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No. 52971-8-II

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

IN RE THE RESTRAINT OF:

BRADLEY DAVID KNOX,

Petitioner.

REPLY BRIEF OF PETITIONER

Judgments in Cowlitz County Superior Court
No. 14-1-00095-0
No. 14-1-01283-4
The Hon. Michael Evans, Presiding

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A. ARGUMENT IN REPLY

1. *The State Does Not Dispute It Brazenly Violated Its Obligations to Disclose Significant Impeachment Evidence About Its Star Witness, Otis Pippen*

Although the State spends multiple pages making formulaic "denials" of material facts, *Response to Personal Restraint Petition* ("*Resp*.") at 5-7, the State does not deny that:

> 1. Thomas Ladouceur was Otis Pippen's lawyer at the time Pippen wanted a deal in exchange for testifying against Mr. Knox;
>
> 2. A few months after representing Pippen, Mr. Ladouceur became the chief criminal deputy of the Cowlitz County Prosecuting Attorney's Office;
>
> 3. Mr. Ladouceur did not screen himself from Pippen's pending criminal case that was continued for dismissal if he testified against Mr. Knox;
>
> 4. As chief criminal deputy, Mr. Ladouceur personally participated in the investigation of child molestation charges against Pippen, charges that ultimately were not filed by the Cowlitz County Prosecuting Attorney's Office;
>
> 5. The State did not disclose the 2015 child molestation case to Mr. Knox's defense counsel;
>
> 6. The State did not disclose to Mr. Knox's defense counsel that Pippen admitted buying and selling drugs after he was released from jail in October 2014, and the State never sought to revoke his release and jail him either for the

> drug activity or for being suspected of sexually abusing a young girl;
>
> 7. The State did not disclose to the defense the 2014 adult rape case where Pippen was accused of raping M.S. and Det. B.J. Mortensen was the investigating officer, who then used Pippen as an informant in drug cases and directed the investigations against Mr. Knox;
>
> 8. The State did not disclose any of the other child molestation investigations involving Pippen going back to the 1990s;
>
> 9. Otis Pippen knew that he was under investigation for rape and child molestation in 2014-15.

The State fails to submit any declarations from Mr. Ladouceur, Det. Mortensen, or the trial deputy, Sean Brittain, about the circumstances regarding the suppression of evidence related to Otis Pippen. "Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it."[1] Without the State even attempting to justify its actions, this Court should conclude that the Cowlitz County Prosecuting Attorney's Office willfully suppressed evidence that its star witness, Otis Pippen, was essentially given a free ticket for years – he could sexually assault women

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[1] *Pierre v. Louisiana*, 306 U.S. 354, 361-362, 59 S.Ct. 536, 83 L. Ed. 757 (1939).

and children with impunity and he could buy and sell drugs without consequence.

The State's *only* argument as to why its suppression of such evidence should not lead to a new trial for Mr. Knox is that, according to the State, evidence of Mr. Pippen's misconduct would not have been admissible at trial. *Resp*. at 7-9. Notably, the State makes no argument about prejudice as it relates to the evidence in the case. The State offers nothing to rebut Mr. Knox's argument that the suppressed evidence would have been used by the defense to expose Pippen's bias and destroy his credibility, which would have undermined confidence in the verdict. The State's only argument is that uncharged sex offenses could not have been used as impeachment at Mr. Knox's trial. The State is mistaken.

The State's argument is based on citations to very old cases which generally prohibited the impeachment of defendants or defense witnesses by means of evidence of prior misconduct – the cases are unremarkable examples of pre-Rule limits on what later became known as ER 404(b) evidence.[2] The State also cites one case generally upholding the restriction

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[2] *State v. Emmanuel*, 42 Wn.2d 1, 11-16, 253 P.2d 386 (1953), dealt with the cross-examination of the defendant in a bribery case about the sources of his income and various real estate transactions. *State v. Belknap*, 44 Wash. 605, 606-11, 87 Pac. 934 (continued...)

of cross-examination of a child witness in a sex case about prior acts of unchastity and disapproving of the cross- examination of the defendant about her large phone bill, again an unremarkable pre-Rule case that foreshadowed ER 404(b) and the "rape shield" statute (RCW 9A.44.020).[3] The State cites one civil case that upheld the trial court's exercise of discretion to exclude evidence under ER 608, again a fairly benign citation. *Resp*. at 8-9.[4]

What is missing in the State's briefing is any mention or discussion of the role that impeachment plays under the Confrontation Clauses of the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution.[5] Indeed, the State operates as if modern Confrontation Clause cases do not exist at all, preferring to rely on fairly old cases that do not involve the constitutional rights of a defendant.

