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Division II  
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State of Washington  
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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

TYLER J. McVEY

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF THURSTON COUNTY  
Cause No. 15-1-00783-5

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BRIEF OF APPELLANT

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**I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it entered Finding of Fact #8 that Mr. Schmidt's abilities at the time of the hearing were the same as they were at the time of trial.

2. The trial court erred when it entered Finding of Fact #9 that "the Court is familiar with the effect of strokes and notes that Mr. Schmidt's presentation is consistent with the Court's understanding of the possible effects of a stroke."

3. The trial court erred when it entered Finding of Fact #13 that Mr. Schmidt's testimony, during the hearing, was unbelievable and had he been called to testify at trial, a jury would have given his testimony no weight due to contradictions and lack of comprehension.

4. The trial court erred when it entered Finding of Fact #14 that testimony from Mr. Schmidt at trial would not have affected the outcome of the proceeding.

5. The trial court erred when it entered Finding of Fact #15 that, prior to trial, Mr. Brungardt had much of the same information regarding Mr. Schmidt as was presented at the hearing, which would have informed his decision on whether to call him as a witness at trial.

6. The trial court erred when it entered Conclusion of Law #2 that Mr. McVey had not met his burden of proving the second prong of the *Strickland* test that no prejudice occurred to the outcome of his case based upon Mr. Brungardt's not further investigating or calling Mr. Schmidt as a witness at trial.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred when it entered Finding of Fact #8 that Mr. Schmidt's abilities at the time of the hearing were the same as they were at the time of trial when no evidence was presented that his abilities were the same? (Assignments of Error #1)

2. Whether the trial court erred when it made Finding of Fact #9 that "the Court was familiar with the effect of strokes and noted that Mr. Schmidt's presentation was consistent with the Court's understanding of the possible effects of a stroke" when no evidence was presented as to the Court's knowledge or familiarity with the affects a stroke might have on a witness' presentation as a witness? (Assignments of Error #2)

3. Whether the trial court erred when it entered Finding of Fact #13 that Mr. Schmidt's testimony during the hearing was unbelievable and had he been called to testify at trial, a jury would have given his testimony no weight due to contradictions and lack of comprehension as such determination is for the jury to make? (Assignments of Error #3)

4. Whether the trial court erred when it entered Finding of Fact #14 finding that testimony from Mr. Schmidt at trial would not have affected the outcome of the proceeding when Mr. Schmidt's testimony and presence at the

home during the alleged event materially contradicted E.S.'s testimony?

(Assignments of Error #4)

5. Whether the trial court erred when it entered Finding of Fact #15 that, prior to trial, attorney Brungardt had much of the same information regarding Mr. Schmidt, which would have informed his decision whether to call Mr. Schmidt at trial when attorney Brungardt admitted that he didn't contact Mr. Schmidt directly and Mr. Schmidt's testimony would have been clearly important for the jury to hear? (Assignments of Error #5)

6. Whether the trial court erred when it entered Conclusion of Law # 2 that Mr. McVey had not met his burden of proving the second prong of the *Strickland* test that no prejudice occurred to the outcome of his case based upon Mr. Brungardt's not further investigating or calling Mr. Schmidt as a witness at trial when Brungardt acknowledged that Mr. Schmidt's testimony would have been critically important for the jury to hear and the unrebutted expert testimony established that the failure to call Mr. Schmidt as a witness created a reasonable probability that the outcome of trial would have been different? (Assignments of Error #6)

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

On June 11, 2015, the State charged Tyler McVey with one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree for an incident that occurred on or between March 1, 2015 and April 17, 2015. CP 6. On August 26, 2016, the State filed a First Amended Information to correct a clerical mistake in Count I related to the initials of the minor child. CP 42.

On December 28, 2015, a child hearsay hearing was held to determine the admissibility of statements made by the minor child, E.S., to her father, Jason Seevers, a forensic interviewer, Sue Villa (Batson), and a medical doctor, Joyce Gilbert, M.D. At the conclusion of the hearing, the court determined that the child hearsay statements were admissible. CP 16-20.

