

FILED  
COURT OF APPEALS  
DIVISION II

2017 APR -7 AM 11:45  
STATE OF WASHINGTON

**In the Court of Appeals of the State of Washington**  
**Division II**

BY AP  
DEPUTY

---

**In re the Personal Restraint Petition of Cynthia Sue Miller**  
**Case No. 49451-5-II**

---

**On the Judgment of the Thurston County Superior Court**  
**Case No. 13-01891-1**

---

**Petitioner's Reply Brief**

## INTRODUCTION

Petitioner Cynthia Sue Miller (“Miller”) has submitted her personal restraint petition seeking to inquire as to the constitutionality of her conviction and restraint by the Washington State Department of Corrections (“WDC”) and here replies to the Response of Jon Tunheim, Prosecuting Attorney, in and for Thurston County, State of Washington (“Government.”) This Honorable Court has suspended Miller’s appeal of her conviction arising from the same matter during this inquiry as to the lawfulness of the restraint imposed upon her consequent to that conviction. The basis for the instant petition is collateral to the issues excepted in that appeal, but the facts supporting this collateral attack is not on the record on appeal. This is so because Miller learned through her legal counsel on appeal for the first time on June 18, 2016 of facts suggesting that the Thurston County Prosecutor’s Office had suppressed potentially exculpatory evidence that would have been highly relevant to her trial strategy, her pre-trial investigation, and her decision not to make a motion in arrest of judgment or for a new trial, prior to imposition of sentence. Miller learned of this information more than three months after sentence had been imposed pursuant to her conviction and nearly six months after her trial commenced. The evidence adduced to date, although conflicting, in support of and in opposition to this petition demonstrates that the Government knew or was imputed to have knowledge that another individual was alleged to have attacked

the victim, yet that information was not disclosed to Miller or her counsel and was not investigated by the government. Moreover, the evidence adduced in support of and in opposition to this petition demonstrates that at least a week before sentence was pronounced against Miller and possibly even before trial commenced, the Government was aware of specific allegations made by the victim minor that she had been sexually assaulted by an individual. This information was never transmitted to Miller or her counsel until June 18, 2016. On or about that day, Miller's legal counsel received an email letter from the Thurston County Prosecuting Attorney to the effect that the individual who had been under investigation by the Lacey, Washington Police Department had admitted to sexually molesting the child victim at least sometime close to the period during which Miller was accused of inflicting corporal injury upon that minor victim.

Miller's legal counsel has submitted, in support of this petition, an affidavit to the effect that if he had been made aware before trial, that the information concerning the allegation of sexual assault had not been investigated, the trial strategy would have been considerably different and would have included expert testimony that the corporal injuries attributed to Miller who is a middle aged female were actually more likely inflicted by a male in his late youth or early adulthood as was the person accused of sexually assaulting the minor victim.

The essence of the Government's opposition is that the government did not have sufficient knowledge of the sexual abuse allegation to warrant advising Miller or her legal counsel. Miller here submits that this is the essential reason she has asked this court to order a reference hearing under the provisions of Rules of Appellate Procedure ("RAP") 16.12. The documents submitted by Miller, together with the Government's argument itself and the Appendices it submits with that argument raise a clear factual issue of what the Government knew and when it knew it. Miller submits here that a conscientious review of the facts adduced in support of—or opposition to—this petition will clearly demonstrate a factual controversy that needs to be resolved in order to establish both the Government's duty to investigate and disclose as well as the prejudice that inured to Miller because the government ignored the information altogether. Miller submits that this is a sufficient showing of factual dispute to warrant a reference hearing.

The Government's argument in opposition seems to turn on the conceit that it had no duty to go further in examining the question of a possible other perpetrator. Miller points out that well settled law renders that argument meritless. Not only does the government have an affirmative duty to investigate alternative suspects; it cannot—as it here attempts—place upon the defendant the onus of making the assumption that the Government failed to investigate and/or concealed information that was required to be disclosed to it under Superior Court Criminal Rules ("CrR")

4.7. Although knowledge of the possible other perpetrator was in the Government's possession since at least April 24, 2014, it was not provided to Miller or her counsel until late July, 2015: more than a year later. Among other things, the documentation provided that the matter had been referred to law enforcement for investigation. Miller submits that it was eminently reasonable for her counsel to assume that the Government would faithfully discharge its duty and, given that no information about that investigation was forthcoming, make the reasonable assumption that there was no substantiation to the minor victim's allegation of a sexual attack by a different perpetrator.