The State's failure to address the Confrontation Clause is fatal to its argument. Evidence about the favorable treatment given to Mr. Pippen

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[2](...continued)
(1906), dealt with the cross-examination of the defendant and his witnesses in a "seduction" case about relations with other women.

[3] *State v. Lampshire*, 74 Wn.2d 888, 891-94, 447 P.2d 727 (1968).

[4] *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 708, 82 P.2d 1199 (2004).

[5] The Sixth Amendment's Confrontation Clause applies to the states through the Fourteenth Amendment's Due Process Clause. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L. Ed. 2d 923 (1965).

would have been valuable impeachment evidence, casting grave doubts on his credibility and bias and, indeed, on the lack of professionalism of the investigations against Mr. Knox. While the State thinks that the *lack* of prosecution of Pippen for his crimes is what makes the failure to disclose immaterial, it is precisely Pippen's seeming immunity from prosecution that makes the failure to disclose material and prejudicial. In other words, the protection afforded to Mr. Pippen by his handler, Det. B.J. Mortensen, and his lawyer, Mr. Ladouceur, is what would have been valuable impeachment. In many ways, the *lack of formal charges* against Pippen would have been *more* valuable as impeachment evidence than if Mr. Ladouceur had decided to file child molestation charges against his client or if Det. Mortensen had taken M.S.'s allegations of rape seriously.

The State apparently does not dispute that *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article I, section 3, of the Washington Constitution are violated by the State's failure to disclose an agreement between the prosecution and one of its witnesses regarding favorable treatment in exchange for testimony. *See Giglio v. United States*, 405 U.S. 150, 151-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

However, *Brady* evidence is not limited to actual "deals" or "signed agreements" between the State and its witnesses. Under firmly established United States Supreme Court precedent, the prosecution must turn over evidence that is "favorable to an accused." *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995).

In the context of a State's witness, "favorable to an accused" could mean impeachment evidence regarding favorable treatment,[6] evidence that impugns the reliability of the witness's testimony,[7] and evidence of bias, prejudice, or ulterior motives affecting the witness's credibility.[8] The lack of certainty in the benefit being provided can be an even stronger incentive for

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[6] *See Giglio*, 405 U.S. at 155 ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (dismissal of public drunkenness charge tied to bias of witness).

[7] *See Kyles v. Whitley*, 514 U.S. at 442 n.13 ("There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegman's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. . . . *These were additional reasons for Beanie to ingratiate himself with the police* and for the police to treat him with a suspicion they did not show.") (emphasis added).

[8] *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (witness on probation).

the witness to give testimony favorable to the prosecutor,[9] and therefore *Brady* requires disclosure of even tacit agreements between the prosecutor and a witness.[10]

Applying these principles, the Ninth Circuit granted habeas relief in *Benn v. Lambert*, 283 F.3d 1040, 1057 (9th Cir. 2002)[11] based upon the failure of the Pierce County Prosecutors to disclose a key informant's "exposure to prosecution":

> The *Brady* rule requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment. *See, e.g.*, *Giglio*, 405 U.S. at 150 (failure to disclose promise of immunity). During Benn's trial, Patrick was stopped for a traffic offense and arrested because he had outstanding warrants. He called the prosecutor from jail and the prosecutor arranged for him to be released without being charged. This benefit was never disclosed to the defense. Also during Benn's trial, the Fife police department asked the prosecution to charge Patrick

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[9] *See United States v. Sedaghaty*, 728 F.3d 885, 901 (9th Cir. 2013) ("This inference is particularly strong because of the uncertain nature of the promise.") (citing *Sivak v. Hardison*, 658 F.3d 898, 916 (9th Cir. 2011) ("[W]itnesses have greater incentives to lie if the potential benefits are not guaranteed through a promise or binding contract.") (internal quotes omitted); *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir. 1986) ("The more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.") (citation omitted)).

