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No. 51029-4

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

In re Personal Restraint Petition of

VINCENT L. FOWLER,

Petitioner

Kitsap County Superior Court No. 13-1-00466-4

SUPPLEMENTAL BRIEF OF PETITIONER

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I. STATUS OF PETITIONER

Petitioner Vincent L. Fowler (DOC #789354), by and through his attorneys, applies for relief from confinement. Mr. Fowler is currently incarcerated at the Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

After trial in Kitsap County Superior Court No. 13-1-00466-4, on October 13, 2013, the jury found Mr. Fowler of guilty of two counts of first degree child molestation and one count of first degree rape of a child. The court imposed 162 months at sentencing on January 10, 2014. The Judgment and Sentence is attached as Appendix, Exhibit A.

Mr. Fowler then filed simultaneous appeals in Division II (No. 45774-1-II) and Division III (No. 33227-6-III) claiming that: (1) the trial court's missing witness instruction was unwarranted and violated due process; (2) the instruction constituted an impermissible comment on the evidence; and (3) the discretionary imposition of the costs of Mr. Fowler's court-appointed attorney without regard to his present or future ability to pay violated his Sixth Amendment right to counsel. In an unpublished opinion, Division Three affirmed. 189 Wn.App. 1039, 2015 WL 4911843 (August 18, 2015).

On September 16, 2015, Mr. Fowler, through his appellate attorneys, filed a petition for review, which the Supreme Court granted.

The Court found error in the trial court's assessment of the discretionary legal financial obligations without considering the statutorily enumerated factors and remanded for resentencing. State v. Fowler, 185 Wn.2d 1016, 368 P.3d 170 (2016).

The trial court entered its Order Modifying Judgment and Sentence as to such obligations on October 19, 2016.

On October 18, 2017, Mr. Fowler filed a "placeholder" petition requesting additional time to prepare his petition because his prior post-conviction relief attorney, John Crowley, had done nothing for him and he retained present counsel just nine days before the one-year deadline. By Ruling dated November 21, 2017, Commissioner Schmidt granted 60 additional days—until January 22, 2018—within which to file a supplemental petition. See RAP 18.6(a). The Court also requested briefing as to why it should waive the one-year statute of limitations established in RCW 10.73.090.

On January 22, 2018, Mr. Fowler filed a motion for extension of time within which to file his supplemental petition on grounds that Crowley had effectively abandoned him so that the doctrine of equitable tolling applies. By Ruling dated January 22, 2018, Commissioner Schmidt granted an extension until March 23, 2018, but subject to the provisions of the Court's prior order.

II. GROUNDS FOR RELIEF

A. ASSIGNMENTS OF ERROR

1. The petition is timely under the doctrine of equitable tolling because post-conviction counsel abandoned Mr. Fowler.

2. New trial is required because trial counsel's performance was deficient in failing to properly investigate, failing to interview relevant witnesses, failing to prepare Mr. Fowler to testify, failing to offer evidence of an other suspect as to Count III, and more general errors which cumulatively undermine confidence in the jury's verdicts.

B. ISSUES PETAINING TO ASSIGNMENTS OF ERROR

1. Whether equitable tolling, which, as recognized by the Washington and United States Supreme Courts, provides relief from statutory time-bars such as RCW 10.73.090 where the failure to file a timely petition is the result of an attorney's bad faith or abandonment of a client, applies here where Crowley did nothing for Mr. Fowler, provided illusory promises, called him Victor, neglected to inform him of his retirement in lieu of discipline, took possession of and failed to forward Mr. Fowler's file, and still has the money Mr. Fowler's brother paid as retainer?

2. Whether a new trial—or at least a reference hearing—is required due to trial's counsel's ineffective assistance where (a) counsel failed to interview all relevant witnesses witnesses and one such witness, Monica Boyle, would have completely exculpated him on one count whereas at trial the State was able to obtain a missing witness instruction against Mr. Fowler because counsel did not offer Ms. Boyle's testimony and trial counsel falsely stated on the record that he had interviewed another witness he deemed unhelpful when she actually had exculpatory testimony; (b) counsel, for some reason, failed to present evidence that the victims' brother had sexually molested them over a period of years, was present in the same bed during one of the alleged incidents with Mr. Fowler, and was thus certainly an other suspect; and (c) counsel, more generally, was inattentive, failed to review the discovery with Mr. Fowler or even provide him with a copy,

failed to prepare Mr. Fowler to testify, failed to advise about the full sentencing ramifications, and other such derelictions of duty?

III. STATEMENT OF THE CASE

This case presents a sad situation where Mr. Fowler's trial counsel failed him by means of numerous instances of prejudicial ineffective assistance that undermine the jury's verdicts, and his post-conviction relief attorney abandoned him, thus warranting application equitable estoppel.

A. PRE-TRIAL

Mr. Fowler was initially charged by Information dated May 9, 2013 with one count of child molestation in the first degree for allegedly having sexual contact with sisters ACG and AG sometime between April 1, 2011 and November 30, 2011. According to the Certificate of Probable Cause, on November 21, 2012, Bremerton Det. Kenny D. Davis received a CPS referral regarding the sexual assault of ACG and AG by their older brother, Nestor, who was charged and later pleaded guilty to such offenses. During interviews on November 29, 2012 with a child forensic interviewer regarding their brother, the girls related that Mr. Fowler, who was a friend of their mother, also sexually abused them. Exhibit B, Information, Probable Cause Statement, and First Amended Information.

During follow-up interviews on December 4, 2012, ACG said she met Fowler through her friend, AAB, and AAB's mom, Stacey Bills. One

night a couple of years ago she was staying at Fowler's and fell asleep on his living room couch. She awoke to him touching her crotch on he outside of her pants, but he stopped when she woke up to go to the bathroom, where she noticed her pants were unzipped. ACG told AAB what Fowler did; AAB said that Fowler had done the same to her.

