court should assume these women were not needed for tactical reasons.

Mr. McAllister is critical of his legal counsel's trial preparation with respect to several witnesses. He complains that they were not asked about Mr. McAllister's physical limitations. At some point such testimony becomes cumulative and is likely to be limited by the trial court. The jury heard testimony from Mr. McAllister about his injuries. As mentioned previously, his counsel also pointed out that Mr. McAllister had limped as he approached the witness stand.

An additional problem counsel had was the potential issue of a surveillance tape "in which Mr. McAllister was seen to limp only when in the presence of others, but to walk normally otherwise. One report also references a prior diagnosis of malingering." See this Court's (Div. III) Opinion in No. 32290—III, p. 15, fn. 6. Apparently this information was not available to defense counsel until after trial however, it might well explain why defense counsel chose to focus on the "positive" parts of

testimony rather than potentially suborn perjury. For example in Kelly Darby's testimony defense counsel skillfully elicits from Mr. Darby the picture of a happy couple that was very much in love... their arms were touching, one playfully took food off the other's plate, she didn't seem scared, singing in the car together at a separate point in time, the seemed happy, etc. VRP 409, 411.

Mr. McAllister attaches the billing records from his physician, Dr. Lang and his chiropractor, Dr. Blevins. Appendix G & H of PRP. These records show ongoing treatment of Mr. McAllister but they fail to show in any manner why or how Mr. McAllister would not be able to kick someone or not be able to assault or rape SL.

Mr. McAllister complains that his witness, Kaye Peterson was not adequately prepared for trial. And yet, Ms. Peterson testified to the appearance of a happy couple at a Bible Study she and her husband hosted at their home ... her hand was on his leg, they were holding hands, they appeared very comfortable together and affectionate. *Id.* at 403. Precisely how defense counsel no doubt hoped she would testify. Mr. Peterson was a bit more vague but he testified that Mr. McAllister and SL sat close to each other, she did not appear to be afraid of Mr. McAllister and they appeared comfortable. *Id.* at 397 - 398. With respect to Ms. Omana, whom Mr. McAllister alleges was not properly prepared, she testified in a

devastating manner describing SL as giggling when the two discussed whether SL and Mr. McAllister had slept together. *Id.* at 432.

Mr. McAllister also asserts more should have been done to interview or investigate SL's new boyfriend. PRP at 16. How this is even remotely relevant to the events that took place approximately a year prior is unknown. Evidence that is not relevant is inadmissible. *ER 402.*

Additionally, there is no offer of proof as to what the boyfriend would have said or how it might have assisted the defense's case.

4. Failing to lay a foundation for the admission of irrelevant evidence does not constitute ineffective assistance of counsel.

Mr. McAllister asserts his legal counsel should have done more to bring into evidence the allegation that one of his witnesses was intimidated in the Philippines. The essence of this issue was previously addressed by Div. III of this Court in its underlying unpublished opinion in the direct appeal. Opinion, pp. 15 -16.

We know of no theory by which the attorney is a guarantor of the court reaching a party's desired outcome. Counsel attempted to admit the evidence. The trial court was not persuaded. The propriety of that decision is subject to review on its merits. Counsel's presentation of the issue to the court could only constitute ineffective assistance if the defendant could establish that the trial court would have ruled differently but for counsel's argument. With discretionary rulings (such as most evidentiary issues), it would be extremely unlikely that a defendant could meet this standard.

We need not opine on that possibility in this case, however, as the trial court did consider and reject the evidence in the new trial

motion. Even if counsel could have made a better offer of proof at trial, he did make an offer of proof in the motion for a new trial. The trial judge continued to be unimpressed. There simply is no reason to believe that the court would have ruled differently if it had faced the same offer of proof initially at trial. Accordingly, the ineffective assistance claim fails due to the failure to establish that counsel erred.

Id. at 16. The information about alleged efforts to intimidate a witness of the defense in the Philippines was irrelevant at trial and it remains irrelevant today, particularly given the lack of information tying the alleged event to SL herself.

5. Focusing the defense on one theory to the relative exclusion of other theories does not constitute ineffective assistance of counsel.

Mr. McAllister claims defense counsel should have pursued the theory that Mr. McAllister was so disabled he could not possibly have kicked SL as alleged and it would have been very difficult for him to rape her. Further, Mr. McAllister asserts defense counsel should have done more to investigate the nature of SL's medical claims of rape and sexually transmitted diseases. He also takes issue with the failure to establish he sent \$8,000 to SL while she was in the Philippines. Finally he argues more should have been done to rebut SL's claims she was kept isolated by Mr. McAllister.

In re Personal Restraint Petition of Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007), Mr. Elmore claimed he was denied effective assistance

of counsel “at nearly every turn,” just as Mr. McAllister does in his Personal Restraint Petition.

In *Elmore* the Court stated:

A petitioner has the burden of showing actual prejudice as to claimed constitutional error; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice.

...

The constitutional standard for a violation of the right to counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner must show that defense counsel's conduct was deficient, i.e., that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. *Id.* To establish a constitutional violation, a petitioner must show that counsel's deficiency was “so serious as to deprive the defendant of a fair trial.” *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. There is a strong presumption that counsel's decision constituted sound trial strategy.

Elmore at 251 – 252 [citation strings omitted].

Mr. McFarland claims his counsel failed to conduct a competent investigation just as Mr. Elmore claimed. *Id.* at 252. With respect to defense counsel investigations the Court stated:

The defendant alleging ineffective assistance of counsel ““must show in the record the absence of legitimate strategic or tactical

reasons supporting the challenged conduct by counsel.’ In any ineffectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel’s judgments. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052.