[10] *See Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009).

[11] Our Supreme Court has consistently cited the Ninth Circuit's *Brady* decisions with approval. *See, e.g.*, *State v. Mullen*, 171 Wn.2d 881, 897, 259 P.3d 158 (2011) (citing *Benn*); *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 487, 276 P.3d 286 (2012) (citing *United States v. Price*, 566 F.3d 900 (9th Cir. 2009) (finding *Brady* violation where government withheld criminal history of main witness)).

> with burglary, but the prosecutor's office dismissed the charges. Once again, this information was withheld from the defense. The prosecution also arranged to postpone the filing of a warrant that was supposed to issue because Patrick had violated his probation. The warrant was delayed for two weeks -- until after the Benn trial ended. The government failed to inform defense counsel about this benefit as well.

Benn v. Lambert, 283 F.3d at 1057.[12]

Another case, discussed in the opening brief (p.9) but which the State ignores, is *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011), where the Ninth Circuit reversed, on *Brady* grounds, public corruption convictions despite the existence of recordings of the alleged bribes. As in this case, a main witness (Mr. Allen) had been investigated for sexual misconduct with minors (and suborning perjury to conceal that behavior) as far back as 2004, but the prosecutors failed to disclose this to the defense. When the district court denied post-conviction relief on the ground that the evidence was inadmissible and cumulative to other evidence of Allen's cooperation, the Ninth Circuit reversed, citing how the evidence would have exposed Allen's motivation for testifying favorably to the Government:

> Indeed, *evidence of Allen's sexual misconduct with a minor would have shed light on the magnitude of Allen's*

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[12] *See also United States v. Boyd*, 55 F.3d 239, 246 (7th Cir. 1996) (government witnesses received sexual favors, free phone calls, and illegal drugs with the knowledge of the U.S. Attorney's office).

> *incentive to cooperate with authorities and would have revealed that he had much more at stake than was already known to the jury*. Beyond facing serious criminal charges, the newly-disclosed information shows Allen was very distressed at the prospect of his alleged sexual misconduct becoming public.

Kohring, 637 F.3d at 904 (emphasis added).[13]

The situation with Mr. Pippen is way worse than anything that took place in *Kohring* or *Benn*. While in both cases the prosecutors knew of the witness's exposure to prosecution, in neither case had the prosecutor recently acted as *the witness's lawyer*. Here, the very prosecutor who was involved in making the decision not to charge Pippen with sex crimes had recently been Pippen's own lawyer and had actual knowledge that Pippen wanted to gain a benefit from testifying against Mr. Knox. Mr. Ladouceur's loyalty[14] to his former client apparently carried over to Ladouceur's input into the decision not to charge Pippen with a sex offense, an event that would have interfered with the deal that Pippen was expecting. This fact alone would

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[13] *See also Lindh v. Murphy*, 124 F.3d 899, 900 (7th Cir. 1997) (denial of Confrontation Clause rights where trial court denied cross-examination that expert "sexually abused some of his patients, was about to lose his medical license and his prestigious faculty positions, and stood a chance of going to prison.").

[14] *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (duty of loyalty is "perhaps the most basic of counsel's duties").

have shown extreme prosecutorial or law enforcement bias and favoritism toward Pippen's criminal predilections.[15]

Although the State now claims that Mr. Ladouceur, as chief criminal deputy, was supposedly screened from Mr. Knox's case, *Resp*. at 18, the State makes no claim that Ladouceur was screened from Pippen's on-going drug case. *See* PRP Ex. 15 at 303-45. This is a key point because Pippen's long-term interest in having his own charges dismissed were tied to Knox's cases. The lack of any effective screening to prevent Mr. Ladouceur from involvement in Pippen's case actually allowed Ladouceur to be involved in Knox's matters through the back door. In any case, it is obvious that Ladouceur was not screened from Pippen's child molestation case, nor was he screened from knowledge that Pippen was dealing drugs even after he was released from jail after cooperating with police against Knox.[16] If there was

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[15] In *Kyles*, the Supreme Court noted the positive impeachment value in the defense raising the sloppy or even fraudulent character of the police investigation. *Kyles*, 514 U.S. at 446 & n.15. Evidence that it was Pippen's lawyer who did not file charges against him for child molestation or that Pippen's handler (and the main detective in the case against Knox) ignored M.S.'s allegations of rape would have revealed the true nature of the law enforcement team arrayed against Mr. Knox.