AG described that when her mom and siblings were staying with their mom's friend, Virginia (Gina) Jordan, Fowler also sometimes stayed there. During one incident, she was sleeping on the couch and everyone else was in another room when Fowler pulled down her pants and underwear and put his finger inside of her private (her word for vagina) and it hurt. During a different incident at Gina's, she was sleeping on the bed and Fowler was touching her private. His hand was really cold and he put it in deep, stretching it and it hurt. Fowler did not say anything. AG pretended to be asleep and moved and Fowler stopped.

The girls' mom, Zeny Cardwell, confirmed that she stayed with Virginia Jordan from approximately July through November of 2011.

AAB denied that Mr. Fowler had sexually assaulted her, but confirmed that ACG told her about waking up and finding her pants undone when she stayed the night with him. Ex. B

On the day of trial, September 30, 2013, the State filed its First Amended Information, which charged Mr. Fowler with: Count 1, child

molestation in the first degree as to ACG between April 1, 2011 and December 1, 2011; rape of a child in the first degree as to ACG between April 1, 2011 and December 1, 2011; and Count 3, child molestation in the first degree as to AG between April 1, 2011 and December 1, 2011 as based upon the same allegations. Ex. B; CP 17-20.

A review of the discovery, which is attached as Exhibit C, shows that the alleged incident with AG occurred at Monica Boyle's apartment in the Olympic Pointe Apartments in Port Orchard; AG particularly recalled playing with her dog. The alleged incidents with ACG occurred at Virginia Jordan's residence in Bremerton.

Mr. Fowler specifically told law enforcement that he was likely staying with Ms. Boyle at the time of the alleged incident with AG and told counsel the same. Id.; see Exhibit D, Declaration of Vincent Fowler in Support of Petition. Trial counsel Craig Kibbe, however, did not visit either location, and definitely did not interview Monica Boyle, though it is unclear whether the defense team contacted Ms. Jordan. Id.

The discovery—and recorded interviews, which present counsel just recently received on disk with no transcripts through Public Records Act requests and the good graces of the Kitsap Prosecuting Attorney's Office and hearing on child hearsay—are clear that the girls' brother had been molesting them for years, and was in the bed during the one of the

alleged incidents with AGC. Kibbe thought this was irrelevant and/or inadmissible and made no effort to admit such evidence.

Mr. Fowler repeatedly professed his innocence, and was adamant that he would not plead guilty to crimes he did not commit. Counsel, nevertheless, focused on pursuing negotiations with the State at the expense of trial investigation. See Ex. D at 1. While counsel was able to negotiate a favorable deal in which Mr. Fowler would have pleaded guilty to a Sex Offender Sentencing Alternative sentence of just 33 total months that would have sent him home soon after he signed the paperwork, Mr. Fowler was not interested. Perhaps he might have been more intrigued had he been aware that conviction on any of the charges against him would result in an indeterminate sentence. Id. at 2.

Mr. Fowler requested a copy of his discovery and a review with counsel. Instead, counsel provided only a copy of the Probable Cause Statement. Id. at 1-2.

At a hearing on July 23, 2013 on the State's motion for continuance by Deputy Prosecuting Attorney Cami Lewis, Mr. Fowler's brother Darryl directly addressed the court to complain about the amount of continuances and request a bail reduction. The the court set a firm August 26, 2013 trial date with no continuances. Mr. Fowler knew that this was unlikely as his cellmate, Brain Darden, was already scheduled to

go to trial in No. 13-1-00283-1 with Mr. Kibbe (against Cami Lewis, he believes) on that same date. Id. at 1; see CP 17-18.

On August 15, 2013, the State filed its Amended Witness List, which included Natalie McMahon. CP 20. No member of the defense team contacted or interviewed McMahon until after her initial trial testimony. See id.; VRP II at 257:8-16.

On August 26, 2013, the court, of course, again continued trial—until September 30, 2013—and rejected bail reduction. CP 21-22. Mr. Fowler was very upset that he was assured that there would be no more continuances and that he had not signed a waiver of his speedy trial rights.

On September 26, 2013, the State submitted extensive briefing on the admissibility of the child hearsay statements to others. CP 26. The defense filed nothing.

At the child hearsay hearing on September 30, 2013, defense counsel neither cross-examined the witnesses nor offered any argument against admissibility. He was, rather, disturbingly nonchalant: "As the Court knows, the Defense did not ask any cross examination questions of the alleged victim. I guess what I would – I don't really – I'm asking the Court to make its own decision. I'm not conceding the child hearsay issue. But I don't particularly have any argument against any of the points made by the State." The court admitted the hearsay.

Also on September 30, 2013, the State filed its motions *in limine*, including No. 4: "No reference to the sexual history, if any, of the victim, who is identified by the initials ACG … and/or AG. ER 405. RCW 9.44[A].020." CP 31. The defense offered no written motions.

B. TRIAL

At the very beginning of trial, the court noticed that Mr. Fowler and defense counsel were conversing and asked if there was anything they wanted on the record. Mr. Fowler replied: "Yeah, it's a conflict in interest - -." VRP I at 10:21-22. Per Mr. Fowler, the remainder of his interchange with the court, in which he related that he wanted to fire Kibbe and that his brother had retained different counsel, was left off of the record. See Ex. D at 2-3.

Mr. Fowler noted that Kibbe "never did come see me until trial started. I've been here six months. He never got my side of the story. And my witness is crucial to this, very crucial, you know, because it puts me in a place that I wasn't at this crime. So therefore, I don't know why he's not calling my witnesses." VRP I at 11:24-12-4.