...

In *Davis*, this court has clearly explained the standard for reasonable investigation by defense counsel:

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.’” *Once counsel reasonably selects a defense, however, “it is not deficient performance to fail to pursue alternative defenses.”* An attorney’s action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and “‘ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.’”

Id. at 252 – 253 [italics added, string citations omitted].

Counsel raised Mr. McAllister’s disability issues in his direct examination of Mr. McAllister as mentioned above so obviously counsel was aware of the issue. Defense counsel agreed to not raise the issue of sexually transmitted diseases. This was obviously done for strategic reasons. Defense Counsel did not inquire into the specific amount of money Mr. McAllister sent to SL while she was in the Philippines but had

he established Mr. McAllister sent too much money and given the age disparity, it may have appeared Mr. McAllister was “buying” a child bride with all the implicit issues that goes along with that type of relationship. Clearly this was a tactical determination to not highlight a situation that was already potentially awkward. With respect to the issue of isolation, Defense Counsel brought out through the testimony of the Petersons and Mr. Clark as mentioned previously, that the couple went out together on outings so she was not isolated.

Hindsight is 20/20 and perhaps it would have been advantageous to create more of an issue with respect to Mr. McAllister’s alleged physical limitations.⁵ However, Defense Counsel was clearly aware of the issue and pointed it out through direct examination of Mr. McAllister. Defense Counsel wisely chose however, to focus on a series of other issues: Namely the inconsistencies between SL’s testimony and the testimony of other witnesses, the testimony of others that saw her as being happy,

⁵ Despite Dr. Nacht’s statement regarding Mr. McAllister’s physical limitations in *Appendix W of PRP*, Dr. Thorson’s materials clearly create potential headaches for the defense:

He has had psychiatric IMEs detailing a variety of behavior and pain-related issues with detection of strong self-image of disability. See *Appendix X of PRP*, IME at p. 2.

Video surveillance tapes have shown the claimant markedly walking differently and about normally when not observed. This was mentioned in the June 2009 IME involving orthopedist Dr. Millet, who had witnessed similar manifestations in the past. *Id.* at p. 3.

A psychiatric IME, June 20, 2009 revealed “no florid display of disability perhaps since patient has been aware of prior discussion by that provider that he may be exaggerating his behavior.” It was felt there was degree of malingering. *Id.*

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photographic evidence she was happy, a first responder to which she denied being assaulted, the fact that SL's only mechanism for staying in the United States was through a U-Visa which required her to be a crime victim, her apparent relationship with another man that lived in the Philippines and so.

6. Not hiring a sexual assault expert or medical expert did not constitute ineffective assistance of counsel.

As mentioned in the preceding section, once defense counsel selects a defense, not pursuing other possible defenses is not ineffective assistance of counsel. *Elmore* at 253. One can see why Defense Counsel did not want to get into issues surrounding sexually transmitted diseases, particularly with a young woman and an older man. Furthermore the relevancy is highly questionable or quite probably inadmissible. If the issue of SL's chastity prior to meeting Mr. McAllister is raised (or lack thereof and resulting STDs) it is likely to be precluded from admissibility by the Rape Shield Statute. If SL received the STD's after her relationship with Mr. McAllister terminated, it is difficult for this writer to understand the relevance of such information to the underlying Rape/Assault charges.

7. Defense Counsel adequately cross-examined or impeached SL and other State witnesses either through cross-examination or through the calling of witnesses that provided contrary testimony.

Mr. McAllister provides a laundry list of perceived errors at this section of his PRP. The State did not see a single issue that would not be subject to trial strategy determinations by defense counsel. For example, Mr. McAllister leads off by suggesting Defense Counsel should have cross-examined SL more aggressively with respect to the appointment she had with an immigration doctor three weeks prior to when she left Mr. McAllister. PRP at 23. When this Court reads the transcript at this section, Defense Counsel clearly had difficulty with a witness that was having memory issues combined most likely with communication problems. VRP 352 – 354. When one topic of cross-examination is not going well it is typically best to move on to the next topic which is what Defense Counsel did. *Id.*

There are many factors that go into the determination of how to cross-examine a witness. One of those factors is the apparent vulnerability of the witness from the perception of the jury. In this case SL almost certainly came across as vulnerable. Experienced trial counsel would know to tread lightly. The Perry Mason moment rarely occurs in a courtroom. Some texts on cross-examination teach that less is more, while others teach that the primary goal is to do damage control. The witness subject to cross-examination is, of course, the other party's witness and the other party would not have called that person as a witness if they did not see some advantage to calling that particular witness. In this case,

Defense Counsel had the added issue of cross-examining a witness for whom English was a third language.

The trial attorney present in the courtroom must keep the pulse of the jury, the witness, the judge, and what impact his or her questions are having, while keeping in mind motions in limine, the rules of evidence related to questions s/he may ask, and so on. For that reason Courts grant great deference to the infinite number of variables the trial practitioner is juggling in their mind during cross-examination or any other phase of trial when assessing whether trial counsel committed ineffective assistance of counsel.

8. So long as Defense Counsel did not prevent Mr. McAllister from testifying, Defense Counsel did not provide ineffective assistance of counsel to Mr. McAllister.

In *State v. Robinson*, 138 Wash.2d 753, 982 P.2d 590 (1999) the Court stated:

In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution. This right is fundamental, and cannot be abrogated by defense counsel or by the court. Only the defendant has the authority to decide whether or not to testify. The waiver of the right to testify must be made knowingly, voluntarily, and intelligently... .

Robinson at 758 – 759 [internal citations omitted].