[16] Pippen was PR'd from jail on October 16, 2014. PRP Ex. 15 at 328. On January 27, 2015, an officer investigating the new molestation charges wrote: "Otis said that for the past month or so he has stopped using and selling drugs." PRP Ex. 20 at 391. In other words, Pippen admitted he used and sold drugs between his release and late December 2014, and Mr. Ladouceur did nothing with this information, and did not move to revoke Pippen's PR.

a "Berlin Wall" set up in the prosecutor's office, Mr. Ladouceur was on the wrong side of it.

Thus, it is actually quite shocking for the State to argue, "Police investigated cooperating witness Otis Pippen for various sex crimes, but, due to lack of evidence, he was never prosecuted." *Resp*. at 8. Although whether Pippen was prosecuted is not actually the standard, the only reason it appears that he was not prosecuted in 2015 for molesting yet another child[17] was that his lawyer became the prosecutor and a likely reason he was not prosecuted for raping M.S. in January 2014 is that his handler was the investigating officer for that case.

Mr. Pippen knew that he was under investigation for child molestation in 2015 and rape in 2014 (with his handler as the investigating officer), knew he admitted dealing drugs after his release from jail in October 2014, and knew that law enforcement was not particularly interested in locking him up as a result. PRP Ex. 18 at 358; Ex. 20 at 358, 391-92. His fear of prosecution for his string of recent and older sex offenses and his legitimate expectation that law enforcement would continue to look away from his

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[17] The string of prior sex crime allegations dating back 20 years should be seen in light of the power the State had to use these prior unfiled sex allegations to prove Pippen's guilt in the 2015 case had Ladouceur filed the charges. *See State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003).

crimes was fair game for cross-examination. Similarly, his obvious lies to the police about not sexually assaulting his victims (i.e., he would never rape M.S. because he had three to four girlfriends that come over to his residence) was proper impeachment under ER 608. PRP Ex. 18 at 358.

Finally, it was the State that placed Pippen's character in issue when he testified he came forward about Mr. Knox because he was the type of person who could not take his own dog to the vet to be "put down" (RP 608) and had to come forward or else he would be "no better" than Knox (RP 632). Similarly, when the State tried to rehabilitate Pippen on re-direct, by making him out to be a sympathetic person who "struggle[d]" with his addiction problems, Pippen testified that when he used drugs he could not see his grandchildren. RP 631. In fact, the likely reason he could not see his grandchildren was because he molested them. *See* PRP Ex. 20 at 391-92; PRP Ex. 21 at 437-44. Once the State went down this path, Pippen's sexual misconduct would have been critical impeachment evidence.[18]

By withholding evidence of Mr. Pippen's history of sexual assault and his immunity from prosecution when his own lawyer declined to file charges

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[18] *See State v. Renneberg*, 83 Wn.2d 735, 738, 522 P.2d 835 (1974) ("The state was entitled to complete the tapestry with his drug addiction."); *State v. Brush*, 32 Wn. App. 445, 452-53, 648 P.2d 897 (1983) (State was allowed to use the defendant's old conviction to rebut evidence of his good character).

against him and his police handler declined to investigate the rape of M.S. any further, the State committed egregious *Brady* violations, which interfered with Mr. Knox's ability to cross-examine witnesses against him at trial (both Pippen and Det. Mortensen). In this way, the *Brady* violation, which violated Mr. Knox's rights to due process of law (U.S. Const. amend. XIV; Const. art. I, § 3) directly led to a violation of Mr. Knox's right to confront witnesses (U.S. Const. amends. VI & XIV; Const. art. I, § 22). The Court should grant relief.

2. *Brady* Violation Related to Crimmins

The State disputes that it committed a *Brady* violation when it failed to disclose a police report that confirmed Cassandra Crimmins' connection to 909 California Way, where she stored her belongings. PRP Ex. 10 at 229. The State argues: "This claim fails because '[e]vidence that could have been discovered but for lack of due diligence is not a *Brady* violation.'" *Resp*. at 9 (quoting *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007)). However, in *Lord*, the Supreme Court actually held that there was no *Brady* violation because "the State disclosed all of the information it had, namely a report showing the dog track was done. The handler's other opinions, e.g.,

that the dog usually followed the most recent scent, were not in the State's possession and did not prejudice the outcome of the proceeding." *Id*. at 293.