The court asked whether he thought he had an alibi defense, and Mr. Fowler responded that he could prove where he was living at the time. Id. at 12-13. He then identified Kineshia Lewis, Lyndsey Warner, and

Darryl Fowler.[1] Id. at 13:2-3. Mr. Fowler also pointed to his speedy trial rights, which the court found were intact because the continuances were granted for good cause.[2]

Kibbe averred that he had "spoken to the witnesses he's indicated" and had "reports from the investigator on those people," but did not think that they would be useful at trial. Id. at 14-15.

While it is true that the defense team contacted Ms. Lewis, the same is not true as to Ms. Warner. When present counsel visited Mr. Fowler at Stafford Creek Corrections Center on March 19 and 20, 2018, he offered Ms. Warner's contact information as he still kept in touch with her. She was easy to reach, and happy to assist.

Ms. Warner related that she was surprised that no member of the defense ever contacted her, especially given that Mr. Fowler lived with her at the time of his arrest, she spoke with law enforcement, CPS visited her children at school as a result of the investigation, and Mr. Fowler helped care for the two children. See Exhibit E, Declaration of Lyndsey Warner in Support of Petition. The kids affectionately referred to him as "Uncle Vinnie." Id. She referenced Mr. Fowler's "three-foot rule," which meant

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[1] These people are incorrectly cited in the record as "Kineshia Lewis, Lindsay Warren, and Earl Fowler."

[2] While Mr. Fowler will not argue that his constitutional speedy was violated given the seeming absence of prejudice and the only five-month delay, this helps to demonstrate that defense counsel was overly inattentive to many aspects of the case and actually disingenuous towards Mr. Fowler and the Court on this matter.

that if a child was within three feet, that was sufficiently close. He instituted this policy, which applies to his own children, due to his concerns about cleanliness and how easily children transmit and spread germs. Id. Defense counsel never communicated enough with Mr. Fowler to discover this information. Ex. D at 3. He did, though, disclose this information during his Presentence Interview.

Darryl Fowler likewise never had any meaningful discussion with counsel, and could have helped verify his brother's address.

The court nonetheless accepted counsel's representations, and refused to grant Mr. Fowler a continuance. VRP I at 16:1-3.

The court also granted the state's motions *in limine*, including exclusion of evidence of the alleged victims' sexual abuse by their brother. Id. at 19-20. Kibbe's position was that there was no "way around" the rape shield statute "as it applies to the brother" and that he was unsure whether it was more helpful than harmful. Id. at 22:18-25.

The defense also stipulated to the admissibility of Mr. Fowler's statement to law enforcement. Id. at 26-29. Mr. Fowler, though, did not know what "stipulate" meant, and was unclear exactly what rights he waived. Id. at 28:10, 59-60; see Ex. D at 13.[3]

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[3] Again, while Mr. Fowler will not contend that he had a meritorious suppression issue, counsel's consistent lack of communication with Mr. Fowler is problematic.

AG testified that the alleged incident happened the one night she stayed alone with Mr. Fowler at his apartment. His female roommate, whose name she could not remember, was home, and AG played with her dog. She left during the evening, and that is when Mr. Fowler allegedly abused her. Id. at 98-102. She told her mom, but she did not believe her.[4] She also stated that ACG did not disclose to her that Mr. Fowler did anything wrong to her. Id. at 105-106.

ACG testified that during the alleged rape, they were at Gina's house, and Mr. Fowler stopped when ACG's mom turned on the bathroom light. Id. at 120-123. Had counsel investigated the scene, he likely could have attacked this narrative. See Ex. D at 2.

ACG further relayed that during the alleged molestation, her brother (who had been convicted of sexually assaulting the girls and was serving time) was on the bed with her at the same time. VRP I at 125. The touching stopped when Nestor rolled over. Id. at 126:16-17.

After the State rested and during the final 15 minutes of the lunch break, Kibbe told Mr. Fowler that he was going to put him on the stand. They had not discussed trial strategy or the substance of his proposed testimony, and Mr. Fowler had not reviewed the discovery, including the report as to his statement to law enforcement. Ex. D at 3.

[4] The discovery indicates that AG and AAB each thought the other was a liar and that AG's mom did not believe her accusations.

Mr. Fowler testified that during the night of his alleged offense in Count III, he and AG were at Ms. Boyle's, and AG fell asleep on the couch and Mr. Fowler on the floor. In the middle of the night, Ms. Boyle's dog got out of the bedroom and went on the couch on AG. Mr. Fowler removed the dog, and Ms. Boyle was there to take the dog back into her room. VRP II at 194-97.

The State noted that Mr. Fowler never said anything about the dog during his recorded interview. Id. at 215, 218-19.

After the State requested a missing witness instruction as to Ms. Boyle, defense counsel related that he thought she was immaterial and and argued against its submission to the jury. Id. at 230-33, 240. The Court granted the instruction, but permitted the defense to elicit testimony that Ms. Boyle moved out of her apartment soon after the alleged incident and argue the inference that it could not find her. Id. at 248.

The defense thus recalled the apartment manager, Natalie McMahon, to testify as to Ms. Boyle's tenancy. McMahon, though, testified not only that Ms. Boyle did, in fact, move out soon after the alleged incident, but also that Boyle left a forwarding address and she saw Boyle at the Wal-Mart in Port Orchard within the past few months. Defense counsel never contacted McMahon until after her initial trial testimony. Id. at 254-57.

C. POST-CONVICTION

On or about September 2, 2015, Mr. Fowler and his family retained attorney John Crowley to prepare his petition. See Petition for Review, Ex. 1. Crowley, however, retired in lieu of discipline on September 18, 2017, and had not done any work for Mr. Fowler. See Petition, Ex. 2. On the few times he spoke with Mr. Fowler, he called him "Victor." Ex. D at 3. Mr. Fowler and his family repeatedly tried to contact Crowley, but by August of 2017, it seems his line was disconnected. Id. As the deadline of October 18, 2017, approached, Mr. Fowler decided to retain new counsel.