If a defendant is able to establish his or her attorney prevented him or her from testifying at trial, they may be entitled to an evidentiary

hearing. *Id.* at 759. Merely being advised to not take the stand is not enough to warrant an evidentiary hearing. *Id.*

The *Robinson* Court continued:

In *Thomas*, a defendant challenged his conviction in post-trial motions, asserting, without any factual support, that his attorney had prevented him from testifying. *We held that no evidentiary hearing was required.* “The defendant must ... produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action.”

...

Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify. Defendants must show some “particularity” to give their claims sufficient credibility to warrant further investigation. The defendant must “allege specific facts” and must be able to “demonstrate, from the record, that those ‘specific factual allegations would be credible.’”

Id. at 760 - 762 [emphasis added, internal citations omitted].

First, and to be clear, Mr. McAllister did testify. VRP, pp. 511 – 566. Mr. McAllister states Defense Counsel would not let him provide testimony related to how allegedly sexually aggressive SL was. Other than his own self-serving declaration, there is no other evidence this is true. See for example, the absence of this type of evidence in Trial Counsel’s Declaration. Appendix M of PRP

To be entitled to a new trial, Mr. McAllister would have to also establish his defense counsel's deficient performance in preventing him from testifying prejudiced him; prejudice is not presumed. *Id.* at 769 - 770.

BRIEF OF RESPONDENT

In re Personal Restraint Petition of Patrick McAllister, No. 49417-5-II

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To establish prejudice, Mr. McAllister must demonstrate “that his testimony would have a ‘reasonable probability’ of affecting a different outcome.” *Id.* “Blaming the victim,” or in this case suggesting she was sexually aggressive, is arguably a questionable approach to the defense of any criminal case and it is a near certainty that if Mr. McAllister had testified SL was sexually aggressive, it would not have furthered his case. What is more likely is that Mr. McAllister wisely heeded the advice of his legal counsel and they jointly decided to not go down that path.

9. Not calling rebuttal witnesses is not ineffective assistance of counsel.

The decision of whether to call a witness or witnesses for rebuttal is a trial strategy issue. Mr. McAllister fails to meet his burden of establishing how this trial strategy decision(s) was ineffective assistance of counsel. Defense Counsel may well have determined they presented all the evidence they needed to present. They also would have had the pulse of the jury and had some sense as to whether the jury needed to hear more testimony on such things as the layout of the U.S. Embassy in the Philippines. Apparently Defense Counsel decided no further information was necessary. Second guessing Defense Counsel, while easy to do from the easy seats, does not establish counsel was ineffective.

B. Counsel for the State did not commit prosecutorial misconduct.

1. Standard of Review.

In *In re Personal Restraint Petition of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999)[internal citations omitted] the Court stated:

Due process requires the State to disclose “evidence that is both favorable to the accused and ‘material either to guilt or to punishment.’”).

There is no *Brady* violation, however, “if the defendant, using reasonable diligence, could have obtained the information” at issue.

Moreover, evidence is “material” and therefore must be disclosed under *Brady* “only if ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” In applying this “reasonable probability” standard, the “question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” “A ‘reasonable probability’ of a different result is accordingly shown when the government's evidentiary suppression ‘undermines confidence in the outcome of trial.’”

2. Brady Violations did not occur.

With respect to the email regarding cell phones not being permitted on U.S. Embassy premises in the Philippines 1) unless your undersigned missed it, the State cannot see where the State possessed the document in question and thus did not have it to provide; 2) the document in question appears to have been emailed to Mr. McAllister, not the State. See Appendix J of PRP, Exhibit 9 (the document was emailed to “patrickbrinnon@aol.com” in December of 2009, when SL was still in the Philippines. The State presumes that the “patrick” part of

“patrickbrinnon” is a reference to Mr. McAllister’s first name and “brinnon” is a reference to where he lived at the time); 3) Mr. McAllister easily could have obtained such a document from the U.S. Embassy without the State’s assistance or just gone into his own email folders retrieved it, and 4) even if this document were in the State’s possession, the State fails to see how Mr. McAllister was deprived of a fair trial as it would not have been relevant per the State’s earlier argument related to cell phones and the Embassy, and therefore inadmissible.

Mr. McAllister asserts Mr. Perkins chose the detective. That statement is absurd. The Jefferson County Sheriff’s Office is a relatively small department. During my tenure in office it has had at best, three paid detectives. One of those detectives is routinely assigned to sex cases. At the time of this case, and as former defense counsel in Jefferson County, it was clear that Det. Garret, now retired, was the Sheriff’s Deputy assigned to sex cases.

Mr. McAllister asserts he should have received copies of the immigration physician’s medical records. First, it is not entirely clear with the materials Mr. McAllister supplies in his PRP that the State possessed such materials. Second, there is nothing the State is aware of that would have prevented Mr. McAllister from issuing a subpoena duces tecum for those same records. Third, even with those records, the testimony of SL appeared to be such that she did not remember a second trip to the

immigration doctor. VRP 352 – 354. It is unlikely the records could have been used to refresh her memory since she did not generate the records. Fourth, even if Mr. McAllister had a witness testify that SL had seen the immigration doctor two times, it is doubtful the records would have been useful to establish there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In other words, establishing SL saw the immigration doctor twice instead of one time does not establish SL lied. Given the trauma she had been subjected to it is unlikely such evidence would have had one iota of impact on the case.

3. The State did not elicit false testimony.

Civilian witnesses rarely testify completely as expected. The fact that SL did not accurately recall the limitations on the usage of cell phones at the U.S. Embassy in the Philippines does not make her a liar nor is it evidence the State suborned perjury.