Here, of course, the report about Crimmins' ties to the property was in the hands of the police agency working closely with the State and thus was chargeable to the State under *Kyles*. Moreover, the Supreme Court later clarified that the State still has an obligation under *Brady* to disclose information even if there was a way for the defense to try to uncover it. *See State v. Davila*, 184 Wn.2d 55, 72-73 & n. 4, 357 P.3d 636 (2015). In any case, Mr. Knox has raised a claim of ineffective assistance of counsel regarding trial counsel's failure to obtain this report on her own, *Op. Br*. at 46, so the State's argument that there was not a *Brady* violation because Mr. Knox's lawyer could have obtained the report herself falls flat – if she could have done so, she should have and her failure to do so was ineffective . Thus, Mr. Knox's rights to due process and effective counsel under the Sixth and Fourteenth Amendments and article I, sections 3 and 22 were violated.

3. *Conflicts of Interest and Recusal of Judge and Prosecutor*

While the State chides Mr. Knox for bringing up a "bewildering web of connections and characterizing them as conflicts," *Resp*. at 13, such a web of connections cannot be ignored. Not only did the lawyers at the Office of

Public Defense represent both Knox and the "other suspect" in the VUCSA case, Christian Sullivan, and for a while, the third person charged as a result of the raid at 909 California Way, Robert Tubbs, but both Cassandra Crimmins and Otis Pippen were represented at times by Mr. Knox's "conflict" counsel, Kevin Blondin. *See* PRP at 36.

The State does not dispute that the law firm representing the three suspects had no screening mechanisms in place, that the various defendants' lawyers sometimes appeared in court for the other defendants, and that they all had access to each defendants' confidential information. Then, one of Mr. Tubbs' lawyers, Ryan Jurvakainen, became the elected prosecutor whose office prosecuted Mr. Knox, while Pippen's lawyer became chief criminal deputy and was personally involved in the decision not to charge Pippen with child molestation.[19]

Overlaying the "web" of defense counsel and prosecutorial conflicts is the fact that another lawyer who used to represent Mr. Pippen was the

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[19] The State cannot seriously argue that Mr. Knox "is even farther still from showing that any such error resulted in harm" from Mr. Ladouceur's dual role as Pippen's lawyer and Pippen's prosecutor. *Resp*. at 18. In contrast to the rule set out in *State v. Schmitt*, 124 Wn. App. 662, 668-69, 102 P.3d 856 (2004), Mr. Ladouceur was not screened from being involved both Pippen's new child molestation case and Pippen's on-going cases that were continued for him to testify against Mr. Knox. There was clearly "harm" not only to the community in general, but also to Mr. Knox in particular because Pippen's freedom to buy and sell drugs and molest children was never disclosed to him for use at trial.

judge presiding over Mr. Knox's trial, Judge Michael Evans. To be sure, if this was the only issue at stake in this case, then perhaps the cases cited in Mr. Knox's opening brief at p. 29, n.23, which include *State v. Dominguez*, 81 Wn. App. 325, 914 P.2d 141 (1996), might doom Mr. Knox's claim.[20]

But one cannot look at Judge Evans' role as Mr. Pippen's prior lawyer in isolation. Recently, the Supreme Court of Louisiana addressed a judicial recusal issue in a capital case where the trial judge had a working relationship and social media relationship with the victim's widow who was a court employee and who was going to be the victim's representative at the penalty phase proceedings. *State v. Daigle*, 241 So. 3d 999 (La. 2018). The judge at first denied the social media relationship. While not finding any actual bias, the court applied *Rippo v. Baker*, ___ U.S. ___, 137 S.Ct. 905, 197 L. Ed. 2d 167 (2017), and its own case, *State v. Lacaze*, 239 So. 3d 807 (La. 2018), to reverse:

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[20] The State argues that the Supreme Court has not changed the standard for judicial recusal in *Rippo v. Baker*, ___ U.S. ___, 137 S.Ct. 905, 197 L. Ed. 2d 167 (2017), citing recent Washington cases that continue to apply the test set out in *Dominguez*. *Resp*. at 21-22. However, none of the cases cited by the State specifically address the U.S. Supreme Court's decision in *Rippo* or even *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009), and thus are of limited relevance. On the other hand, Division Three has followed recent U.S. Supreme Court cases holding that judicial recusal is subject to an objective analysis. *See State v. Blizzard*, 195 Wn. App. 717, 727-28, 381 P.3d 1241 (2016).