On August 29, 2016, trial was held before the Honorable Carol Murphy and on September 1, 2016, the jury returned guilty verdicts on both counts. CP 126-127. On October 13, 2016, the Court sentenced Mr. McVey to an indeterminate sentence of 160 months to life as well as other conditions of sentence. CP 149-162. On October 25, 2016, Mr. McVey filed his notice of appeal with the Court of Appeals.

On January 30, 2018, the Court of Appeals affirmed the conviction and the Supreme Court denied a Petition for Review on June 6, 2018. The Mandate issued on June 14, 2018.

On June 14, 2017, current defense counsel obtained the audio taped forensic interview of E.S., which had not been provided to or obtained by trial counsel.

In April 2018, the defense obtained a declaration from E.S.'s grandfather, Mark Schmidt. Per his declaration, there was no physical contact between Mr. McVey and E.S. at any time on the date of the allegation. Mr. Schmidt was neither interviewed by the police nor trial counsel and was not called as a witness at trial. CP 67-68.

On August 29, 2018, Mr. McVey filed a motion for a new trial, which was heard before the Honorable James Dixon on October 11, 2018. CP 144-154. After the hearing, Judge Dixon ordered a show cause hearing as to why defendant's motion for a new trial should not be granted pursuant to Cr 7.8(c)(3). CP 109. The motion for new trial was heard before the Honorable Chris Lanese on January 14-16, 2019. At the conclusion of the hearing, Judge Lanese entered Findings of Fact and Conclusions of Law on March 11, 2019 denying defendant's motion for a new trial. CP 129-132. The defense took exception to specific findings and conclusions entered by Judge Lanese. CP 126-128.

On March 13, 2019, Mr. McVey filed his notice of appeal regarding the judge's decision. On June 6, 2019, Mr. McVey filed a Personal Restraint Petition (PRP) alleging ineffective assistance of counsel for prior defense counsel's failure to effectively cross-examine E.S. and to allow Mr. McVey to testify at trial. The Court of Appeals joined Mr. McVey's PRP with the current appeal on July 17, 2019.

This appeal follows.

**B. Facts**

Kecia Johnson and Jason Seevers are the parents of E.S., a minor child born October 21, 2010. RP 39:13-40:18. In 2012, when E.S. turned two, her parents separated. RP 41:3-9. After their separation, Ms. Johnson and Mr. Seevers had split custody of E.S., and then Mr. Seevers obtained full custody. RP 41:14-21.

In approximately 2014, Ms. Johnson was in a romantic relationship with the defendant, Tyler McVey, who she met while working at the Manor Care long term care facility. RP 41:25-42:21. During the period of Ms. Johnson's relationship with Mr. McVey, Jason Seevers obtained full custody of E.S., but Ms. Johnson had visitation with her daughter two to three times per week, which would occur at her house. RP 44:4-45:12. During the 2014-2015 period, Ms. Johnson's nanny, Peggy Cluck, and her step-father, Mark Schmidt, lived in her home. RP 45:8-18. At times when E.S. came for visits, Mr. McVey was present. RP 47:10-18.

After Ms. Johnson's nanny moved out of the home, Mr. McVey watched E.S. on three or four occasions. RP 48:6-13. This would occur when Ms. Johnson had to leave for work. *Id.* Mr. Schmidt, who was also living at the house during this time, was not able to watch E.S. by himself because he suffered a stroke that prevented him from being able to care for E.S. RP 49:13-50:14.

After one of E.S.'s visits with Ms. Johnson, Mr. Seevers picked her up and E.S. disclosed that something had happened to her by Mr. McVey. RP 51:8-56:12;

RP 100:19-103:14. Mr. Seevers called Ms. Johnson and asked E.S. to tell her what she had just told him. RP 103:16-19. E.S. did not explain anything about the touches, even though Mr. Seevers asked her to describe the touches. RP 103:20-104:14. Even though Mr. Seevers attempted to talk to E.S. more during the drive, she would not speak with him. RP 105:19-21.