Darryl Fowler, Mr. Fowler's brother, contacted this office and met with John Henry Browne on October 6, 2017. Mr. Browne had to relay the unfortunate news about Crowley's difficulties with the Bar and retirement. Crowley has yet to repay Darryl. See Exhibit F, Declaration of Darryl Fowler in Support of Petition.

On October 9, 2017—25 months after hiring Crowley—Darryl retained present counsel, who was able to file a timely placeholder petition requesting additional time to obtain the file and submit substantive argument in a supplement to the petition. This Court granted leave to supplement, but with instructions to brief why it should waive the one-year statute of limitations established in RCW 10.73.090.

Counsel first tried to contact Crowley over the next several weeks, but to no avail. Counsel then reached out to appellate counsel, Backlund & Mistry, by letter dated November 17, 2017. On November 30, counsel received an email reply seeking confirmation that our office represented Mr. Fowler. We replied via email on December 1, 2017 that we had already filed a pleading in this Court and would like Mr. Fowler's file as soon as possible. We received the file on December 18, 2017. Upon inspection, though, the file contained only the appellate record and nothing from trial counsel's files.

After the holidays, on January 3, 2018, this office contacted trial counsel Kibbe via telephone and then via email requesting a copy of Mr. Fowler's file. On January 10, 2018, we requested an update from Kibbe. On January 16, 2018, Mr. Kibbe promised that he was sending the file and that we should get it by Thursday, January 18, 2018. In further correspondence with Mr. Kibbe in early February, he disclosed that he no longer had the file as he had given it to Crowley for Mr. Fowler's resentencing. Kibbe failed to respond to several communications thereafter.

This office then submitted several requests under the Public Records Act and contacted the Kitsap County Prosecuting Attorney's Office. Files came in as recently as March 21, 2018, but it now seems that present counsel possesses a decent approximation of trial counsel's file (but without trial counsel's notes, reports, investigative records and the like).

Counsel also located and interviewed Monica Boyle, the "missing witness," as well as visited Mr. Fowler at Stafford Creek and followed up on the information he provided.

On March 6, 2018, licensed investigator Greg Walsh contacted Ms. Boyle and obtained a declaration, which is attached hereto as Exhibit G. Ms. Boyle, now known as Monica Raducanu, relates that she used to let Mr. Fowler stay at her apartment with her and her puppy, but that he was not allowed there when she was not present. No one from the defense team ever contacted her until Mr. Walsh that day, and until that time, did not know of the exact nature of the allegations against Mr. Fowler. She was adamant:

> I understand that an account has been offered that my dog awoke a young girl sleeping on the couch, a guest of Fowler's, and that there was some communication about this involving me at the time. No such thing occurred. There was no child on my couch, and my dog never awoke a child on my couch, and there was no communication with me about any such event.
>
> No young girls ever spent the night in my apartment as Fowler's guests. I never allowed Fowler to have any guests of any age or gender in the apartment. I clearly recall that no young girls ever spent the night in my apartment, on the couch or anywhere else. It is not the case that I don't remember, or that I'm not sure. I am certain no such thing occurred.
>
> I was always there overnight while Fowler was a roommate. I would not have had and did not permit Fowler to have anyone stay overnight, and he did not have anyone stay overnight, ever.

Id.

IV. ARGUMENT

A. THE COURT SHOULD ACCEPT REVIEW BECAUSE THE SUPPLEMENTAL PETITION IS TIMELY PURSUANT TO EQUITABLE TOLLING AND RAP 18.8[5]

Given that preparation of Mr. Fowler's petition has been severely handicapped by (1) Mr. Crowley's incompetence and failure to perform any work on his behalf or assist him in any manner so as to effectively abandon him and (2) present counsel's subsequent difficulties in obtaining Mr. Fowler's entire file and conducting reasonable investigation despite the exercise of due diligence, he qualifies for equitable tolling of the one-year time bar delineated in RCW 10.73.090 and relief from any Rule of Appellate Procedure which his untimely petition might implicate.

1. Equitable Tolling Applies

Equitable tolling "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed," and can provide relief from RCW 10.73.090's one-year time bar. In re Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). While a narrow doctrine, relief through equitable tolling is appropriate where a personal restrain petition or amended petition is untimely due to one of the "predicates of bad faith, deception, or false assurances." In re Haghighi, 178 Wn.2d 435, 449, 309 P.3d 459 (2013). Although prior cases

[5] The following argument was included in Mr. Fowler's Motion for Extension of Time.

suggested a rule that would make equitable tolling available only where the untimely filing was the result of another's malfeasance, the appellate courts have taken a more expansive view. Bonds, 165 Wn.2d at 142 (citing In re Hoisington, 99 Wn.App. 423, 993 P.2d 296 (2000) (equitably tolling one-year time limit where court failed on three occasions to address petitioner's meritorious attack on his guilty plea); State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002) (applying equitable tolling where, due to mistakes by counsel, the court, and the immigration service, petitioner was unaware until after the one-year time limit that he would be deported if he pleaded guilty).

Even under such a restrictive standard, Mr. Fowler still qualifies due to Crowley's assurances that he had been diligently working on his case and was going to do all sorts of things for him. See Ex. D.

While no Washington case is directly on point, cases from the federal realm are clear that attorney misconduct and abandonment are grounds for application of equitable tolling of the analogous one-year time bar for federal habeas petitions set in the Antiterrorism and Effective Death Penalty Act of 1996. See, e.g., Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012); Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010); Gibbs v. Legrand, 767 F.3d 879, 885 (9th Cir. 2014); see also In re Marriage of Olsen, 183 Wn.App.