> Perhaps, if viewed in isolation, any one of these facts would not be sufficient to require recusal. However, viewed collectively, this record satisfies both prongs of proof required by this court in *LaCaze*.

State v. Daigle, 241 So. 3d at 1000.

This idea of "collectively" analyzing the situation finds support in the recent Division Three opinion involving prosecutorial recusal -- *State v. Nickels*, 7 Wn. App. 2d 491, 434 P.3d 535, *rev. granted* 193 Wn.2d 1012 (2019). There, one of Mr. Nickels' former lawyers, Garth Dano, was later elected prosecutor of Grant County. Mr. Dano did not have a major role in Mr. Nickel's first trial, but he did appear in the case in a limited fashion and had confidential communications with the defendant. After Mr. Nickels' conviction was reversed, and the case sent back for retrial, his attorneys moved to recuse the Grant County Prosecutor's Office. *Id*. at 492-94.

In a split opinion, Division Three reversed the denial of the recusal motion. Both the majority (Judges Pennell and Lawrence-Berrey) and the dissent (Judge Korsmo) rejected a defense-proposed "bright-line" rule that *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988), required "office-wide recusal whenever an elected prosecutor has a conflict of interest based on prior representation of a client in the same or a similar case as the one

currently pending prosecution." *Nickels*, 7 Wn. App.2d at 495. The majority adopted this rule:

> Rather than a bright-line rule, we interpret *Stenger* as setting a general standard that an elected prosecutor's prior representation of the accused in the same or a similar case will ordinarily require office-wide recusal, but an exception can apply in extraordinary circumstances. . . .
>
> . . .
>
> [W]e interpret *Stenger*'s extraordinary circumstances standard to be focused on the elected prosecutor's prior work as counsel for the accused. Two aspects of an elected prosecutor's prior work are salient: (1) whether the elected prosecutor's prior work involved acquisition of privileged work product and/or confidential attorney-client information and (2) the nature of the case giving rise to the elected prosecutor's conflict of interest.

Nickels, 7 Wn. App.2d at 497-98.

Nickels was not a death penalty case, but still, as a murder case, it was serious and Mr. Dano had actual attorney-client contacts with Mr. Nickels, Not even a screening mechanism could prevent office-wide recusal, and thus the majority voted to reverse. *Nickels*, 7 Wn. App.2d at 498-502. Judge Korsmo would not have reversed, and would have adopted a "totality of circumstances" test that would have allowed Grant County to remain on, *inter alia*, because Mr. Dano's involvement was minimal and a screening mechanism could be effective. *Id*. at 507-08 (Korsmo, J., dissenting).

Both the majority and dissenting opinions in *Nickels* should lead to reversal in this case, a case where there were limited, but ineffectual, screening mechanisms in the prosecutor's office, no screening mechanisms in the public defender's office, and a lack of disclosure that the judge (like the chief criminal deputy) was Mr. Pippen's former lawyer. While each particular conflict or prior representation can be parsed out, at some point "enough is enough" and the picture needs to be looked at as a whole.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L. Ed. 2d 1208 (2009), the Supreme Court made it clear that due process is violated, not just by "actual" judicial bias, but by a "serious risk of actual bias -- based on *objective and reasonable perceptions*." *Id*. at 884 (emphasis added). This tracks in many ways the tests adopted for *prosecutorial* recusal by both the majority and dissent in *Nickels*. Such an objectively reasonable standard also makes sense when evaluating defense counsel's conflicts of interest.[21]

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[21] At its core, the right to conflict-free representation is a variation of effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)) (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The standard under *Strickland* is also an objective one. *Strickland*, 466 U.S. at 687-88 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.").