When Ms. Johnson confronted Mr. McVey about what she had learned, he stated that the allegation was false and fabricated because neither Mr. Seevers nor E.S. liked him. RP 56:10-15. Mr. Schmidt was present at the time Mr. McVey was with E.S. on the day of the disclosure. RP 52:1-7. Schmidt Declaration.

In March, 2015, Mr. Seevers complained to the child custody court that E.S. was living in unsanitary conditions when she visited her mother. RP 119:10-17. Mr. Seevers made this complaint approximately two and one-half weeks before E.S.'s April 7, 2015 allegations. *Id.* at 18-20. When Ms. Johnson was questioned by law enforcement regarding the allegations, she believed that E.S.'s allegations were the result of the custody battle she was having with Mr. Seevers. RP 66-21-23.

When E.S. testified, she said that she told her dad that Mr. McVey touched her privates. RP 125:2-3. E.S. also stated that she told her mother and her babysitter about what occurred, but never saw a doctor. RP 125:20-21. E.S. said that the event only happened one time, RP 126:9-10, and occurred the same day she told her dad. RP 126:22-23. E.S. also testified that no one else was at the house at the time. RP 126:15-16.

During cross examination, E.S. stated that she told her mother first and then told her father later in the day about what had occurred. RP 127:8-23. E.S. acknowledged that when this event occurred, her grandfather was home. RP 128:18-20. Later, during cross examination, E.S. stated that the only persons present were Mr. McVey and her babysitter, Peggy. RP 129:11-20; RP 130:5-9. Based upon Mr. Schmidt's declaration, he was present during the time E.S. and Mr. McVey were in the living room, and nothing occurred, physically, between them. CP 67-68. What did occur, however, is that Mr. McVey scolded her for doing cartwheels in the living room near the television. *Id.*

On April 30, 2015, Sue Villa (Batson) conducted a recorded forensic child interview of E.S. at the Monarch Children's Justice and Advocacy Center in Lacey. RP 172:12-21. At the time, E.S. was 4 ½ years old. RP 173:22-23. During the interview, E.S. said that she was there to talk about Tyler. RP 176:12-23. She reported that Mr. McVey touched her with his hands, that she didn't like it, and that he "screwed" her and it hurt. RP 177:7-14. E.S. stated that his hand went inside her body. RP 177:15-16. E. S. said the event happened more than one time in the dining room. RP 177:20-178:8. E.S. also stated that her grandfather was present in the house when the touching occurred. RP 179:7-12.

E.S.'s physical examination conducted by Joyce Gilbert, M.D. was normal. RP 241:1-4. The abuse allegations reportedly occurred on April 7, 2015 and the physical examination occurred April 10, 2015. RP 248:18-21. The doctor acknowledged that there was no physical evidence of recent physical trauma as it would take 7-10 days for scar tissue to form and there was no scarring. RP 250:2-

251:3; 255:10-14. One of the explanations for a normal examination is because no physical contact occurred. RP 255:19-21.

After the State rested, the defense also rested. Mr. McVey did not testify. RP 258:19-261:23.

During the show cause hearing, the State called various witnesses, including the prior deputy prosecutor, Craig Juris, the child witness interviewer, Sue Villa, and the parents of the minor child, Keisha Johnson and Jason SeEVERS. These witnesses testified consistently with what they testified to in the original trial.

Additionally, and more importantly, the State also called the trial attorney's investigator, David Haller (01/14/19; RP 97-113) and Mr. McVey's trial attorney, Robert Brungardt (01/14/19; RP 117-157). In response, the defense called Mark Schmidt (01/15/19; RP 170-192), expert witness, attorney Don WINSKILL (01/15/19; RP 193-225) and Tyler McVey (01/15/19; RP 227-235)<sup>1</sup>.