The fact that a witness statement changes over time as they are re-interviewed does not establish they lied on the witness stand. Humans are not recording machines, much to the contrary. This is no doubt particularly true for people that have been subjected to extensive abuse and trauma.

Additionally, with respect to the issue of whether Mr. or Ms. Perkins called 911 to report the abuse, the fact that they both said they

made the call but only one call to 911 came from their house on the date in question, does not mean that they lied. The events in question and the trial were separated by a substantial period of time, approximately 16 months. VRP 25, 270. Some of us have difficulty remembering what we had for dinner last night. The important fact is that someone at the Perkins' residence called 911 on the date in question. It is unclear how a minor error in recall amounts to the State eliciting false testimony.

4. The State did not argue facts not in evidence.

If the defense does not object at trial, “[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Failure to object to an allegedly improper remark constitutes waiver unless the remark is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). If the defense does object to a prosecutor's comment, we review the trial court's ruling on the objection for abuse of discretion. *Id.* at 718, 940 P.2d 1239. This standard of review recognizes that the trial court is in the best position to determine whether prosecutorial misconduct actually prejudiced the defendant's right to a fair trial. *Id.* at 718–19, 940 P.2d 1239.

Mr. McAllister argues the prosecutor committed misconduct by stating facts not in evidence during closing argument, such as SL being left alone while Mr. McAllister went to medical appointments. PRP, p. 48. The section referenced however in the report of proceedings does not contain any statement by the prosecutor about SL being left home alone by Mr. McAllister while he went to medical appointments. Even if the prosecutor had so stated, the record supports such a statement. VRP 323. Further, SL in broken English intimates that she doesn't know the area, the neighbors, that she's left alone, and that she lives in a forest. VRP 335.

Mr. McAllister asserts the prosecutor "placed the jury in [SL's] shoes. PRP, p. 48. Perhaps it is an issue of semantics but the State does not see the section of text referenced the way Mr. McAllister. The prosecutor described the situation SL found herself in but he did not ask the jury to step into her shoes. Furthermore, the situation he described SL as finding herself in was supported by the record. Finally, there was no objection to this line of argument.

VI. CONCLUSION

Mr. McAllister had a prior opportunity for judicial review. A Petitioner filing a Personal Restraint Petition must show they were actually and substantially prejudiced by constitutional error or that their trial suffered from a fundamental defect of a nonconstitutional nature that

inherently resulted in a complete miscarriage of justice. Mr. McAllister's personal restraint petition fails to meet that high burden.

The State requests this Court deny his Petition.

Respectfully submitted this 8th day of December, 2016.

A handwritten signature in black ink, appearing to read 'M. Haas', is written over a horizontal line.

MICHAEL E. HAAS, WSBA #17663
Jefferson County Prosecuting Attorney
Attorney for Respondent

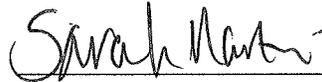
PROOF OF SERVICE

I, Sarah Martin, certify that on this date:

I filed and served the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, and with Petitioner's Attorney John Cain (jcainjd11@comcast.net) through the Court's online filing system.

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

Signed at Port Townsend, Washington on December 8, 2016.



Sarah Martin
Sr. Legal Assistant

ATTACHMENT A

SM

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IN SUPERIOR COURT
JEFFERSON COUNTY CLERK



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

PRE-SENTENCE INVESTIGATION

TO: The Honorable Craddock Verser
Jefferson County Superior Court
NAME: Patrick J. McAllister
ALIAS(ES): None Known
CRIME(S): 12 Counts of Rape 2 DV
11 Counts of Rape 3 DV
8 Counts of Assault 4 DV
DATE OF OFFENSE: 3/18/2010 to 4/25/2010
CHOOSE ONE ADDRESS: Jefferson County Jail

DATE OF REPORT: 9-25-12
DOC NUMBER: 360256
COUNTY: Jefferson
CAUSE #: 11-1-00141-1

SENTENCING DATE: 10-5-2012
DEFENSE ATTORNEY: Lance Hester

I. OFFICIAL VERSION OF OFFENSE:

The following information is what was gleaned from material facts surrounding these offenses as gathered through review of investigative reports.

The victim, SL, was introduced to the defendant, Patrick McAllister, via telephone by her brother-in-law back in 2007. They soon developed and maintained a close telephonic relationship as SL lived in the Philippines and McAllister lived in the United States. This relationship became more serious as she began to have feelings for him.

In May of 2008 McAllister went to the Philippines to visit SL and her family. McAllister did not want to stay with her parents and chose to stay in a motel and wanted SL to stay with him. SL explained to him that would only be possible if her father was allowed to stay in the room with them. McAllister was able to convince SL to have her father return home. During their time together in the Philippines, McAllister and SL stayed at a hotel and beach resort. SL considered McAllister as a "nice person with a good attitude". They discussed her coming to the United States and getting married. McAllister then returned to the United States after his approximately two week visit.

McAllister and SL continued their relationship via phone with multiple calls every week. After a time SL agreed to marry McAllister and he would assist her with the money and paperwork needed for her to come to the United States. McAllister had SL move to Manila, where he had some friends to assist her to complete the needed paperwork.

SL came to Washington on 3-14-2010 and was picked up at the airport by McAllister. They later returned to his home in Brinnon, Washington. McAllister wanted to have sex that night but because this was her first time having sex with anyone she was scared. However McAllister insisted so she gave in to his demands. SL felt much pain and discomfort. After this first event SL would tell McAllister that she did not want to have sex as it hurt her. However McAllister forced sex with her. SL kept a calendar detailing the sexual assaults. McAllister would take a pill and demand she have sex with him. Despite her protests McAllister would have sexual intercourse with her until he was finished. At times McAllister would grab her by the head and force her mouth over his penis until he was finished. SL stated that McAllister would be verbally abusive to her and would kick her repeatedly. In addition, he kept her away from her sister living in the Port Townsend area.