Here, any neutral observer coming into the courtroom where Mr. Knox was tried would be appalled. The "web" of conflicts -- of defense lawyers, prosecutors and the judge -- is so serious here that the only just remedy is to vacate the convictions and start over. Mr. Knox's rights to due process and effective assistance of counsel under the Sixth and Fourteenth Amendments and article I, sections 3 and 22, were violated.[22]

4. *The Issue Regarding the Lack of a "True Threat" Instruction is Not "Intent" but "Believability"*

The State misunderstands the "true threat" requirement. *Resp*. at 23-25. The reason why such an instruction is critical has nothing to do with the "intent" of the speaker of the alleged soliciting remarks. Someone who is mentally ill may well, at the very time they are speaking, mean what they say. But the issue about a "true threat" is whether any reasonable listener would take the ramblings of the mentally disturbed person seriously.

The standard instructions that only require "intent," Inst. Nos. 26 & 32 (PRP Ex. 1 at 69,75), are not sufficient because they only provide an element that would satisfy a subjective mental state, not an objective standard

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[22] The State argues that in *State v. Jensen*, 125 Wn.App 319, 104 P.3d 717 (2005), relief was granted because of the procedural posture of the case. *Resp*. at 10. Knox is in the same position as Jensen – this is his first opportunity for judicial review of the "web of conflicts" and thus the Court need "not apply the heightened threshold requirements usually applicable to personal restraint petitions." *Id*. at 333.

of harm. In this regard, Mr. Knox's citations to *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 192 L.Ed.2d 1 (2015), and *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016), were not meant to "recognize[] that state law is against him." *Resp*. at 23. Rather, the citations show that state law supports applying an objective, not a subjective, standard of liability – not just what the defendant intended, but what a reasonable person would see as a "true threat" of harm. Mr. Knox's rights to due process of law and freedom of speech under the First and Fourteenth Amendments and article I, sections 3 and 5, were violated.

5. *"Tying Up" the Impeachment*

The ramblings of a mentally disturbed person ties into the next issue – whether the State failed to tie up the impeachment of Mr. Knox by introducing evidence that he actually paid Ms. Crimmins $8000, that she and Mr. Walker bought a truck, or that Crimmins did not show up to testify. The State makes two arguments: (1) it claims that Mr. Knox should have objected to the impeachment, and (2) that the evidence came in through Mr. Pippen. *Resp*. at 25-29.

As for (1), the cases hold that a contemporaneous objection is not required because the error lays not in the impeachment, but in the failure to

introduce evidence at the end of the case in rebuttal. *See State v. Babich*, 68 Wn. App. 438, 446, 842 P.2d 1053 (1993). As for (2), Mr. Pippen's testimony never confirmed the claim that there really was $8000, a white truck, and Crimmins somehow being reluctant to come to court. The State could easily have brought the witnesses to court (since they were in custody) but opted to leave the jury with the mis-impression that the prosecutor knew the "truth." Mr. Knox's rights to due process and confrontation under the Sixth and Fourteenth Amendments and article I, sections 3, 9 and 22 were violated. The Court should vacate the convictions.

6. *Corpus Delicti*

The State argues that Mr. Knox cannot raise issues about *corpus delicti* in this petition. *Resp*. at 29-30. The State has no response, though, to the Supreme Court's decision in *State v. Cardenas-Flores*, 189 Wn.2d 243, 401 P.3d 19 (2017), which explicitly held the *corpus* rule is essentially a rule of sufficiency of the evidence under the Due Process Clause of the Fourteenth Amendment and that a defendant need not even object in the trial court for the issue to be considered on appeal (for the first time) – that to determine sufficiency, the reviewing court cannot consider a confession alone. *Id*. at 250-63. The State's discussion of sufficiency that relies on Mr. Knox's

statements should be discounted as it does not comport with our Supreme Court's ruling to the contrary.