546, 557, 333 P.3d 561 (2014) (citing Maples and Holland for the proposition that a client should not be responsible for his or her procedural default where the lawyer abandoned the client).

In federal courts, equitable tolling is warranted where (1) "petitioner has been pursuing his rights diligently" and (2) some extraordinary circumstance stood in petitioner's way and prevented timely filing. Gibbs v. Legrand, 767 F.3d at 885 (9th Cir. 2014) (quoting Holland, 560 U.S. at 649 (add'l citation omitted)).

In Maples, for example, two appointed capital post-conviction relief attorneys left their firm, left no forwarding address, failed to inform the court or the client, and let the time to appeal lapse. 132 S.Ct. at 916-17. The Court agreed that there was cause to excuse the procedural default in state court: "Abandoned by counsel, [petitioner] was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*." Id. at 917.[6] The Court reasoned that while the general rule is that a client is subject to his or her attorney's negligence, a "markedly different situation is presented … when an attorney abandons his client without notice, and thereby occasions the default." Id. at 922.

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[6] The Maples Court conflated its analyses regarding mere attorney negligence versus abandonment in the procedural default and equitable tolling contexts. 565 U.S. at 93 n.7.

Citing Holland, the Maples Court stressed the difference between garden variety attorney error and a claim of attorney abandonment, the latter of which mandates relief: "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." Id. at 923 (quoting Holland, 130 S.Ct. at 2568) (Alito, J., concurring).

In Gibbs, the Court found equitable tolling applied where petitioner's court appointed attorneys failed, despite repeated inquiries, to inform him when the state court denied his post-conviction petition, and by the time of his realization, the one-year federal habeas deadline had passed. In accord with Maples and Holland, the Court opined that attorney abandonment may constitute an extraordinary circumstance warranting equitable tolling of the time bar and that is was appropriate in that case. 767 F.3d at 882.

Even prior to Maples and Holland, courts had determined that egregious attorney misconduct was cause for equitable tolling.

In the factually analogous Spitsyn v. Moore, a case arising out of this state, the Court concluded that equitable tolling is appropriate "where an attorney was retained to prepare and file a petition, failed to do so, and disregarded requests to return the files pertaining to petitioner's case until well after the date the petition was due." 345 F.3d 796, 798 (2003).

Spitsyn had retained counsel well in advance of the one-year post-conviction time bar and made several inquiries of counsel, but to no avail. Id. Spitsyn and his family filed grievances with the Washington State Bar Association ("WSBA"), but counsel never communicated or filed the petition. Two weeks after the deadline, counsel sent an apology letter with petitioner's payment, but he did not return petitioner's file for three months—and only after the WSBA issued a reprimand. Id. at 798-99. Spitsyn finally filed a *pro se* petition approximately seven months after the due date. Id. at 799.

As a critical component of its rationale, the Spitsyn Court highlighted that without his file, petitioner could not have prepared and filed a meaningful petition on his own before the limitations period. Id. at 801. In the same vein, by the time he realized that he might need another attorney, Spitsyn "could have concluded that it was too late to get a new attorney to file a petition on time, especially since [counsel] still had the files for the case." Id. at 801-802. The Court thus found that such egregious conduct mandated equitable tolling. See also Baldayaque v. United States, 338 F.3d 145 (2d Cir.2003) (equitable tolling proper where counsel failed to file any habeas petition, conducted no legal research, and failed to communicate with the client).

Here, the facts are nearly identical.

Washington courts, moreover, have recognized that relief from final judgment in a civil case is proper where "an attorney's condition effectively deprives a diligent but unknowing client of representation." Barr v. MacGugan, 119 Wn.App. 43, 48, 78 P.3d 660 (2003). Although CR 60(b)(11), similar to equitable tolling, is applied sparingly and confined to situations involving extraordinary circumstances, the Barr court echoed prior decisions from other jurisdictions and held that an attorney's mental illness or other disability is grounds for granting relief to an unaware client. Id. at 45-47 (citing, e.g., Cmty. Dental Servs. v. Tani, 282 F.3d 1164 (9th Cir.2002) (holding that an attorney's gross negligence and quasi-abandonment of a client may be grounds to set aside a judgment under F.R.Civ.P. 60(b)(6), the federal "catch-all" counterpart to CR 60(b)(11); United States v. Cirami, 563 F.2d 26 (2d Cir.1977) (vacating default judgment resulting from attorney's mental illness); L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C.Cir.1964) (holding that relief justified where personal problems of counsel caused him to grossly neglect a diligent client's case and mislead the client). Id. at 47.

In the case at hand, Mr. Fowler and his family paid Crowley to file a personal restraint petition. He did not. He, instead, offered only illusory promises of performance before ceasing to communicate with Mr. Fowler, and resigned in lieu of discipline without forwarding his files. Mr.

Crowley's egregious misconduct thus certainly constitutes abandonment under the applicable case law.

Mr. Fowler sought different counsel as soon as it was apparent that Crowley was absent. Present counsel, in turn, was diligent in filing the timely "placeholder" petition, making timely requests of prior counsel for their records pertaining to Mr. Fowler, conducting factual investigation and legal research, and filing appropriate pleadings with this Court.

Mr. Fowler has not yet had the opportunity to collaterally attack his convictions, and it would seem to constitute a gross miscarriage of justice to deny him this opportunity on account of Crowley's incompetence and in spite of his and present counsel's diligence.

2. RAP 18.8 Applies

RAP 18.8(a) provides that an appellate court may waive or alter any provision of the Rules and "enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice."