SL called local law enforcement on 4-26-2010 and asked for them to stand by as she moved out of the home with the assistance of her sister and brother-in-law.

On 4-28-2010 Jefferson County Sheriff's office was contacted by SL's brother-in-law, Temur Perkins. After meeting with Perkins, SL's sister, and SL, the sexual assaults were disclosed. SL disclosed she was last raped by McAllister on 4-25-12.

On 8-10-12 McAllister was found guilty of 12 counts of Rape 2 DV, 11 counts of Rape 3 DV, and 8 counts of Assault 4 DV. Aggravating circumstances of deliberate cruelty were found by the jury on all counts. Sentencing is set for 10-5-12.

McAllister is also looking at Federal charges.

II. VICTIM CONCERNS:

I met with the victim SL in my office on 8-21-12. SL described a fairly idealist family growing up in the Philippines. She grew up on the family farm with her parents and 5 brothers and 4 sisters. SL first met McAllister when she was 19 YOA. Prior to meeting him she had no experience in serious personal relationships. She and McAllister spent about two years talking long distance and the relationship evolved to something more serious. When it was decided that they would get married, SL spent about two months processing the immigration paperwork. After a harrowing flight from the Philippines she arrived in Seattle and was picked up by McAllister.

After arriving at McAllister's home things started changing. He would keep her isolated from her sister in Port Townsend and his personality was always mad and angry. He was very secretive and would leave the house often with no explanation. He was very controlling and did not want her to touch his things. He was not happy with how she did things, how she looked, and her asking questions. Their conversations were superficial

at best.

McAllister would remind her often how much money he spent getting her over to the United States and that she in fact owed him. The months of the sexual abuse, physical abuse and mental abuse were devastating for SL and was like a nightmare she could not wake up from. SL was afraid of McAllister and feared for her safety as well as for the safety of her sister and brother-in-law. When she finally moved out and disclosed the abuse she had suffered, she felt a sense of relief.

After the trial SL now feels she can start letting go. When she smiles now it is a genuine smile not fake. This has affected not only her, but her family back in the Philippines as well. While she realizes the crimes against her were not her fault she still feels shame but her family remains very supportive of her. Since the trial she has made new friends, is working full time, and is slowly getting back to "normal". She has no real plans at this time but mentioned she may return to her family in the Philippines.

Regarding the sentencing of McAllister, she hopes he is in jail forever. SL and her family wish for no further contact with McAllister. She hopes that the court requires him to be in sex offender treatment, be required to notify anyone he enters a relationship with of his crimes, and that he be placed on a curfew.

III. DEFENDANT'S STATEMENT REGARDING OFFENSE:

Since McAllister is appealing his conviction he was advised by his lawyer not to provide a description of the offense. However, McAllister and I did meet and completed a risk/needs assessment.

IV. CRIMINAL HISTORY:

The following is McAllister's criminal history as specified in the NCIC, WASIS/NCIC, and DISCIS data bases as well as DOC records. McAllister has no known felony history.

Juvenile Felony:	
Date of Offense:	
Crime:	
County/Cause No.:	
Date of Sentence:	
Disposition:	Score/Wash
Adult Felony:	
Date of Offense:	
Crime:	
County/Cause No.:	
Date of Sentence:	
Disposition:	Score/Wash

Misdemeanor(s):

Date of Offense: 12-24-2006
Crime: Assault 4 with Sexual Motivation
County/Cause No.: Jefferson/09-1-0087-1
Date of Sentence: 10-16-2009
Disposition: Guilty

Score/Wash

Date of Offense: 10-18-1986
Crime: Resisting Arrest/Criminal Trespass
County/Cause: Tacoma/A54182
Date of Sentence: 7-7-1987
Disposition: Guilty

Date of Offense: 7-26-1986
Crime: Simple Assault
County/Cause: Pierce/A56083
Date of Sentence: 7-7-1987
Disposition: Guilty

Date of Offense: 12-10-1981
Crime: Simple Assault/Theft 3
County/Cause: Vancouver/43871
Date of Sentence: 3-26-1982
Disposition: Guilty

V. SCORING:

	SERIOUSNESS LEVEL	OFFENDER SCORE	STANDARD RANGE
Count I	Rape 2 DV	9+	From 210 to 280 Months
Count II	Rape 2 DV	9+	From 210 to 280 Months
Count III	Rape 2 DV	9+	From 210 to 280 Months
Count IV	Rape 2 DV	9+	From 210 to 280 Months
Count V	Rape 2 DV	9+	From 210 to 280 Months
Count VI	Rape 2 DV	9+	From 210 to 280 Months
Count VII	Rape 2 DV	9+	From 210 to 280 Months
Count VIII	Rape 2 DV	9+	From 210 to 280 Months
Count IX	Rape 2 DV	9+	From 210 to 280 Months
Count X	Rape 2 DV	9+	From 210 to 280 Months
Count XI	Rape 2 DV	9+	From 210 to 280 Months
Count XII	Rape 2 DV	9+	From 210 to 280 Months
Count XIII	Rape 3 DV	9+	Statutory max 60 Months
Count XIV	Rape 3 DV	9+	Statutory max 60 Months
Count XV	Rape 3 DV	9+	Statutory max 60 Months
Count XVI	Rape 3 DV	9+	Statutory max 60 Months
Count XVII	Rape 3 DV	9+	Statutory max 60 Months
Count XVIII	Rape 3 DV	9+	Statutory max 60 Months