Accordingly, Miller submits that her petition should be granted on the basis that the Government deprived her of due process by failing to timely disclose its knowledge concerning an alternative perpetrator and/or to order a reference hearing under RAP 12.6 to establish, as a matter of fact, what the Government knew and when.

///

///

///

## DISCUSSION

### I

#### **The Evidence Adduced in Support of the Petition at the Very Least Raises a Strong Inference that Miller was Denied Her Due Process Right to PreTrial Disclosure Which Inured to Her Prejudice**

Miller agrees with the Government's assertion of the standards prerequisite to this court's granting her Personal Restraint Petition. She notes, however, that assuming the allegations she makes in her petition were proven, her confinement under the judgment of the Thurston County Superior Court would be unlawful in that it was obtained in violation of her right to due process, secured to her by Amendment XIV of the United States Constitution as well as by Article I, §§ 2 and 3 of the Washington State Constitution, providing, respectively, that the United States Constitution is the supreme law of the State of Washington and that no person shall be deprived of life, liberty, or property without due process of law. As this court held in *In re Personal Restraint of Hacheney*, 169 Wn.App. 1, 23, [288 P.3d 619, 630]:

Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant's right to due process is violated when the prosecution suppresses material evidence favorable to the defendant. [citation] A Brady violation occurs when (1) there is exculpatory or impeaching evidence, (2) the State willfully or

inadvertently suppresses the evidence, and (3) prejudice results. Delmarter, [citation]<sup>1</sup>

It is difficult to conceive of how an allegation that the minor victim makes against another individual involving sexual violence could not be material and potentially exculpatory. Where, as here, the minor victim denies during trial that anyone else harmed her, the fact that she has accused another individual of violating her sexually would be highly relevant. As set forth in Miller's legal counsel's declaration in support of her petition, that knowledge likely would have resulted in impeachment of the minor victim had she testified that no one else hurt her.

The evidence adduced on this issue leads to only one of two possible results: either the government did not investigate the allegations made by the minor victim

---

<sup>1</sup> Although this court went on to say: "The prosecution has no duty to independently search for exculpatory evidence," [citation] the Supreme Court has subsequently held, in *State v. Davilla* 184 Wn.2d 55,71 (Wn. 2015):

Under Brady, the prosecution has a duty to seek out exculpatory and impeaching evidence held by other government actors. [citation] Thus, the prosecution "suppresses" evidence, for purposes of Brady, even if that evidence is held by others acting on the government's behalf, e.g., police investigators. [citation]

The instant circumstances mesh much more harmoniously with the *Davilla* case than with *Hachenev* in that it is instantly undisputed that the Government knew about the minor victim's complaint and investigation, whether or not Megan Winder knew. Certainly, while it may not have been incumbent upon the Government to follow up on the accusation, the report clearly stated that the matter had been referred to law enforcement for investigation. The Government—and not Miller—would be in a far better position to determine the fruits of any investigation done—or the fact that none had been—and disclose that to Miller or her counsel immediately, rather than waiting over a year to do so.

until after the trial had concluded, or it did investigate and failed to disclose the results of that investigation to Miller or her counsel. Either way, the Government is deemed to have suppressed evidence that would have been exculpatory to Miller.

Moreover, contrary to the declaration of Megan Winder submitted by the Government in opposition to Miller's petition, in paragraph 5 of that declaration, Winder asserts: ". . .at no time did the victim allege that anyone other than Ms. Miller had hurt her." This is not accurate. The victim made an allegation that was transmitted to law enforcement—hence imputed to Winder's knowledge by the *Davila* holding. 184 Wn.2d at p. 71. That allegation was that on or about April 24, 2014, the minor victim alleged that she had been sexually molested by Kenneth Unknown while she resided with Miller. Kenneth Unknown was identified as a male adult, 34 years and three months of age. State's Response to Personal Restraint Petition ("Response") Appendix H:8. Despite its being reported to law enforcement (*Ibid.*) the Government evidently chose not to disclose

For that reason, despite the Government's assertion that Miller had as much information as it did—albeit nearly one and one half years later—Miller is entitled, at least, to a reference to establish what, exactly, the Government knew about the allegation and whether it had more evidence, in July of 2015 concerning the allegations that it did not disclose. This is beyond mere speculation: the evidence abundantly establishes that the Government knew of the allegation and failed to

disclose it to Miller or her counsel for fifteen months. That failure alone warrants a reference hearing: *a fortiori* Winder's failure in her declaration to even address whether she investigated, upon learning of the matter, to see if an investigation had been done and, if so, what came of it. Instead, she makes a broad statement that she had a conversation with Miller's counsel regarding the twelve pages of investigation notes from Child Protective Services (which, among other things, concluded that the allegations against Miller were unfounded) without specifically addressing the issue of what efforts were made by the Government to establish the results of any effort made by law enforcement to investigate the rape allegations. Declaration of Megan Winder, Appendix G to Response, ("Winder Decl.") ¶ 2.