David Haller was the investigator who worked on the McVey case on behalf of attorney Robert Brungardt. RP 97:22-25. Previously, Mr. Haller was employed as a police officer by the Los Angeles Police Department and for 22 years with the Thurston County Sheriff's Department, 17 as a detective. RP 97:15-17. Attorney Brungardt asked Mr. Haller to make personal contact with Mark Schmidt, but he was unable to do so. Rather, Mr. Haller attempted contact with Mr. Schmidt by text with "someone who said he was Mr. Schmidt." RP 98:5-11. Mr. Haller made a report for Mr. Brungardt regarding his contact with

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<sup>1</sup> Except where specifically identified, all further RP citations relate to the hearing conducted January 14-16, 2019.

Mr. Schmidt. RP 98:12-16. Sub #109 – Haller’s report – supplementing Clerk’s Papers. After providing the report to Mr. Brungardt, Mr. Brungardt asked Mr. Haller to find a physical address for Mr. Schmidt, but he was unable to do so. RP 109:12-25.

Mr. Haller acknowledged that he did not know who he was communicating with during this text communication. RP 106:15-22; 107:1-6. Significantly, Mr. Haller noted that Mr. Schmidt would have had an unobstructed view of the dining area where the events purportedly occurred based upon the information Mr. Haller learned. RP 107:10-12. Mr. Haller understood the significance of Mr. Schmidt’s testimony as he would have been an eye witness to the specific events. RP 109:9-16. After Mr. Haller provided Mr. Brungardt the information regarding Mr. Schmidt, Mr. Haller took no other actions to try to contact Mr. Schmidt. RP 109:17-20.

Mr. Brungardt has been a lawyer since April, 1978. RP 117:23-24. Mr. Brungardt has significant experience representing individuals in child sex cases, and he was retained to represent Mr. McVey in this case soon after he was charged with the offenses. RP 118:6-10, 141:1-7.

Mr. Brungardt became familiar with Mr. Schmidt immediately upon speaking with Mr. McVey. RP 124:13-16. Mr. Brungardt acknowledged that Mr. McVey stated that Mr. Schmidt would be an alibi witness for him. RP 124:18-125:2. Mr. Brungardt stated that he did not look into Mr. Schmidt further after not receiving a physical address because E.S. had stated that Mr. Schmidt was in his room at the time of the event. RP 128:9-20. Significantly, however, E.S. also

testified that Mr. Schmidt was in the living room during the event, and that he was in his own room. RP (08/31/16) 179:7-12. E.S. provided inconsistent statements as to who was present during the time the purported event occurred, including no one, her babysitter, her grandfather, Mr. Schmidt, and Mr. McVey. *See generally* (08/30/16) RP 125-130 and (08/31/16) RP 179.

Significantly, Mr. Schmidt, in his declaration, indicated he was in the living room the entire time. CP 67-68. Mr. Brungardt acknowledged he took no efforts to try to find Mr. Schmidt after he received the memo from Mr. Haller regarding Mr. Schmidt's information. RP 140:3-10.

Mr. McVey, however, was adamant as to Mr. Schmidt's significance as he was present during the interaction between himself and E.S. and that within the first ninety-six hours of retaining Mr. Brungardt, that was Mr. McVey's primary focus. RP 140:11-25. Mr. Brungardt was aware that Mr. Schmidt was referenced in the discovery provided to Mr. Brungardt for his representation of Mr. McVey. RP 141:11-25. Mr. Brungardt was also aware that Keisha, E.S.'s mother, explained that, although Mr. Schmidt had some physical disabilities because of a stroke, he was home the afternoon of the incident, was seated on the couch in the living room when the allegations arose, he had not seen anything unusual occurring between Mr. McVey and E.S., and E.S. had not made any complaints to Mr. Schmidt about Mr. McVey, either before or after the purported event. RP 143:3-20.