7. *Ineffectiveness and Cumulative Error*

The State combines its treatment of these two issues. *Resp*. at 32-35. In this way, the State essentially glosses over each individual claim of ineffectiveness – i.e., not subpoenaing Cassandra Crimmins, not asking for a true threat instruction, not knowing about the web of conflicts, not discovering all of the evidence of Pippen's background or Crimmins' connection to 909 California Way, or the failure to raise certain issues on direct appeal. The State simply derogatorily criticizes Knox for carrying "on the legal tradition of recasting each substantive legal claim as an ineffective assistance of counsel claim." *Resp*. at 32. The State ignores multiple cases that reverse convictions based upon ineffectiveness arguments that engage in such "recasting."[23]

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[23] *See, e.g. State v. Joseph Eldridge*, 2019 Wash. App. LEXIS 1383, 2019 WL 2341273, No. 77071-3-I (6/3/19) (unpub.) (reversing conviction on ineffectiveness grounds where trial counsel did not object to testimony on Confrontation Clause grounds); *State v. Crow*, ___ Wn. App.2d ___, 438 P.3d 541 (2019) (reversal where counsel failed to object to profile testimony).

However, in some senses, the State's combination approach is proper given the cumulative error doctrine.[24] Based upon the cumulative nature of the errors and the ineffectiveness at trial and on appeal, Mr. Knox's rights to due process, to an appeal, and to effective assistance of counsel under the Sixth and Fourteenth Amendments and article I, sections 3 and 22, were violated.

8. *Reference Hearing*

The State sets out a whole series of denials of facts and requests a reference hearing. *Resp*. at 5-7. Some of the State's blanket denials should be rejected out-of-hand. For instance, the State "denies the entirety" of the report of Dr. Jerry Larsen. *Resp*. at 7. Yet, the State attached this very report to one its briefs filed in superior court file, PRP Ex. 1 at 28-39, and used this report to impeach Dr. Larsen at trial. RP 888-91. The State objects to Ms. Crimmins' declaration, but when it was introduced as part of the motion for a new trial, the State did not object to considering it – although it did argue that the substance of the declaration was not sufficient to get a new trial. PRP Ex. 1 at 90-107; RP 1072-77. The State denies that Mr. Pippen is a child

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[24] *See State v. Mohamed Aweys Muse*, 2019 Wash. App. LEXIS 1389, 2019 WL 2341274, No. 77363-1-I (6/3/19) (unpub.) (reversing conviction based on cumulative error -- prosecutorial misconduct, evidentiary error and trial court's prejudicial comments).

molester, *Resp*. at 7, but whether he is or not is not the issue – the issue is whether the State violated *Brady* when it did not disclose Pippen's true history and how his protectors, Det. B.J. Mortensen and Thomas Ladouceur, suppressed evidence.

Given the State's failure to deny key facts (i.e., the suppression of Pippen's sordid history and the prosecutor's office's conflicted role), the Court could grant relief without a reference hearing.[25] However, should the Court remand the case for a reference hearing, Mr. Knox is prepared to prove all of the constitutional violations he has suffered.

B. CONCLUSION

The Court should grant relief and vacate the convictions.

DATED this 24th day of June 2019.

Respectfully submitted,

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

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[25] *See In re Pers. Restraint of Fero*, 192 Wn. App. 138, 367 P.3d 588 (2016), *aff'd* 190 Wn.2d 1, 409 P.3d 214 (2018) (granting of relief without a reference hearing). Because of the fractured nature of the Supreme Court's opinion, this Court's decision is what has precedential value. *See Fero*, 190 Wn.2d at 24 (Yu, J., concurring in part). As for whether an appellate court can "find facts," *Resp*. at 6, see *State v. Gregory*, 192 Wn.2d 1, 12-13, 427 P.3d 621 (2018) and *State v. Frampton*, 95 Wn.2d 469, 492-93, 627 P.2d 922 (1981) (Dolliver, J., opinion) (courts decided factual issues in direct appeals through written submissions).

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

IN RE THE PERSONAL RESTRAINT OF: BRADLEY DAVID KNOX, Petitioner.	)))))))))	CAUSE NO. 52971-8-II CERTIFICATE OF SERVICE

I, Neil M. Fox, certify and declare that I served a copy of the REPLY BRIEF OF PETITIONER by filing through the Portal, which will deliver an electronic copy to all parties.

I am also causing a copy to be deposited in the U.S. Mail in an envelope addressed to:

Daniel H. Bigelow
P.O. Box 397
Cathlamet, WA 98612

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

DATED THIS 24th day of June 2019 in Seattle, Washington.

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

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