Count XIX	Rape 3 DV	9+	Statutory max 60 Months
Count XX	Rape 3 DV	9+	Statutory max 60 Months
Count XXI	Rape 3 DV	9+	Statutory max 60 Months
Count XXII	Rape 3 DV	9+	Statutory max 60 Months
Count XXIII	Rape 3 DV	9+	Statutory max 60 Months
Count XXIV	Assault 4 DV	na	GM up to 365 days
Count XXV	Assault 4 DV	na	GM up to 365 days
Count XXVI	Assault 4 DV	na	GM up to 365 days
Count XXVII	Assault 4 DV	na	GM up to 365 days
Count XXVIII	Assault 4 DV	na	GM up to 365 days
Count XXIX	Assault 4 DV	na	GM up to 365 days
Count XXX	Assault 4 DV	na	GM up to 365 days
Count XXXI	Assault 4 DV	na	GM up to 365 days

VI. COMMUNITY CUSTODY (If applicable):			
	SERIOUSNESS LEVEL	OFFENDER SCORE	STANDARD RANGE
Count I to XII	XI	9+	From To Life
Count XIII to XXIII	V	9+	From 36 to 48 Months

VII. COMMUNITY CUSTODY BOARD (If applicable):			
	SERIOUSNESS LEVEL	OFFENDER SCORE	SENTENCE RANGE
Count I to XII	XI	9+	Min 210 to To Life Max
Count XIII to XXIII	V	9+	Min to Max

VIII. RISK/NEEDS ASSESSMENT:

A risk/needs assessment interview was completed with the offender. The following risk/needs area(s) and strengths have implications for potential risk, supervision, and interventions. Unless otherwise noted, the following information was provided by the offender and has not been verified.

Education/Employment: McAllister reported he received his GED in 1980 while in Job Corp. and learning the welding trade. He later attended Clover Park Technical School from 1990 - 1992 and received a AA degree in Multi Media. The work was difficult to find so he went to Bates Technical College in 1994 for a refresher welding class. In regards to his employment we went back about 15 years. From about 1996 to 2000 he worked as a welder at Ace Tank. From about 2000 to 2003 he worked as a signal man for the railroad. From about 2003 to 2004 he worked as a grinder on submarines at QED. In 2005 he started working at Safeboat as a welder. During the time at Safeboat, McAllister injured himself resulting in a severely shattered ankle. This injury led to several surgeries and a knee replacement. McAllister was then placed on L&I for a couple of years He later went back to work at a few other companies. The last place he worked at was at Skookum at Fort Lewis as a Hazmat Tech. After working there for about 7 months his doctor advised him that he was unable to continue due to his previous injures.

Financial: Prior to his incarceration, McAllister was receiving L&I or SSI benefits. He has no child support payment requirements.

Family/Marital: McAllister was raised by his natural parents, Bob and Carrie McAllister. His father lives in Mount Vernon and his mother lives in Oregon. McAllister reports a brother and sister. His brother Mike lives in Spokane and his sister Mary lives in Mount Vernon. McAllister reports he has never been married in the United States. However he married a woman in the Phillipines about a year and half ago. His wife resides in the Phillipines.

Accommodation: McAllister owns a home in the Brinnon area and resides by himself.

Leisure/Recreation: McAllister reports that he is involved in Bible studies about 4 days a week and also attends church weekly.

Companions: Most of McAllister's companions are folks he knows through Bible studies and church.

Alcohol/Drug Use: McAllister reports he does not use alcohol and has been clean and sober for over 25 years. He did smoke marijuana but that has also been over 25 years ago. He reported no other substance use. He quit drinking on his own and has never been in treatment. When asked if any of his family members have a history of drug/alcohol abuse he stated he did not know.

Emotional/Personal: McAllister reports he has never had any problems or experiences with assaultive behavior or domestic violence, nor has he ever participated in domestic violence treatment or anger management classes. About three years ago McAllister did see a mental health professional during his SSI application process. McAllister reports he has never been diagnosed with a mental illness and is not involved in mental health treatment. There have been no thoughts of suicide and has never been prescribed medication for mental illness.

Attitude/Orientation: McAllister denies any wrong-doing and feels his conviction is based on lies. He is appealing his conviction.

IX. CONCLUSIONS:

Before the Court is Patrick John McAllister, a 49 year old defendant with no known prior felony conviction history. There are 4 known misdemeanor convictions.

Statements made by the victim and her brother-in-law, Temur Perkins, indicate that McAllister was made aware of the cultural values of the Philippines. Mr. Perkins reported that he told McAllister before he went to the Philippines that SL's father would need to be present if the two of them would be staying at a motel. The father was to act as a chaperone. If an unmarried woman was to spend the night with a man and not have a chaperone, she would be ostersized by the village. However McAllister was able to manipulate SL to send her father home from the

hotel. According to Perkins, the reason SL went to Manila was because of pressure from the village. She had spent the night in a motel with a man without a chaperone. In a sense, SL was now bound to McAllister.

According to reports, the 12-24-06 Assault 4 DV (Jefferson 09-1-00087-1) was originally charged as a Rape 3 but pled down. This offense was the result of a woman McAllister knew from AA meetings, being sexually assaulted by him at his home in Brinnon. The woman originally did not report the sexual assault, but months later she found out that McAllister allegedly raped three other women that attended AA meeting in Kitsap. The NCIC shows that McAllister was arrested on 9-15-03 for Rape 2 (Kitsap 03-1-1263-5). In this case the victim was a member of an AA group that McAllister attended. It appears that no charges were filed.