Moreover, Winder's affirmation that she was not aware of the identity of Kenneth Spears prior to the trial in this matter is also questionable and requires examination in the form of a reference hearing. This is supported by an email, dated January 8, 2016, from the CPS investigator charged with investigating the allegations that Kenneth Spears raped the minor victim and could well be the Kenneth Unknown of the April 24, 2014 report. Winder Decl. ¶¶ 8 - 11 That email is reproduced in Appendix N to the Response and

clearly identifies Kenneth Spears to Winder.<sup>2</sup> It is not entirely clear, however, what the identification relates to, but upon reading the email in its entirety, it does appear that he is the subject of some law enforcement interest. While the reference is slightly oblique as to Spear's involvement, it bears further investigation, especially since nothing was disclosed to Miller or her counsel about this communication, even though it was sent to Winder three days before Miller's bench trial commenced. Again, the importance of this to Miller's petition is that it tends to demonstrate the need for a reference hearing, despite the Government's assertion that such a hearing is not warranted under the circumstances.

///

///

///

---

<sup>2</sup> There are other anachronisms disclosed by Winder's declaration. For example, she indicates at paragraph 8 that the minor victim's grandfather told her about the accusations against Kenneth Spears on February 24, 2016 and then goes on to detail the process whereby the Lacey Police Department commenced its investigation. However, according to the Lacey Police Department Report (Appendix M to the Response) the reporting officer attended the grandfather's residence on March 3, 2016—the day after Miller was sentenced—and learned from the grandfather that the minor victim had “just” disclosed to him that Kenneth Spears had raped her approximately 2 years earlier. Response: Appendix M-4 Nothing offered by the Government explains why the grandfather took more than a week to report the matter to the Lacey Police Department, nor why he waited until one day after Miller was sentenced to tell the Lacey Police Department that this had “just” been disclosed to him.

## II

**EVEN IF WINDER'S DECLARATION THAT SHE DID NOT HAVE SUFFICIENT EXCULPATORY INFORMATION TO DISCLOSE TO MILLER PRIOR TO THE TRIAL CAN BE CREDITED, IT IS CLEAR THAT SHE POSSESSED THAT INFORMATION PRIOR TO THE FINAL DATE BY WHICH MILLER COULD APPLY FOR A NEW TRIAL**

Perhaps the most salient feature of Winder's declaration may be found in paragraph 8 thereof. Winder declares that on February 24, 2016, exactly one week prior to the sentencing hearing scheduled for Miller, she was approached by the minor victim's grandfather who related that the minor victim had accused Kenneth Spears of sexually molesting her. Indeed, it is fairly clear from Winder's declaration that this information somehow involved Miller because the grandfather is attributed with saying that the minor victim feels safe enough to disclose other bad acts, presumably occurring to them while they lived with Miller, because Miller was away from them now. Winder Decl. ¶ 8

Even if Winder had received this information only one week before sentencing, it must needs have been disclosed to Miller or her counsel under *Brady* as interpreted by *Davila*. Yet the Government does not explain why

this information was not immediately disclosed to Miller's counsel. Even if it was necessary to make a lengthy investigation of the facts and circumstances of the investigation, Miller's counsel could have sought a continuance of the sentencing hearing: thus preserving her right under CrR 7.4(b) or 7.5(e) to move for arrest of judgment and/or a new trial. Under CrR 7.5(a)(3,) Miller would be entitled to a new trial when:

Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

That the minor victim had identified another perpetrator as someone who could have inflicted some or all of the injuries to her person that were attributed to Miller and for the infliction of which she had been convicted, would certainly qualify as "newly discovered evidence material for the defendant." Whether or not the defendant could have discovered that evidence and produced it at trial is something that would have had to be established, of course, but the Government's failure to disclose the information altogether deprived Miller of even the chance of making that argument. It is in this respect that Miller was deprived of due process and the Government offers no excuse whatsoever for its failure to disclose this

information. By withholding it, the Government prejudiced Miller's ability to apply for arrest of judgment and/or a new trial, or at the very least a continuance of the sentencing hearing to allow time to establish whether or not the accusation against Spears was well founded. As it turned out, Miller may well have been vindicated in that respect because Spears, a previously convicted child molester, admitted his sexual assault against the minor victim. Response Appendix M 10 – 11