Mr. Brungardt understood the extreme significance of circumstantial evidence in allegations involving sexual abuse when no physical evidence is

present. RP 143:20-25. Mr. Brungardt also acknowledged that, even if Mr. Schmidt did not have a line of sight view for the entire 45 minutes, he was present while Mr. McVey and E.S. were in the room, and his observations would be critically important for the jury to hear. RP 144:1-6. Mr. Brungardt also acknowledged that there was absolutely helpful information obtained by the investigator regarding the communication that he had with Mr. Schmidt as it related to a defense of Mr. McVey in this case. RP 144:25-145:4. Mr. Brungardt also acknowledged that E.S. had stated that, "Grandpa Mark" was in the home, and she had also stated, at a prior time, that no one was in the home. Mr. Brungardt was aware of the inconsistencies in her reporting, based upon the information he had learned about Mr. Schmidt being present in the home at the time of the event. RP 145:20-146:19.

Mr. Brungardt acknowledged that he did not seek to impeach E.S. with her testimony of Mr. Schmidt's presence or absence from the house. RP 147:5-22. Mr. Brungardt also did not seek to impeach her about the presence or absence of the babysitter being present in the room. RP 148:2-13. Mr. Brungardt also acknowledged that he did not call the babysitter to the stand for purposes of impeaching E.S. regarding who was present. RP 148:20-149:4. Throughout this time, Mr. McVey was adamant that he wanted Mr. Schmidt to testify because he was an important witness for him in this case. RP 149:5-13.

Because Mr. Schmidt had difficulty answering audibly, the court allowed counsel to make a record of what Mr. Schmidt responded to by way of a head nod and to make a record of his response. At the time of this hearing, Mr. Schmidt

was residing in Daytona Beach, Florida, and, before moving to Daytona Beach, lived with Keisha Johnson, E.S.'s mother. RP 170:14-171:3. Mr. Schmidt acknowledged that he knew Tyler McVey. RP 171:11-13. He was aware that Tyler McVey was Keisha Johnson's boyfriend during the period that Mr. Schmidt lived with Ms. Johnson. RP 171:14-17. Mr. Schmidt was aware of E.S. making allegations that Tyler McVey touched her inappropriately during the time that he lived at Keisha Johnson's residence. RP 171:24-172:2. Mr. Schmidt acknowledged that, at no time when he saw E.S. interacting with Mr. McVey, did Mr. McVey touch her inappropriately. RP 172:9-12. Mr. Schmidt acknowledged that he signed the declaration, dated April 20, 2018. RP 173:4-14. CP 67-68. Mr. Schmidt affirmed that at no time did E.S. say to him that Tyler McVey touched her inappropriately. RP 178:16-18. Mr. Schmidt acknowledge that, at the time he signed his declaration dated April 20, 2018, the contents of the document were true and accurate. RP 190:7-23.

Attorney Don Winskill has been practicing since 1979. RP 194:7-12. Mr. Winskill is familiar with the standards that a reasonably prudent criminal defense lawyer must engage in when representing individuals in criminal cases, generally, and in sex offense cases, specifically. RP 195:15-20. Mr. Winskill reviewed the discovery presented in this case as well as the transcripts of Mr. McVey's trial. RP 195:21-25. Typically, in sex offense cases, there are usually only two witnesses: the person saying that something happened and the other person saying something didn't happen. RP 197:11-17. Mr. Winskill acknowledged when a third party is present as a potential witness, such witness' testimony can be very