RAP 18.8(b) then limits application of the Rule to "extraordinary circumstances" when necessary to "prevent a gross miscarriage of justice." Courts have interpreted this phrase to mean "circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." Reichelt v. Raymark Indus., Inc., 52 Wn.App. 763, 765–66, 764 P.2d 653 (1988).

Here, for the same reasons warranting application of the doctrine of equitable tolling, waiver of any court rule which may impinge upon Mr. Fowler's ability to seek collateral relief is likewise appropriate.

B. REVERSAL—OR AT LEAST A REFERENCE HEARING—IS REQUIRED DUE TO TRIAL COUNSEL'S MULTIPLE INSTANCES OF INEFFECTIVE ASSISTANCE

Given trial counsel's overall failure to properly and adequately investigate and prepare for trial; his failure to communicate with Mr. Fowler, heed his suggestions, and prepare his trial testimony—particularly Mr. Fowler's "three-foot" rule as to children; his failure to contact Monica Boyle, whose proffered testimony would have directly contradicted AG's account, seriously impugned her credibility, and likely led to a different verdict on Count I; and his failure to pursue Nestor as an other suspect, which would have been admissible, seriously impugned ACG's credibility, and likely led to a different verdict on Count III, the cumulative impact of such deficient performance not only undermined the jury's verdict on Count I and III, but also likely affected the jury's assessment of Count II.

Reversal and remand for a new trial—or at the very least a reference hearing—are thus constitutionally mandated.

1. Controlling Legal Standards

A criminal defendant is entitled to effective assistance of counsel. State v. Lopez, ---Wn.2d---, 410 P.3d 1117, 1123 (2018) (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22). Effective assistance includes many things, but at the very least

> 'entails certain basic duties,' such as a duty of loyalty, a duty to avoid conflicts of interest[,] ... the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. (quoting In re Per. Restraint of Yung-Chen Tsai, 183 Wn.2d 91, 100, 351 P.3d 138 (2015) (alterations in original) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The right to effective assistance also includes a "reasonable investigation by defense counsel." Id. (citations omitted). Reasonable investigation "includes expert assistance necessary to an adequate defense." Id. (citations omitted).

To establish a claim of ineffective assistance, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citation omitted). Deficient performance is performance

falling "below an objective standard of reasonableness based on consideration of all the circumstances." Id. (citations omitted).

The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. Id. (citations omitted). This threshold is "lower than a preponderance standard," and requires only a "probability sufficient to undermine confidence in the outcome." Lopez, supra, at 1123.

2. Failure to Interview Witnesses, Missing Witness Monica Boyle, and Failure to Prepare Mr. Fowler to Testify

Effective assistance requires investigation of the case, "and investigation includes witness interviews." State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) ("Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest.") (add'l citation omitted); citing also Jones v. Wood, 114 F.3d 1002 (9th Cir.1997) (failure to investigate witnesses called to attention of trial counsel as important constitutes ineffectiveness). Id. at 339-40. The inquiry thus depends on the reason for the failure to interview. Id. at 340.

While courts typically defer to counsel's *informed* and reasonable decision against conducting a specific witness interview or calling a particular witness, "strategic choices made after less than compete investigation are reasonable precisely to the extent that reasonable professional judgments support the limits on investigation." Id. (citation omitted). There simply cannot be a strategic choice where counsel "has not yet obtained the facts on which a decision could be made." Id. (citation omitted).

Here, trial counsel stated on the record that he had interviewed Lyndsey Warner; this was untrue. Such misrepresentation is both constitutionally and ethically egregious. She had helpful and exculpatory testimony she would have willingly provided, but counsel failed to conduct this basic component of investigation. His decision to not contact her cannot be construed as strategic.

Counsel, more importantly, failed to contact Monica Boyle, who ended up being crucial to the trial. Mr. Fowler was residing with her when the alleged incident with AG occurred and her apartment was the alleged crime scene; she was mentioned in the police reports; Mr. Fowler told counsel about her; and AG mentioned her and her dog in her interviews. There is no fathomable reason counsel failed to contact her.

As to prejudice, the end of trial was a seeming absurdity. Mr. Fowler testified about Monica Boyle and the dog and that she could corroborate his narrative. The state then requested a missing witness instruction against Mr. Fowler for his failure to produce her for trial. Kibbe decided that he would recall Natalie McMahon to testify that Ms. Boyle had moved out long ago and would have been difficult to locate. McMahon, instead, averred that Ms. Boyle had left a forwarding address and that she had recently seen her. This information was easily available to the defense, which never contacted McMahon until after she testified.

Given these machinations, it impossible that the jury fairly considered the evidence on this charge. Had Boyle testified that the incident with Mr. Fowler and AG never happened, she would have directly contradicted AG and cast doubt on her tale while simultaneously bolstering Mr. Fowler's credibility. Her proffered testimony also would have obviated the need for McMahon's damning and embarrassing testimony, for which counsel was clearly unprepared. This is the essence of prejudice. See Jones, 183 Wn.2d at 341-43 (finding that corroborating other testimony is important) (citing, e.g., Howard v. Clark, 608 F.3d 563, 573 (9th Cir.2010) ("Whatever the challenges to Ragland's credibility, his testimony might well have tipped the balance in Howard's favor. At the very minimum, if Ragland was ready and willing to testify as to Howard's

innocence, and Howard was deprived of such testimony because of his attorney's shoddy investigation, our confidence in the jury's verdict would be significantly undermined.").

In Jones, for example, defense counsel's failure to interview three eyewitnesses identified in discovery was deficient performance and prejudicial because it deprived the defendant of the opportunity to develop a better theory of the case. 183 Wn.2d 327. Such is the case here.