### CONCLUSION

It is not at all clear why the Government did not share the results of its handling of the minor victim's complaint reported to them on April 24, 2014. It is not at all clear why the Government did not even disclose the basic information of the minor victim's statement regarding her rape for fifteen months. It is not at all clear why, despite knowledge in the possession of the Government at least three days before trial that the minor victim had disclosed that an individual—who was probably Kenneth Spears—had sexually molested her, the Government did not disclose that information to Miller or her counsel. It is not clear why, having been told at least a week before Miller's sentencing that the minor victim did report a rape by Kenneth

Spears during the time she lived with Miller, that the Government did not alert Miller or her counsel to this issue.

What is clear is that by failing to do those things—abundantly evidenced on the record before this court in support of and in opposition to Miller’s petition—Miller lost a number of opportunities to investigate and prepare a defense around the fact that all of the minor victim’s injuries attributed to her by the Government were very reasonably attributable to the admitted behavior of Kenneth Spears. That would create reasonable doubt and, given that most of the evidence adduced against Miller in support of the most greivous charges was circumstantial and based upon forensic examination of the minor victim, would clearly have been exculpatory.

Miller contends that the facts adduced in support of and in opposition to this petition clearly substantiate a failure on the part of the Government to disclose Brady material to Miller in a timely fashion and to her prejudice. However, Miller is prepared to go forward with an evidentiary hearing on reference under RAP 16.4 (2) and (3).

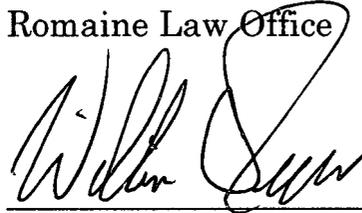
///

///

Respectfully submitted on;

Date: April 3, 2017

Romaine Law Office



---

William A. Romaine  
WSBA # 21364  
16404 Smokey Point Blvd.  
Suite # 302  
Arlington, WA 98223

Telephone 360 474 5655  
Telecopier 360 561 5666  
[war@lawromaine.com](mailto:war@lawromaine.com)

Attorney for Petitioner

///

///

///

FILED  
COURT OF APPEALS  
DIVISION II  
CERTIFICATE OF SERVICE  
2017 APR -7 AM 11:45

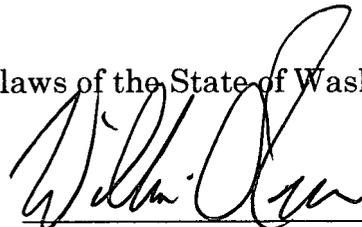
I certify that I have served a copy of Petitioner Cynthia Sue Miller's Reply to State's Response to Personal Restraint Petition on the date below as follows: AP  
STATE OF WASHINGTON  
DEPUTY

David Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-6045

Carol LaVerne, Esq., Deputy  
Thurston County Prosecuting Attorney  
2000 Lakeridge Drive, SW  
Olympia, WA 98502

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: April 3, 2017



William A Romaine..



of imprisonment imposed by the Thurston County Superior Court from which the above-referenced petition arises and that Cynthia Sue Miller is therefore restrained of her liberty by such custody.

4. I have served as counsel for defendant Cynthia Sue Miller in the matter from which the above-captioned petition arises since January, 2014 and have appeared on her behalf in the Thurston County Superior Court as her legal counsel of record until the date of her conviction on March 2, 2016. I have made the respondent State of Washington through the office of County Prosecutor, County of Thurston of my representation since January, 2014.

5. I have made a number of requests of the Thurston County Prosecutor commencing in January, 2014 for all disclosures required under Rule 4.7, Washington State Superior Court Criminal Rules. I am informed and believe that the Thurston County Superior Court ordered the Thurston County Prosecutor's office to comply with those rules in the matter from which the above-captioned petition arises.

6. Although I spoke with the deputy Thurston County Prosecutor regarding the matter on numerous occasions on and after January, 2014 and although I received numerous disclosures during this period, I did not receive any document that indicated that the minor victim in the case had made a report to the Thurston County Child Protective Services of a sexual assault by an individual identified as Kenneth Unknown that was reported to law enforcement by that agency on April 24, 2014. (Appendix H) I received a copy of that report by email

from the Thurston County Prosecutor's Office on July 20, 2015 without amplification or other comment.