significant to the trial. RP 197:18-20. Mr. Winskill reviewed the declaration of Mark Schmidt, and he acknowledged that what was set forth in the declaration was significant because it contradicted what E.S. stated occurred. RP 198:12-199:1. Mr. Winskill indicated that, based upon the information provided by Mr. Schmidt, this information should have been followed up with, particularly when an ambiguity exists in a statement, and it would be reasonably prudent for the attorney representing the individual to interview the potential witness. RP 198:12-201:7. Specifically, a reasonably prudent attorney would talk to a witness who had significant importance to a case such as Mr. McVey's. RP 201:7-19. Failure to investigate a witness is not a trial strategy. RP 201:24-202:2. Mr. Winskill acknowledged that if you have a potential eye witness to an alleged offense, it would be mandatory to flesh out what the individual knows or doesn't know. RP 202:18-21. Mr. Winskill opined that Mr. Brungardt's failure to investigate Mr. Schmidt as a potential witness and to call him at trial fell below the reasonable standard of care for a reasonably prudent attorney. Mr. Winskill also opined that a reasonable probability existed that the result of the trial would have been different but for the failure to interview and call Mr. Schmidt as a witness. RP 204:19-205:16. Mr. Winskill's opinion was unrebutted.

Mr. McVey testified at the hearing that he was in the home with Mr. Schmidt and E.S. for about 45 minutes on April 7, 2015. RP 228:2-10. Mr. Schmidt was watching TV and E.S. was running around the house and doing cartwheels near her mother's new TV, for which Mr. McVey scolded E.S. RP 228:16-22.

When Mr. McVey learned that E.S. complained about him touching her inappropriately, Mr. McVey told Keisha that she should speak to Mr. Schmidt as he was present the entire time. RP 229:4-14. Mr. McVey understood that after he instructed Keisha to speak with Mr. Schmidt, she did so and Mr. Schmidt verified that Mr. McVey had not done anything inappropriate to E.S. RP 229:13-22.

Throughout the time that Mr. McVey was represented by Mr. Brungardt, he continually brought up the importance of Mr. Schmidt as a witness, and did so on every interaction he had with Mr. Brungardt. RP 230:9-17. Mr. McVey believed that Mr. Schmidt was an eye witness, which is why he was emphatic that Mr. Schmidt should be a witness at his trial. Unfortunately, Mr. Schmidt did not testify. RP 231:7-21.

Had Mr. McVey testified at trial, he would have denied that he had any inappropriate contact with E.S. RP 231:24-232:2.

#### IV. **ARGUMENT**

##### A. **MR. McVEY'S COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW AND TO OFFER THE TESTIMONY OF AN EYE WITNESS.**

###### *1. Ineffective Assistance of Counsel*

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the

proceeding's result would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Ineffective assistance of counsel is an exception from the actual and substantial prejudice standard: we presume prejudice where a petitioner successfully establishes ineffective assistance of counsel. *In Re Pers. Restraint of Lui*, No. 92816-9 WL 2691802, at \*3 (Wash. June 22, 2017). Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686; *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1992) (“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 res.” (citing *State v. Visitacion*, 55 Wn.App. 166, 173-74, 776 P.2d 986 (1989))).

*2. Trial Counsel's Failure to Interview and call Mark Schmidt at Trial Constitutes Ineffective Assistance of Counsel.*

As set forth by the cases cited above and the testimony of expert Donald Winskill, Mr. McVey's trial counsel was clearly deficient and ineffective for

failing to interview and call Mark Schmidt at trial regarding his observations of the interaction between E.S. and Mr. McVey. Further, this failure prejudiced Mr. McVey's right to a fair trial as a reasonable probability exists that the result of the proceedings would have been different, particularly since Mr. Schmidt was an eyewitness to the events that were alleged to have occurred and acknowledged that Mr. McVey never touched E.S. at any time, and that E.S. never complained to him about any inappropriate conduct.

The "failure to interview a particular witness certainly constitutes deficient performance." *State v. Jones*, 183 Wn.2d 327, 346, 352 P.2d 776 (2015).

In *Jones*, trial counsel failed to interview several witnesses who had information about the facts of the alleged offense. Although the trial court found that the failure to interview the witnesses constituted deficient performance, the trial court found that such failure was not objectionably unreasonable." *Jones*, 183 Wn.2d at 340.