Even if Ms. Boyle's proffered testimony contradicts Mr. Fowler's trial testimony, relief is still required. See Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997) (reversing rape conviction for ineffective assistance where counsel failed to investigate and discredit the defendant's uncorroborated and lame denial at the scene of an alleged rape because he would have testified differently or not at all had counsel fulfilled his obligations); see also Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) (reversing capital murder conviction for ineffective assistance where counsel chose an alibi defense but did not fully support it with proposed alibi witnesses); Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002) (reversing second degree murder conviction for ineffective assistance where counsel failed to interview more than one of numerous witnesses before abandoning a potentially meritorious defense).

Counsel's failure to investigate ultimately forced Mr. Fowler to begrudgingly testify without having reviewed the discovery—and after only 15 minutes of preparation. While courts typically will not excuse a defendant's *tactical* decision to testify and the case law typically applies to an attorney's prevention of the defendant's testimony, see, e.g., State v. Mendes, 180 Wn.2d 188, 322 P.3d 791 (2014), it is nonetheless well established that the ultimate decision whether or not to testify rests with the defendant. State v. Robinson, 138 Wn.2d 753, 763, 982 P.2d 590 (1999). "Courts have held that a defendant's right to testify is violated not only when an attorney uses threats and coercion against his client, but also when the attorney flagrantly disregards the defendant's desire to testify." Id. This pronouncement seems to apply here.

The failure to interview Ms. Warner, counsel's misrepresentations about contacting her, and the failure to interview Ms. Boyle is inexcusable performance. Ms. Warner had exculpatory information to share while Ms. Boyle would have completely opposed AG's allegations, which were based solely on her testimony with no physical evidence. Analogous to Johnson, Mr. Fowler then testified and the jury did not believe him. Given Boyle's exculpatory testimony, Mr. Fowler likely would not have taken the stand or altered the substance of his testimony.

There is thus a reasonable probability that such lacking performance sufficiently undermines confidence in the outcome as to Count I and likely impacted the whole of the proceedings.

3. Evidence of Nestor as an Other Suspect in Count III

Given that evidence of Nestor as an other suspect was relevant, admissible, and likely would have directed a different outcome as to Count III and also perhaps the other counts, counsel's failure to present such evidence constitutes ineffective assistance. Relief is thus required.

a. The Evidence Was Admissible

The Sixth Amendment and Const. art. I, § 22 grant a criminal defendant "the right to present testimony in one's defense" and the "right to confront and cross-examine adverse witnesses." State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citations omitted).

"Whether rooted directly in the Due Process Clause of the Fourteen Amendment, or in Compulsory Process of Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (citations omitted). The ability of a criminal defendant to present relevant, admissible evidence that someone else committed the crime of which he or she stands accused is at the core of this fundamental right. Id.

This right to present a complete defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id. at 324-325 (citations omitted); see State v. Gregory, 158 Wn.2d 759, 875 n.3, 147 P.3d 1201 (2006) (Fairhurst, J., concurring) (citing Holmes) ("[w]hen a trial court excludes defense evidence under evidentiary rules that 'serve no legitimate purpose' or are 'disproportionate to the ends they are asserted to promote, it violates due process") (add'l citations omitted).

"[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (state hearsay rule prohibiting a party from impeaching his or her own witness precluded defendant from examining a witness who had confessed to the crime and thus unconstitutionally denied the defendant his right to present witnesses and evidence negating the elements of the charged crime).

In Holmes, for example, the United States Supreme Court invalidated a South Carolina state court rule excluding evidence of third-party guilt if the prosecution's case was strong as a violation of a defendant's constitutional right to present a complete defense.

For more than 120 years, the State of Washington has recognized that a defendant has an evidentiary and constitutional right to offer evidence of other suspects. See, e.g., State v. Ortuno-Perez, 196 Wn.App. 771, 781, 385 P.3d 218 (2016); Leonard v. Territory, 2 Wash.Terr. 381, 396, 7 P. 872 (1885). As a prerequisite, however, "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014).

A court thus must analyze whether the proffered evidence "tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt." Id. (citation omitted) (emphasis in original). This does not mean that a defendant must demonstrate the steps the other suspect took to commit the offense. State v. Ortuno-Perez, 196 Wn.App. 771, 789, 383 P.3d 218 (2016). Rather, the threshold analysis "involves a straightforward, but focused" review of the materiality and probative value of the evidence and "whether the evidence has a logical connection to the crime." Id.

While there are limitations that the evidence must be relevant and admissible, such restrictions cannot present a "bar higher than the relevance, foundation, and similar prerequisites to admissibility established by the Washington Rules of Evidence." Franklin, 180 Wn.2d

at 373. In Franklin, analogous to Holmes, the trial court erred in excluding evidence that another suspect had motive, opportunity, and a prior history of having sent the threatening communications at issue as based upon the strength of the state's case. The Court noted that the restrictions on other suspect evidence are similar to the requirement that evidence must have probative value. Id. at 380; see Holmes, supra, at 372 (explaining that any limitation on other suspect evidence is a "specific application" of well-established evidence rules permitting exclusion on grounds of irrelevance, unfair prejudice, confusion, or potential jury confusion). The Court thus concluded that circumstantial evidence of another's motive, ability, or opportunity is admissible if there is "an adequate nexus between the alleged other suspect and the crime." Id.

In a recent case from the Ninth Circuit, the Court reiterated that "fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of [evidence] which tends to prove that a person other than the defendant committed the crime that is charged." United States v. Espinoza, 880 F.3d 506, 511 (9th Cir. 2018) (quoting United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980). "In other words, "all evidence of third-party culpability that is relevant is admissible, unless barred by another evidentiary rule." Id. The Court thus

held that the district court erred in excluding other suspect evidence where there was no "substantial evidence tending to directly connect that person with the actual commission of the offense." Id. at 512.