What is also troubling are the five Protection Orders filed by women in Pierce County Superior Court against McAllister.

On 8-28-87 KR obtained a Protection Order 87-2-05654-1
On 11-18-96 VS obtained a Protection Order 96-2-04088-9
On 10-25-99 HM obtained a Protection Order 99-2-03021-0
On 7-30-02 MW obtained a Protection Order 02-2-02053-0
On 8-26-03 AD obtained a Protection Order 03-2-02360-0

Confinement within the Standard Range Sentence/Community Custody Board:

McAllister is not a persistent offender and the current offenses were committed on or after September 1, 2001. This subjects McAllister to the sentencing requirement under RCW 9.94A.712 recodified as RCW 9.94A.507 effective 8-1-09, including community custody under the supervision of the DOC and the authority of the Indeterminate Sentence Review Board/Community Custody Board for any period of time McAllister is released from total confinement before the expiration of the maximum sentence. Under this RCW when the court sentences McAllister to the custody of DOC under this section, the court shall, in addition to the other terms of the sentence, sentence McAllister to community custody under the supervision of DOC and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence. The maximum term shall consist of the statutory maximum sentence of the offender. In McAllister's case that would be life. While in prison, McAllister can voluntarily involve himself in the Twin Rivers Sex Offender Treatment Program at the Monroe Correctional Complex. While treatment is no cure for sexual deviancy, it allows offenders to learn to avoid sexual aggression as well as the skills they need to live responsibly in the community. However, for any of this treatment to happen, McAllister must first admit to these sexual assaults.

If this option is considered I would recommend the court set a minimum term at 280 months with the maximum term being life. The standard range for this cause is 210 to 280 months. Maximum term is life. His community custody time would also be life under the authority of the Department of Corrections and the Indeterminate Sentence Review Board/Community Custody Board.

Exceptional Sentence:

The court may consider imposing an exceptional sentence when there are substantial and compelling reasons to justify imposing a sentence outside the standard range. I believe there are aggravating circumstances that the court may wish to consider. The jury also found aggravating circumstances of deliberate cruelty on all 31 counts. The current offenses committed by McAllister took place from the time the victim first arrived in the United States to the day she left his home. The victim was trapped and isolated from her family with few options available to her. He preyed on her vulnerability. Medical records also indicate that it is likely McAllister infected SL with a STD. McAllister put himself in this position and this would show continued planning over a lengthy period of time. In addition, McAllister was seen by the victim to be someone she should be able to trust as a husband figure, not someone to fear.

If an exceptional sentence is considered I would recommend a minimum sentence of 372 months, 1 year for each of the 31 counts.

Special Sex Offender Sentencing Alternative (SSOSA):

A SSOSA can only be considered/imposed if the sentence is less than 11 years, or 132 months. In addition McAllister would not be considered because he denies any wrong doing.

X. SENTENCE OPTIONS:

- Confinement within the Standard Range Sentence
- Work Ethic Program
- Exceptional Sentence
- First-time Offender Waiver (FTOW)
- Drug Offender Sentencing Alternative (DOSA)
- Special Sex Offender Sentencing Alternative (SSOSA)
- Community Custody Board (CCB) RCW 9.94A.507
- Family Offender Sentencing Alternative (FOSA)

XI. RECOMMENDATIONS:

Sentence Type/Option: Exceptional

Confinement:

Counts 1-12 372 months concurrent with each other and counts 12 - 23

Counts 13-23 60 months concurrent with each other and counts 1 - 12

Counts 24-31 365 days each count

Community Custody Board: Minimum Term: 280 months Maximum Term: Up to Life

Supervision Type & Duration: 36 months of Community Custody

Conditions of Supervision: (See attached DOC 09-130 Appendix F – FELONY

Additional Conditions of Sentence)

XII. MONETARY OBLIGATIONS:

Restitution: \$0.00	Court Costs: \$0.00	Other: \$0.00
Victim Penalty: \$0.00	Attorney Fees: \$0.00	

Drug Fund: \$0.00

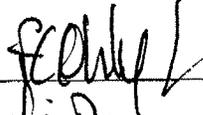
Fine: \$0.00

Submitted By:

Approved By:



9-25-12
Date


For Det. Ba

9-25-12
Date

Frank Ohly
Community Corrections
11696 Rhody Drive

Port Hadlock, WA 98339
(360) 379-5032

Distribution: ORIGINAL-Court COPY- Prosecuting Attorney, Defense Attorney, File, WCC/RC (Prison)

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF Jefferson**

STATE OF WASHINGTON]	Cause No.: 11-1-00141-1
]	
	Plaintiff]	JUDGEMENT AND SENTENCE (FELONY)
	v.]	APPENDIX H
McAllister, Patrick J.		COMMUNITY CUSTODY
	Defendant]	
]	
DOC No. 360256]	

- (a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:
- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
 - (2) Work at Department of Corrections' approved education, employment, and/or community service;
 - (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
 - (4) While in community custody not unlawfully possess controlled substances;
 - (5) Pay supervision fees as determined by the Department of Corrections;
 - (6) Receive prior approval for living arrangements and residence location;
 - (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
 - (8) Notify community corrections officer of any change in address or employment; and
 - (9) Remain within geographic boundary, as set fourth in writing by the Community Corrections Officer.