The Supreme Court disagreed about the reasonableness of trial counsel's actions because trial counsel had no idea what the witnesses would have said about the case. As such, the failure to interview the witnesses and the failure to call the witnesses to testify could not be deemed a strategic decision. Additionally, the Supreme Court determined that this failure to interview or call the witnesses created a reasonable probability that such failure affected the trial's outcome. *Jones* at 341. Appropriately, the Supreme Court reversed Jones' conviction and remanded for a new trial.

Recently, Division II Court of Appeals returned an unpublished opinion in *In Re Personal Restraint of McAllister*, No. 49417-5-II, 06/25/2017. There, the Court of Appeals granted Mr. McAllister's PRP when trial counsel was deficient for failing to use known, exculpatory evidence regarding McAllister's physical limitations, for failing to call expert witnesses, and for failing to effectively cross-examine the alleged victim, S.L.<sup>2</sup>

In *McAllister*, the complaining witness, S.L., claimed that McAllister perpetrated multiple rapes and assaults against her during the time she resided in McAllister's home. McAllister was subsequently charged with 10 counts of Third Degree Rape, 18 counts of Second Degree Rape, and 11 counts of Fourth Degree Assault, each count involving domestic violence. During her testimony, the victim testified that McAllister kicked her with his right foot and raped her multiple times. Medical testimony on behalf of the State supported S.L.'s claim of sexual abuse.

McAllister testified that he had an artificial knee that didn't work and that the ankle of the same leg was injured because of his injuries. He also testified that it was impossible for him to move his leg the way that S.L. had demonstrated.

During closing arguments, the prosecutor focused on the defense's failure to introduce medical records or call a doctor to testify about McAllister's physical limitations. After McAllister appealed his convictions, Division III

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<sup>2</sup> Unpublished opinions may be cited pursuant to GR 14.1(a).

Court of Appeals, reversed one count of rape due to insufficient evidence, but affirmed the remaining counts.

During McAllister's PRP, McAllister claimed that his attorney was ineffective for failing to contact his treating physician to testify about his physical limitations and for failure to call a sexual abuse expert to counter S.L.'s medical testimony. McAllister stated that he had called his attorney more than 20 times to ask whether his doctor had been interviewed. Mr. McAllister's doctor, who treated McAllister from 2007 to 2011, submitted a declaration that he was never contacted to testify for McAllister and had he been contacted, the doctor would have testified that McAllister was not physically capable of kicking the victim in the manner she described, or of raping her in the bathtub as S.L. claimed. McAllister also submitted declarations of several defense witnesses, who would have testified that McAllister had physical limitations.

McAllister also appealed defense counsel's failure to call a sexual abuse expert to contradict the source of bruising noted on S.L.'s sexual assault exam. In total, the Court found that the failure to call experts in the above disciplines was deficient and fell below an objective standard of reasonableness.

The Court held that the failure to call such expert witnesses created a reasonable probability that the outcome would have been different because had trial counsel taken the actions McAllister advocated, the prosecutor would not have been able to argue McAllister's failure to produce corroborative medical records and testimony related to his claimed physical injury. Additionally, the failure to call a sexual abuse expert was also deficient and prejudicial because the

use of a sexual assault expert would have assisted the defense to contradict the evidence of the bruising and that such bruising could have been from consensual sex.

Finally, McAllister raised the issue of defense counsel's failure to effectively cross-examine the complaining witness. The Court, based upon the failures noted previously, found that trial counsel's failure to cross-examine S.L. to elicit a number of inconsistencies in her account established, again, that counsel's performance was deficient and prejudicial given that the jury was primarily provided with considerations of the victim's credibility.

Here, McVey's trial counsel's failure to interview Mr. Schmidt to learn about his observations and call Mr. Schmidt as a defense witness was deficient and prejudicial, and affected Mr. McVey's rights to a fair trial as it undermines confidence in the jury's verdict. Given that the only witnesses to the alleged event were E.S., Mr. McVey and Mr. Schmidt, the failure to call Mr. Schmidt cannot be deemed a trial tactic. Accordingly, and based upon *Jones*, *McAllister*, and the *Strickland* test set forth above, Mr. McVey's counsel's performance was deficient and such deficient performance prejudiced Mr. McVey's constitutional guarantee of a fair trial.