Given the constitutional ramifications of other suspect evidence as part of the right to present a complete defense as well as the broad contours of relevance, there is no question that evidence of Nestor as an other suspect would have been admissible as to Count III.

First, even where a defense theory is speculative, this "is not a valid reason to exclude evidence of third-party culpability." Id. at 517 (citing United States v. Stever, 603 F.3d 747, 754 (9th Cir. 2010) (a court "is not free to dismiss logically relevant evidence as speculative"); United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2000). If "the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." Id. (quoting United States v. Crosby, 75 F.3d 1343, 1349 (9th Cir. 1996) (alterations in original) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. 1983)). It is thus "the role of the jury to consider the evidence and determine whether it presents all kinds of fantasy possibilities … or whether it presents legitimate alternative theories for

how the crime occurred." Id. (quoting Vallejo, 237 F.3d at 1023) (internal punctuation and amendments omitted).

b. Counsel Was Ineffective for Failing to Move to Introduce Nestor as an Other Suspect

Given that evidence of Nestor as an other suspect was admissible and would have significantly questioned the validity of Count III as well as cast doubt on Count II and the remainder of the proceedings, counsel's failure to research the applicable law and admit such relevant and compelling evidence warrants relief.

Objective reasonable performance requires defense counsel to "research the relevant law." Kyllo, supra, at 862.

Had counsel performed his duty, he would have realized:

> Courts should not use Washington's Rape Shield law to exclude evidence that an alleged child victim had previously been abused. *State v. Carver,* 37 Wn.App. 122, 124, 678 P.2d 842, *review denied,* 101 Wn.2d 1019 (1984). Instead, courts should use the general evidentiary principles in ER 403 to balance the probative value of the evidence against the possible prejudice. *Carver,* 37 Wn.App. at 124, 678 P.2d 842.

State v. Kilgore, 107 Wn.App. 160, 177, 26 P.3d 308 (2001), aff'd, 147 Wn.2d 288, 53 P.3d 974 (2002). The Kilgore Court further noted that in child sex abuse cases where the defendant consistently denied the accusations "and the case centers around credibility, a physical finding serves to bolster the child's testimony." Id. at 178 (citing generally, State

v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (discussing the significance of credibility in child sex abuse cases); (State v. Florczak, 76 Wn.App. 55, 74, 882 P.2d 199 (1994) (holding that a finding of abuse implicated the defendant when no other suspect is suggested).

More recently, the Washington Supreme Court reiterated that the rape shield law "cannot be used to bar evidence of extremely high probative value per the Sixth Amendment." State v. Jones, 168 Wn.2d 713, 723, 230 P.3d 576 (2010) (holding that a defendant's constitutional right to present a complete defense trumped the rape shield statutes).

Given the circumstances of this case and Nestor's admitted abuse of his sisters, for which he is incarcerated, it seems this extremely compelling and probative evidence was admissible. There is no excuse for such omission. Trial counsel was thus ineffective in failing to research the controlling law and offer evidence that Nestor was the culprit.

Trial counsel also had the further duty to seek an expert to discover whether the sisters might have fabricated the allegations against Mr. Fowler to deflect attention from Nestor or to somehow normalize their awful situation. See State v. A.N.J., 168 Wn.2d 91, 112, 225 P.3d 956 (2010) (noting that "false confessions (especially by children), mistaken eyewitness identifications, and the fallibility of child testimony are well documented" and holding that "depending on the nature of the charge and

the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant"). This is yet another example of counsel's deficient and prejudicial performance.

The girls' mother did not believe AG's tale. AAB and AG called each other liars. Lyndsey Warner had the impression from rumors circulating throughout the apartment complex that the mother coached the girls to blame Mr. Fowler in efforts to protect Nestor. In light of Nestor's admitted and proven history of abusing his sisters and Mr. Fowler's repeated denials, there is thus a reasonable probability that this evidence was sufficient to undermine confidence in the verdict, certainly as to Count III, but also as to the whole of the proceedings.

4. The Numerous Instances of Deficient Performance Collectively Mandate Relief

Given trial counsel's many deficiencies and the clear prejudice resulting therefrom, relief is mandated.

"Like materiality in the *Brady* context, prejudice resulting from ineffective assistance of counsel must be 'considered collectively, not item by item.'" Doe v. Ayers, 782 F.3d 425, 466 (9th Cir. 2015) (quoting Kyles v. Whitley, 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); citing also Silva v. Woodford, 279 F.3d 825, 834 (2002) (recognizing that

"cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel."); Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir.1992) (holding that where there is a finding of cumulative prejudice, a reviewing court need not decide whether each error alone would meet the prejudice standard).

Here, had trial counsel properly investigated this case, interviewed all of the witnesses, communicated with Mr. Fowler, and presented all of the relevant evidence, there seems to be no doubt that the result would have been different. There would have been another suspect and no missing witness instruction, to begin with. Monica Boyle, rather than serving as a liability, would have offered cogent exculpatory evidence. Ms. Warner would have testified about Mr. Fowler's "three-foot" rule and also might have been able to identify who the girls' mom told that she coached them to divert attention from Nestor.

This is the very essence of an ineffective assistance claim, which warrants relief on the compelling facts of this case.

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V. CONCLUSION

For the foregoing reasons, Mr. Fowler respectfully requests that this Court accept his supplemental brief and reverse his convictions and remand for a new trial—or at least grant remand for a reference hearing to more fully develop his claims.

DATED this 23rd day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March, 23 2018 I caused to be served electronically a copy of the Supplemental Brief of Petitioner in the Division II Court of Appeals.

DATED at Seattle, Washington, this 23rd day of March, 2018.

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

/s/ Craig Suffian

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