7. Although I noted that the report had been made, given that it was then almost one year and three months after the report to law enforcement had been made, I assumed, given no reason to believe otherwise, that law enforcement had not found evidence to support the allegation and, given its lack of specificity, I did not follow up nor discuss it further with the Thurston County Prosecutor's Office. At no time did the Thurston County Prosecutor's office advise me that it had not inquired of law enforcement as to the status of any investigation done pursuant to the minor victim's remark. At this time, I was laboring under the assumption that if any potentially exculpatory evidence such as the existence of another suspect who may have caused the injuries to the minor victim attributed to my client had been received by the Thurston County Prosecutor's office, it would have been disclosed to me forthwith. I was not concerned, therefore, about the notation given that it appeared to me the minor victim had been relating a number of unspecific encounters that appeared to be highly questionable and exaggerated.

8. In the course of my preparation for trial, I consulted with several possible expert witnesses as to the nature of the injuries identified by the Thurston County Prosecutor's office as depicted by photographs taken of the forensic medical examination done on the minor victim during the investigation that led to the indictment against my client.

9. In late 2014, well before I received any information about allegations of sexual abuse perpetrated by an individual other than the defendant, I met personally with a pediatric physician in Chehalis, Washington who was identified as an expert in the identification of child abuse. I showed this consultant the photographs of the forensic examination done in the matter and explained the theory of the Thurston County Prosecutor's Office as to the etiology of those injuries. The purpose of my consultation was to determine whether or not it would be valuable to my client's defense to engage the services of a forensic child abuse expert to testify beyond the testimony expected of the expert witness engaged by the Thurston County Prosecutor's Office.

10. During my consultation with this expert, I learned that the photographs indicated physical abuse that appeared to have been caused, at least in substantial part, by sexual assault, likely by a young, fully developed adult male. However, the consultant indicated that his testimony at trial would have to concede that the injuries were consistent with the physical abuse reported by the minor victim according to the reports disclosed to me at that time. Those reports did not include any mention of potential abuse by a male adult, so I made the decision not to recommend to my client that the expert be engaged to testify. It was my opinion at that time that testimony of that nature would only serve to enhance the conclusion drawn by the Thurston County Prosecutor's Office that my client had inflicted grievous bodily harm upon the minor victim.

11. It has subsequently transpired that had an investigation been done in 2014 of the allegations reported to law enforcement attributed to the minor victim concerning the assault by Kenneth Unknown, the allegation would have been sustained by the evidence. Among other things, "Kenneth Unknown" has been identified as Kenneth Spears who confessed to sexually abusing the minor victim at or near the time injuries attributed to my client were identified forensically.

12. I did not receive any information concerning the allegations made against Spears until I received an email on June 17, 2016—more than two months after judgment of sentence had been pronounced upon my client—from the Thurston County Prosecutor's Office to the effect that a male adult had confessed to sexual assault against the minor victim at or near the time my client had been convicted of inflicting corporal injury upon the minor victim.

13. During trial, the minor victim testified that no other person had injured her. However, I am informed and believe that when she was interviewed after my client had been convicted and sentenced, the minor victim testified that Kenneth Spears had sexually assaulted her.

14. Had I known of these allegations during trial, I would have questioned the minor victim at length about the matter as a means of impeaching her testimony that my client had caused the injuries forensically noted.

I do solemnly swear and affirm, under the penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct of my own knowledge, except as to matters stated upon information and belief and, as to those matters, I

believe them to be true upon reasonable consideration of all evidence and  
circumstances available to me. Executed at Visalia, County of Tulare, State of  
California on:

Date: April 3, 2017

A handwritten signature in black ink, appearing to read "William A. Romaine", written over a horizontal line.

William A. Romaine

CERTIFICATE OF SERVICE

FILED  
COURT OF APPEALS  
DIVISION II

2017 APR -7 AM 11:45

I certify that I have served a copy of Declaration of William A. Romaine in Support of Personal Restraint Petition on the date below as follows:

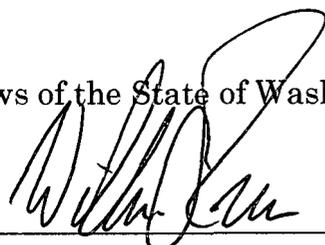
BY AP  
DEPUTY

David Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-6045

Carol LaVerne, Esq., Deputy  
Thurston County Prosecuting Attorney  
2000 Lakeridge Drive, SW  
Olympia, WA 98502

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: April 3, 2017

  
\_\_\_\_\_  
William A Romaine