WAIVER: The following above-listed mandatory conditions are waived by the Court:

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

1. Enter into, participate in, and satisfactorily complete sex offender treatment as recommended by therapist in the psychosexual evaluation dated .
2. Do not change therapist (sexual deviancy treatment provider) without prior permission from the Court.
3. Have no direct or indirect contact with the victim without prior permission from the supervising community corrections officer and the treating sexual deviancy treatment provider.
4. Have no direct or indirect contact with minors (under the age of 18) without prior permission from the supervising community corrections officer and the treating sexual deviancy treatment provider.
5. Do not enter into and/or remain in areas where minors are known to congregate, including but not limited to schools, parks, playgrounds, and arcades.
6. Do not hold any position of trust or authority over minors in any form, including employment and volunteer work.
7. Do not purchase, possess, or use any pornographic material including but no limited to books, magazines, video/audio medium (in any form), other item(s) that show/depict the exposed breasts and/or genitals of humans, any item showing/depicting humans engaged in sexually explicit activity, or any depictions in any form of minors engaged in any kind of sexual or sexually seductive activities.
8. Do not enter into and/or remain in any adult bookstore, peep show, other establishment(s) that sell sexual devices, or places of prostitution.
9. Do not solicit or utilize in any form the services of any prostitute, call girl, or escort service.
10. Do not purchase, possess, or use sexual devices without prior permission from the supervising community corrections officer and the treating sexual deviancy treatment provider.
11. Do not purchase, possess, or use any computer connected to the internet or other communication devise with internet access capability without prior permission from the supervising community corrections officer and the treating sexual deviancy treatment provider.
12. Submit to polygraph testing as directed by the supervising community corrections officer and/or the treating sexual deviancy treatment provider.
13. Submit to plethysmograph testing as directed by the supervising community corrections officer and/or the treating sexual deviancy treatment provider.
14. Do not purchase, possess, or consume drugs without a valid prescription from a licensed medical professional. Provide CCO with verification of all prescriptions received within 72 hours of receipt.
15. Do not enter into and/or remain any areas where illegal drugs are being purchased, possessed, consumed, manufactured, or sold.
18. Do not associate with persons involved in the purchase, possession, consumption, manufacture, or sales of illegal drugs.
19. Do not purchase, possess, or use drug paraphernalia.
20. Do not purchase, possess, or consume alcohol and/or alcoholic beverages.

21. Do not enter into and/or remain in establishments whose primary source of income is through the sales of alcohol and/or alcoholic beverages, including but not limited to bars, taverns, lounges, casinos, and liquor stores.
22. Submit to urinalysis and/or breathalyzer testing as directed by CCO and/or treatment provider.
23. Must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purpose of visual inspections of all areas of residence in which the offender lives or has exclusive/joint control/access.
24. Disclose current conviction prior to entering any new relationships.

Date

The Honorable
Judge, County Superior Court

ATTACHMENT B

1 **Court Reconvenes**

2 COURT: Good afternoon. Please be seated. Okay. Anything we
3 need to take up outside the presence of the jury?

4 MR. ROSEKRANS: No, sir.

5 COURT: Hearing nothing we'll bring in the jury.

6 CLERK: And we have a few marked Defendant's Exhibits No. 16
7 and 17.

8 **Jurors Return to Courtroom**

9 COURT: Okay. Good afternoon and please be seated. Okay, call
10 your next witness.

11 MR. ARBENZ: Thank you, Your Honor. The defense would call
12 Elizabeth Li.

13 COURT: Elizabeth Li. Ms. Li if you'll come right over here
14 and raise your right hand please, I'll give you the oath. Do you
15 swear or affirm that the testimony you're about to give in this
16 matter is the truth, the whole truth and nothing but the truth?

17 MS. LI: I do.

18 **DEFENSE WITNESS ELIZABETH LI SWORN**

19 COURT: Thank you. Please be seated.

20 **DIRECT EXAMINATION**

21 **BY MR. ARBENZ:**

22 Q: Ms. Li, good afternoon.

23 A: Hello.

24 Q: Would you mind stating for the record your full name spelling
25 your last name?

26 A: Elizabeth Li, L-I.

27 Q: And Ms. Li, where do you live?

1 A: I live in Bellingham, Washington.
2 Q: And did you drive over from Bellingham today?
3 A: I did.
4 Q: And what do you do in Bellingham for a profession?
5 A: I am an immigration attorney.
6 Q: Okay. And before we talk about your status as an immigration
7 attorney, do you mind telling the jury a little bit about your
8 education and experience that led to your current occupation?
9 A: Oh, sure. Um, I, my education and experience. Okay. So, I went
10 to college in the University of California, Berkeley. And then I
11 went to law school at Loyola in Chicago. Afterwards I worked for
12 an insurance defense firm for about a year and then I was a
13 judicial law clerk for two Alaska judges. And then after that I
14 decided to become an immigration attorney. That was probably 1999.
15 And since then I've practiced immigration law exclusively.
16 Q: Okay. So about thirteen years? And exclusively immigration law?
17 A: Uh huh. Since 1999.
18 Q: And are you licensed to practice in any states besides
19 Washington?
20 A: I am. I am licensed to practice in California, as well.
21 Q: And do you work for a law firm now?
22 A: I work for myself. I've had my own law firm since 2000.
23 Q: And what's the name of that firm?
24 A: Elizabeth Li, Attorney, P.S.
25 Q: And are you associated with any professional organizations in
26 the area of immigration law?
27

JEFFERSON COUNTY PROSECUTOR

December 08, 2016 - 5:05 PM

Transmittal Letter

Document Uploaded: 6-prp2-494175-Respondent's Brief.pdf

Case Name: In Re Personal Restraint Petition of Patrick McAllister

Court of Appeals Case Number: 49417-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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