In support of its order denying Mr. McVey's motion for a new trial, the Court entered certain Findings of Fact that, respectfully, were not supported by the evidence. With respect to the Court's Finding of Fact #8 that Mr. Schmidt's abilities at the time of the hearing were the same as they were at trial, no

evidence was presented by either party to support such finding. Further, Mr. Schmidt's ability was not such that he was deemed incompetent by the judge.

The Court, in Finding of Fact #9, *sua sponte*, injected itself as being familiar with the effects of strokes, yet it was impossible to challenge this finding with respect to the court's understanding of the possible effects of a stroke. No medical testimony was provided by either party surrounding such issue, and, respectfully, many individuals testify with physical and mental limitations, but such potential deficiencies don't necessarily lessen the witness' ability to report accurately.

The Court's Findings of Fact #13 and 14 that Mr. Schmidt's testimony was unbelievable and that the jury would not have given his testimony any weight and that his testimony would not have affected the outcome of the proceeding is simply not supported by the record as developed. The jury should be presented with this evidence and the jury can give Mr. Schmidt's testimony the weight it deserves.

E.S.'s testimony was the only testimony that set forth a claim of sexual abuse. No physical evidence existed and Mr. McVey was saddled with having his attorney present no evidence to contradict E.S.'s testimony, which is troubling since evidence, Mark Schmidt, existed. Mr. Schmidt's testimony, coupled with the testimony of Mr. McVey, would have provided evidence to overcome E.S.'s inconsistent testimony.

The trial court's Finding of Fact #15 that Mr. Brungardt had much of the same information regarding Mr. Schmidt as was presented at the hearing,

likewise, is not accurate. The record at the hearing conclusively establishes that Mr. Brungardt never had personal contact with Mr. Schmidt even though he knew that he possessed valuable evidence for Mr. McVey's defense, evidence that he knew would be critical for the jury to consider.

Accordingly, the Court's conclusion that Mr. McVey failed to prove the prejudice prong of the *Strickland* test is simply not supported by the evidence. Rather, the evidence supports a finding that Mr. Brungardt was deficient for failing to follow through with interviewing Mr. Schmidt and calling him as a witness at trial, and, even more significantly, his deficient performance resulted in actual prejudice to Mr. McVey. Accordingly, and based upon the aforementioned, as well as the issues raised in the PRP previously filed, Mr. McVey respectfully urges this Court to reverse his convictions and remand for a new trial.

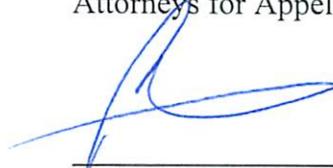
## V. CONCLUSION

Mr. McVey was convicted of two sex offenses because his trial attorney's performance was deficient in his failure to obtain all evidence and interview all witnesses. Specifically, trial counsel's failure to interview Mark Schmidt about his observations of Mr. McVey and E.S. was deficient performance. Further, the failure to obtain all discovery before trial also constitutes deficient performance. Both failures prejudiced Mr. McVey as trial counsel's failure undermines confidence in the jury's verdict. Respectfully, considering counsel's deficient

performance, this court should grant Mr. McVey a new trial under the rules and in the interest of justice.

DATED this 25<sup>th</sup> day of September, 2019.

HESTER LAW GROUP, INC. P.S.  
Attorneys for Appellant



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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

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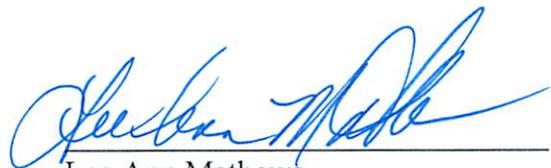
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Signed at Tacoma, Washington this 25<sup>th</sup> day of September, 2019.

  
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Lee Ann Mathews

**HESTER LAW GROUP, INC., P.S.**

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